





THE ALL ENGLAND LAW REPORTS

(INCORPORATING THE
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AND THE
LAW JOURNAL REPORTS)

OF CASES DECIDED IN

THE HOUSE OF LORDS

THE PRIVY COUNCIL

THE COURT OF APPEAL

ALL DIVISIONS OF THE HIGH COURT

AND

COURTS OF SPECIAL JURISDICTION

1954

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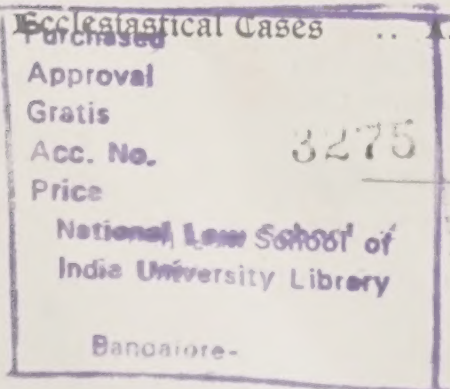
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CORRIGENDA

[1954] 1 All E.R.

- p. 772. *Re GREAVES' WILL TRUSTS*. Line A.4: for "realising" read "releasing".
 p. 793. *CHAO v. BRITISH TRADERS AND SHIPPERS, LTD.* Line A.2: for "damages" read "damage".

[1954] 2 All E.R.

- p. 189. *WATERMAN v. WALLASEY CORPN.* For solicitors for the appellants read: "*S. Eversley & Co.*, agents for *G. Gerald Strong*, Liverpool (for the appellant, *Waterman*); *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the appellant, *Hesketh*)" instead of as printed.
 p. 212. *SEMTEX, LTD. v. GLADSTONE*. Line F.2: for "in the blank statement of the law" read "in the then state of the law".
 p. 571. *SOUTHPORT CORPN. v. ESSO PETROLEUM Co., LTD.* Line F.2: for "probably" read "properly". P. 573, line B.1: for "out of control" read "in control".

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

C [COURT OF APPEAL (Somervell, Morris and Romer, L.J.J.), March 29, 30, 1954.]
Factory—Safe means of access—Icy surface at entrance to factory—Result of snowfall—Factories Act, 1937 (c. 67), s. 26 (1).

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G

(1) *Latimer v. A.E.C., Ltd.*, [1953] 2 All E.R. 449; [1953] A.C. 643; 117 J.P. 387.

APPEAL by the plaintiff from an order of LYNSKEY, J., at Bristol Assizes, dated Nov. 18, 1953.

The plaintiff, who was employed by the defendants, slipped on an icy surface at the foot of a ramp while entering the defendants' factory on his way to work and suffered injuries. At about 6.45 a.m. on a Monday morning in winter there was a fall of snow which froze as soon as it reached the ground. A policeman, who was on duty at the entrance to the works from 6 a.m., realising that the conditions were dangerous, scattered sand along the ramp and over one side of the

flat surface at the bottom of the ramp. It was no part of his duty to take any such steps. The plaintiff arrived soon after 7 a.m. (the time at which the men were due to arrive), and, as he descended the ramp, the policeman on duty warned him of the slippery surface below. He failed to hear the warning and stepped on a dark surface which he believed to be asphalt, but was, in fact, ice, and he slipped and fell. It appeared from the evidence that the defendants employed a number of maintenance workers who came on duty at 7.30 a.m. on a Monday morning and whose duty it was to spread sand over dangerous surfaces. Maintenance workers were similarly employed on night shifts from Monday to Friday. The system was that the policeman on duty would ring up his own headquarters, who would in turn inform the works department, and the maintenance workers would be sent to rectify the conditions. On the morning in question, the official in charge of the maintenance workers arrived at the works at about 7 a.m., that is, half an hour earlier than the time at which he was due to arrive, and, seeing the condition of the ground, took immediate steps to summon his men. By 7.30 a.m. the men were spreading sand on the slippery surfaces.

In an action for damages for personal injuries based on negligence at common law and a breach of the Factories Act, 1937, s. 26 (1), on the part of the defendants, the plaintiff contended that the defendants, by employing these maintenance workers, had a system for dealing with icy surfaces, but that it was a defective system in that it did not operate on Monday mornings until 7.30 a.m., half an hour after the defendants' workmen had arrived to start their day's work. **LYNSKEY, J.**, gave judgment for the defendants.

Beney, Q.C., and *L. H. Collins* for the plaintiff.

Marven Everett, Q.C., and *K. H. Bain* for the defendants.

SOMERVELL, L.J., stated the facts and continued: My approach to this case, which is the same, I think, as that of the learned judge, is that this danger of slippery or icy surfaces is an incident of winter in our country which everyone encounters and it is something one must anticipate and deal with oneself. I entirely agree, of course, that, just as highway authorities have a system of laying gravel on roads, it is right and proper that, if the icy condition persists, there should be a system in factories for gravelling or sanding such surfaces. I cannot, however, think that the mere fact that a man is required to walk on an icy surface which at the time is uncovered or unsanded indicates in itself the lack of a safe system, or that there has been a failure so far as is reasonably practicable to maintain a safe means of access. The present case strikingly illustrates what would be necessary if the plaintiff were right. This snow storm was obviously exceptional, as the learned judge pointed out, and started only at 6.45 a.m. The men started arriving soon after seven o'clock. The maintenance man who realised that some steps should be taken to render the surface less slippery arrived at seven o'clock, but he would have had to arrive half an hour or an hour earlier to make his work effective. To suggest that in this case the defendants failed in their duty under s. 26 because they had no men standing by to lay sand or gravel on the chance of any surface becoming slippery, is, in my opinion, to impose a higher standard of duty than is imposed either by the Act or by common law. The learned judge said:

"I am satisfied here that the employers did do all they reasonably could be expected to do in the circumstances to provide that their passages and gangways 'were of a sound construction and properly maintained' [that is a reference to s. 25]. Equally, I am satisfied, as far as s. 26 is concerned, that they did 'provide and maintain a safe means of access'—they did so as far as is reasonably practicable. I think it is putting the duty far too high to say that in the circumstances that happened in this case, the employers ought to provide some form of almost 'insurance' against ways

becoming unsafe . . . In my opinion, the duty at common law is not so high, really, as that contained in s. 26."

I have not to decide that matter, but certainly the duty at common law is no higher than that imposed under s. 26, and for these reasons I would dismiss the appeal.

MORRIS, L.J.: I am of the same opinion and I agree with the conclusions as to reasonableness which were reached by the learned judge. It seems to me that the view he took of the system in operation was the view to which the evidence pointed. The witness, Mr. Stone, said:

"The instructions we get are that if the weather should become dangerous, we should immediately telephone for the job to be done, but this happened to be early in the morning, after Sunday, and there was no night shift to take over anything".

Then there is the following passage from the evidence of Mr. Fisher:

"**LYNSKEY, J.** Normally, of course, you would have the night shift ?

A.—Normally there would be two men. Q.—And, as far as the night shift was concerned, if it became slippery in the night they would deal with it ?

A.—Definitely. Q.—And there is no night shift on Sunday, and you come in at about 7.30, apart from the cleaners ? A.—Yes. Counsel for the plaintiff: Have the night shift any instructions to deal with this ? A.—Yes, on police instructions. Q.—Do you mean that the police get in touch with them ? A.—Yes, the sergeant in charge would get in touch with them. Q.—Are there no night people on the Sunday to Monday night ? A.—No.

Q.—Is there nobody who could give any warning of the ramp or passage being slippery ? A.—No, other than the police".

The system was, therefore, that the policeman at the gate would, if he thought it necessary, get in touch with police headquarters and they in turn would get in touch with the works department who would take the necessary steps, but the system did not provide for having any men available in the period before most of the men came to work on a Monday morning.

Leading counsel for the plaintiff has strongly pressed before us that the system was, therefore, defective in that there was that admitted gap in it. It seems to me that the questions which arise, whether approached on the basis of common law obligations or on a consideration of the Factories Act, 1937, s. 26, largely turns on what it was reasonable for the employers to do in this case. In this connection I think it is important to have in mind some words used by LORD TUCKER in *Latimer v. A.E.C., Ltd.* (1) when he said ([1953] 2 All E.R. 455):

" . . . it appears to me desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations on employers, that the courts should be vigilant to see that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations".

Viewing the matter from the point of view of the employers' obligations at common law it seems to me that the question is: What action should a reasonably careful employer have taken.

I do not think that the learned judge erred in coming to the conclusion that the defendants here were not shown to have been remiss. The men who came to work between seven and seven-thirty on a Monday morning would know that there had been no night shift on the Sunday night. They would also know the conditions that prevailed that morning, and, indeed, the passage from the plaintiff's evidence read to us by leading counsel for the plaintiff showed that the plaintiff himself fully appreciated the difficult conditions that existed. In those circumstances it seems to me that to say that the defendants should have provided a system in which no part of the approaches that the men would use

would be very or difficult to walk on would be to place an altogether excessive and intolerable burden on them. The obligation, if it existed, could not be confined to the ramp or to the space at the bottom of the ramp: it could be said to extend to other parts where men would have to walk. Furthermore, even the system nearest to perfection would involve some interval of time between the moment when difficult conditions began and that when measures to remedy them could be put into operation.

It seems to me, therefore, that the risks which resulted that morning at that time from the vagaries of the weather were no more than the risks which form a part of the ordinary incidents of daily life to which all are subject. I think that a similar approach is applicable when considering s. 26 (1), for the obligation requires that:

"There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work".

I have in mind that LORD PORTER in the *Latimer* case (1), in reference to the statutory definition of the word "maintained", said (*ibid.*, 452):

"It has still, however, to be determined what it is which has to be in an efficient state. Does it include the elimination of some matter which is temporarily superimposed on the floor, or is the requirement confined to the floor itself? To be efficient, the appellant contended, the floor must be fit for any of the purposes for which it is intended, e.g., for support and for passing over in safety. The difficulty of such a view is that it puts an excessive obligation on the employer. Indeed, it was conceded that it could not be carried to the length of saying that a temporary obstruction, such as a piece of orange peel or the like, would make it inefficient. Once this concession is made it becomes a question of the degree of temporary inefficiency which constitutes a breach of the employer's obligation".

On this part of the case it is also useful to have in mind that TUCKER, L.J., said in this court in *Edwards v. National Coal Board* (2) ([1949] 1 All E.R. 746):

"... in every case it is the risk that has to be weighed against the measures necessary to eliminate the risk".

Applying those principles, it seems to me that, viewed by the test of reasonableness, it would be to impose an excessive demand on employers to say that they should have provided against the risk of anyone slipping at this place at this particular moment on a Monday morning. In my view, the employers did not fail to fulfil their common law obligations, nor were they in breach of their statutory duty under s. 26, and I, therefore, agree that the appeal fails.

ROMER, L.J.: I also agree. The learned judge, after pointing out that neither at common law nor under the Factories Act, 1937, s. 26, are employers bound to provide a perfect system, said, I think, quite rightly:

"The duty of the employer is not a duty to put in a perfect system which will avoid all accidents; he has only to take the care of a reasonable, prudent man in the circumstances of the case".

The learned judge, after a careful and well-balanced review of the evidence, came to the conclusion that the employers in the present case had taken that care which he had described. In my view, that is the end of the case, and the appeal consequently fails.

Appeal dismissed.
Solicitors: *Pattinson & Brewer*, agents for *Lawrence, Williams & Co.*, Bristol (for the plaintiff); *Peacock & Goddard*, agents for *Cartwright, Taylor & Corps*, Bristol (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

COMMISSIONERS OF CUSTOMS AND EXCISE v. SOKOLOW'S TRUSTEE.

[QUEEN'S BENCH DIVISION (Hilbery, J.), February 19, March 5, 1954.]

Customs—Importation of prohibited goods—Seizure—Claim for forfeiture and condemnation—Limitation of time—“Suits . . . for any offence against the Customs Acts”—Customs Consolidation Act, 1876 (c. 36), s. 257.

A In March, 1949, certain securities or certificates of title to securities were imported into the United Kingdom without permission of the Treasury, in contravention of the Exchange Control Act, 1947, s. 21 (1) (d). Being liable to forfeiture under the Customs Consolidation Act, 1876, s. 177, they were seized in August, 1952, by the Commissioners of Customs and Excise, under s. 202 of the Act of 1876, and notice in writing of the seizure was given to the owner, as required by s. 207. The owner having been adjudicated bankrupt, his trustee in bankruptcy gave notice under s. 207 claiming the securities or certificates. In an action by the commissioners for forfeiture and condemnation of the securities or certificates, the trustee contended that the claim was a “suit” within the meaning of s. 257 of the Act of 1876 and was barred by the section as it was not brought “within three years next after the date of the offence committed”, i.e., March, 1949.

B
C
D HELD: section 257 being in a group of sections headed: “As to prosecution by indictment or information”, and all the forms of proceedings enumerated in s. 257 being qualified by the words “for any offence against the Customs Acts”, the section applied only to criminal proceedings; the commissioners’ claim to have the documents which they had seized condemned by the court was a suit to determine the legality of the seizure, and not a suit for an offence against the Customs Acts within s. 257; and, therefore, the claim was not barred by the section, and the court would declare that the securities or certificates of title were forfeited and order them to be condemned.

E EDITORIAL NOTE. The Customs Consolidation Act, 1876, except ss. 42, 43, 141, 275, 277, 283 and 285, was repealed by the Customs and Excise Act, 1952, s. 320, and sched. XII, Part I. The Act of 1952, which consolidated with amendments the earlier enactments relating to customs and excise, came into operation on Jan. 1, 1953.

FOR THE CUSTOMS CONSOLIDATION ACT, 1876, s. 257, see HALSBURY’S STATUTES, Second Edn., Vol. 21, p. 349.

F Case referred to:

(1) *de Keyser v. British Railway Traffic & Electric Co., Ltd.*, [1936] 1 K.B. 224; 154 L.T. 158; sub nom. *de Keyser v. Harris, de Keyser v. British Railway Traffic & Electric Co., Ltd.*, 105 L.J.K.B. 74; 99 J.P. 403; Digest Supp.

G ACTION for (a) a declaration that certain securities or certificates of title to securities seized by the plaintiffs, the Commissioners of Customs and Excise, in August, 1952, were forfeited under and by virtue of the Exchange Control Act, 1947, and the Customs Consolidation Act, 1876, and (b) an order for condemnation of the said securities or certificates of title.

H In March, 1949, securities or certificates of title to securities of a nominal value of more than £12,000 were imported into the United Kingdom without the permission of the Treasury, in contravention of the Exchange Control Act, 1947, s. 21 (1) (d), and were delivered to one Leon Sokolow, who, on Mar. 31, 1949, deposited them with Martins Bank, Ltd., in London. In February, 1951, Sokolow was adjudicated bankrupt and the defendant was appointed his trustee in bankruptcy. As the Exchange Control Act, 1947, s. 34 (1) and sched. V, Part III, para. 1 (1), provided that the enactments relating to customs were to apply to certificates of title to any securities, the securities or certificates of title

deposited by Sokolow with Martins Bank became liable to forfeiture under the Customs Consolidation Act, 1876, s. 177, and in August, 1952, they were seized on behalf of the Commissioners of Customs and Excise under s. 202 of the Act. On Aug. 18, 1952, the commissioners gave notice of the seizure in writing to Sokolow, as required by s. 207 of the Act of 1876, and, by a letter dated Sept. 5, 1952, the defendant gave notice, under the section, that he claimed the securities or certificates of title. The defendant contended that the commissioners' claim was a "suit" within the meaning of s. 257 of the Act of 1876, and that, therefore, it was barred by the section, as it was not brought within three years next after the date when the securities or certificates of title were imported into the United Kingdom without the permission of the Treasury and in contravention of the Exchange Control Act, 1947, s. 21 (1) (d).

J. P. Ashworth for the Commissioners of Customs and Excise.

F. H. Lawton for the defendant.

Cur. adv. vult.

Mar. 5. **HILBERY, J.**, read the following judgment. The question for determination in this case is whether the plaintiffs' claim for condemnation of the securities particularised in the schedule to the statement of claim is barred by the provisions of s. 257 of the Customs Consolidation Act, 1876. That section is in the following terms:

"All suits indictments or informations brought or exhibited for any offence against the Customs Acts in any court or before any justice, shall be brought or exhibited within three years next after the date of the offence committed".

The defendant contends, in short, that the words "all suits", the opening words of the section, must be interpreted to mean all such suits as can be brought under the Act in which those words are used, i.e., the Act of 1876. He further contends that the word "suit" at the time of the Act of 1876 had a civil connotation: see the Crown Suits, etc., Act, 1865; and, therefore, that, in using that word in this section, Parliament intended to cover civil proceedings, and the section was, therefore, not intended to be confined to criminal processes. Furthermore, he has urged that, if the word "suits" in the section is *prima facie* to be given this meaning, then the words "for an offence" are inappropriate unless interpreted as meaning all proceedings in respect of offences. The question, therefore, becomes one of construction. The section must be interpreted in the context of the whole Act and in the context of the particular four sections which are grouped together in the Act under a special sub-heading of which the section in question is one.

It is convenient to consider the section in question first in its place in this subsidiary group of four sections and then to see if the construction put on it, when so considered, is consonant with, or in any way inconsistent with, other provisions of the Act. The section is one of four numbered 255 to 258 inclusive. These four are grouped under the following heading: "As to prosecution by indictment or information". Section 255 enacts in whose names indictments or suits are to be preferred. Section 256 gives power to the senior law officers of the Crown in England, Scotland or Ireland, by entering a *nolle prosequi* or otherwise, to stop any prosecution for recovery of any fine, penalty or forfeiture. Section 257 is in the terms already quoted. Section 258 provides the venue for the trial of any indictment, prosecution or information instituted or brought under the direction of the Commissioners of Customs for offences against the Customs Acts. It is to be observed that these sections are grouped under a heading which indicates that they are intended to relate to prosecutions by indictment or information, i.e., to criminal proceedings. The sections deal with the persons in whose names proceedings are to be begun; how, in certain circumstances, they can be stopped; where, if tried, they are to be tried; and the time within which they must be begun.

Section 257 is, therefore, one of a special group providing for certain particular matters in connection with criminal proceedings. Furthermore, in so far as s. 257 is expressed to relate to indictments or informations in any court or before any justice, it is confined to criminal proceedings, more especially as, if the section is to apply, the indictment or information must be for an offence against the Customs Acts. As one of the group under a sub-heading apparently intended to indicate the subject to which the group coming under it relates, or taken by itself, s. 257 would seem to apply only to criminal proceedings. All the forms of proceedings there enumerated are qualified by the words "for any offence" against the Customs Acts. If that is right, the section in question has no application in the case under consideration, unless the case is within the words of the section as a suit for an offence against the Customs Acts. It certainly is not an indictment or information. In my view, it is not a suit for an offence against the Acts. It is a claim to have certain articles, which have been seized, condemned by the court. In the language of LORD HEWART, C.J., in *de Keyser v. British Railway Traffic & Electric Co., Ltd.* (1) ([1936] 1 K.B. 230), it is an action to complete what was an inchoate forfeiture by the combination of forfeiture and condemnation. In this connection it is important to remember the provisions of the Act under which the various steps in this matter were taken by the customs officials. It is conceded that the securities in question were "goods" the import of which was prohibited, and which, when brought into this country, became forfeited goods under s. 177. Being goods liable to forfeiture, s. 202 applied, and by its express terms customs and excise officers, and other specified persons, were empowered to seize them. This they did, and, having done so, s. 207 came into operation, and they were obliged to give notice in writing of such seizure and of the grounds thereof to the master or owner of the things seized.

Section 207 provides that, unless within one month from the date of such seizure the master or owner or some person authorised by him gives notice in writing that he claims, or intends to claim, the things so seized, the seizures made shall be deemed and taken to be condemned and may be sold. In such circumstances no suit for condemnation by the court is necessary, because the forfeiture, which was inchoate at the time of the seizure, is completed by a condemnation which follows by operation of law, and the Commissioners of Customs are empowered to sell the goods and to pass a statutory title to them. If, on the other hand, within one calendar month of seizure notice in writing is given by the person from whom such seizure is made, or the master or owner thereof or some person authorised on his behalf, that he claims the things so seized or intends to claim them, the section [as amended by the Statute Law Revision Act, 1894] enacts that thereupon proceedings shall be taken for the forfeiture and condemnation of the goods either by information filed in the High Court of Justice on the Revenue side or exhibited before any justice of the peace. It is because of that last mandatory provision that this action is brought.

In such circumstances, is such an action a suit for an offence against the Customs Act? In my view, it is not. It is a suit to determine the legality of the seizure. It may be true that the fact that the goods were goods the import of which was restricted or forbidden and that they were seized are matters which must be proved unless, as in this case, they are admitted. But the proceedings are not for the offence which led to the seizure; they are proceedings to establish that the seizure which followed the offence has resulted in the customs authorities having a good title to the goods, and, therefore, one which they could pass to a purchaser of the goods from them.

When considering the use of the word "forfeiture" in the phrase

"proceedings shall be taken for the forfeiture and condemnation"

of the goods, in s. 207, regard must be had to the fact that the word "forfeiture" is used in the Act to connote two distinct and different things. The word

"forfeiture" is used in the Act both for the articles confiscated and for many penalties incurred in consequence of the doing of something which the Act prohibits. Under s. 177, if any prohibited goods shall be imported or brought into any part of the United Kingdom, then such goods shall be forfeited. Under s. 186, every person smuggling prohibited goods or goods liable to duty or dealing with such goods with intent to defraud Her Majesty of the duty or to evade the prohibition

" . . . shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or £100, at the election of the Commissioners of Customs . . . "

The side-note against these last words is: " Penalty treble value, or £100 ". The forfeiture of treble value or £100 there-spoken of is a penalty for the offence.

Section 218 to s. 242, which are grouped under the sub-title:

" As to the course of procedure for recovering penalties, enforcing forfeitures, and punishing offenders under the Customs Acts "

constitute a complete code of procedure. Section 218 begins by providing that:

" All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts . . . "

Having regard to what I have pointed out is the use in the Act of the word "forfeiture" to mean a money penalty, I am of opinion that, in this section, when it speaks of duties, penalties and forfeitures, it is forfeiture in this sense that is intended. Inasmuch, however, as seizure of goods is also spoken of as a forfeiture, but the liability to that forfeiture can be challenged under s. 207, and thereupon the proceedings must be taken for the forfeiture and condemnation of the goods either by information filed in the High Court on the Revenue side or exhibited before any justice of the peace, s. 218 expressly also provides for how the liability to forfeiture of any goods seized under the authority of the Customs Act may be sued for in the High Court or proceeded for before a justice of the peace.

Throughout these sections there runs a distinction between information for an offence and the proceedings to establish the liability to forfeiture of goods seized. Section 223 begins:

" All informations exhibited before any justice for any offence committed against or forfeiture incurred under this or any other Act relating to the customs . . . "

Clearly the forfeiture there intended is the penalty incurred for an offence. Section 256 gives power, as I have already pointed out, to stop by nolle prosequi any prosecution for recovery of any fine, penalty or forfeiture, and is, undeniably, applicable only to criminal proceedings. Nolle prosequi, as a method of stopping proceedings, is appropriate only in criminal proceedings. The forfeiture there spoken of would seem, therefore, to refer to a money penalty specified by the Act as the consequences of a crime committed against the Act, such as the treble value or £100 forfeiture under s. 186 to which I have already referred.

When, therefore, s. 257 speaks of suits for any offence, it may be intended to cover a suit for a penalty which by the Act results from the committing of the offence. Such a suit may, perhaps, be said to be "for an offence", but, seeing that in the sections constituting the code of procedure, to which I have already drawn attention, a distinction is drawn between proceedings for an offence and suits to determine the liability to forfeiture of goods seized, I am the more convinced that, when the expression "suits . . . for any offence" is used in s. 257, it is not intended to refer to such a suit as the present where the legality of a seizure already effected is the sole issue to be determined. In addition, one cannot overlook the fact that there is good reason why the framers of s. 257 should have intended to confine the period of limitation imposed by the section to

proceedings of one sort or another for an offence and not to proceedings for the condemnation of goods seized which have been claimed. Dutiable goods smuggled into the country or goods imported, the import of which is forbidden, can be seized when found. No limit of time is anywhere imposed by the Act within which, if such goods have been brought into the country, they must be seized. Valuable goods such as the securities in question in this action, the import of which is prohibited, might be hidden for more than three years and be increasing in value during that time, and, if it was intended that they should none the less be immune from seizure after three years from the date when they were imported, one would expect the Act to make this so plain as to be beyond question and certainly not to leave it a nice question of construction. For these reasons, I am of opinion that s. 257 does not bar the claim for condemnation made in this action. I, therefore, adjudge and declare that the securities or certificates of title, particulars of which are set out in the schedule to the statement of claim, and which were seized by the plaintiffs, are forfeited under and by virtue of the Exchange Control Act, 1947, and the Customs Consolidation Act, 1876, and I order that the said securities or certificates be and are hereby condemned.

Order accordingly.

Solicitors: *Solicitor of Customs and Excise; Nordon & Co.* (for the defendant).
[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

CILIA v. H. M. JAMES & SONS. SPARK (Third Party).

[QUEEN'S BENCH DIVISION (Byrne, J.), March 29, 30, 1954.]

Master and Servant—Duty of master—Provision of safe place for servant to work—Work on premises not occupied by master.

On Jan. 10, 1952, the plaintiff's son, who was a plumber's mate employed by the defendants, was installing some handbasins on the ground floor of a house which was at the time unoccupied. The water storage tank in the loft of the house began to overflow and the plaintiff's son went to attend to it. Later he was found dead lying across the tank. The floor of the loft had been covered with steel plates by the owner of the house as a protection against fire bombs. Under one plate was a defective electric conduit and HIS LORDSHIP found that the deceased had been electrocuted by completing the circuit when standing on the "live" plate and touching the ball-valve of the tank. In an action by the plaintiff as administratrix of her son's estate for negligence,

HELD: the defendants as employers were under no duty to see that premises which they did not occupy and over which they had no control were reasonably safe: *Taylor v. Sims & Sims* ([1942] 2 All E.R. 375), applied; dictum of DENNING, L.J., in *Christmas v. General Cleaning Contractors, Ltd.* ([1952] 1 All E.R. 41), not applied. Alternatively, even if the defendants were under a duty to see that the premises were reasonably safe, the electrocution of the deceased resulted from a danger which no reasonable employer could have been expected to know of or to have foreseen, and, therefore, the plaintiff's claim failed.

AS TO BURDEN OF PROOF AS BETWEEN MASTER AND SERVANT, see HALSBURY, *Hailsham Edn.*, Vol. 23, p. 671, para. 954; and FOR CASES, see DIGEST, *Replacement* Vol. 36, pp. 140, 141, Nos. 735-746.

Cases referred to:

- (1) *Taylor v. Sims & Sims*, [1942] 2 All E.R. 375; 167 L.T. 414; 2nd Digest Supp.
- (2) *Naismith v. London Film Productions, Ltd.*, [1939] 1 All E.R. 794; Digest Supp.

- (3) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 1937 S.C. (H.L.) 46; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (4) *Paine v. Colne Valley Electricity Supply Co., Ltd., & British Insulated Cables, Ltd.*, [1938] 4 All E.R. 803; 160 L.T. 124; Digest Supp.
- (5) *Christmas v. General Cleaning Contractors, Ltd.*, [1952] 1 All E.R. 39; [1952] 1 K.B. 141; *affd.* H.L. sub nom. *General Cleaning Contractors, Ltd. v. Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180; 3rd Digest Supp.
- (6) *Hodgson v. British Arc Welding Co., Ltd., & B. & N. Green & Silley Weir, Ltd.*, [1946] 1 All E.R. 95; [1946] K.B. 302; 115 L.J.K.B. 400; 174 L.T. 379; 2nd Digest Supp.
- (7) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.

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ACTION for negligence.

The plaintiff, Mrs. Cilia, brought an action as administratrix of the estate of her son, John Emanuel Cilia, under the provisions of the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. The deceased, who was twenty-one, was employed as a plumber's mate by the defendants, a firm of builders and contractors. On Jan. 10, 1952, the deceased was engaged with the plumber, one Bush, in fitting some handbasins and water closets on the ground floor of a house at No. 79, Wanstead Park Avenue, Manor Park. The house was unoccupied at the time, but the third party was negotiating to buy the house and it was under a contract with the third party that the work in the house was being done. On that day, while the deceased and Bush were working on the ground floor, the water storage tank in the loft began to overflow, owing, probably, to a defective ball-valve. Bush told the deceased to attend to it. After a time, as the deceased did not return, Bush went up to the loft himself and found the deceased, dead. He was lying across the tank with one arm in the water and both feet off the floor. On the floor of the loft there were some steel plates which had been put there during the war as a protection against incendiary bombs. One of the steel plates close to the tank rested on an electric conduit. Evidence was given that this conduit was defective with the result that the plate above it was charged, at least intermittently, with electricity. His Lordship found as a fact that the deceased died as the result of an electric shock when he completed the circuit by touching the ball-valve.

Goodenday and D. D. H. Sullivan for the plaintiff.

B. Finlay for the defendants.

Laskey for the third party.

BYRNE, J., stated the facts and continued: In these circumstances, this action is brought against the deceased's employers, the defendants. Counsel for the plaintiff alleges that the defendants were negligent and were in breach of their common law duty as employers to take reasonable care to see that the premises where their workmen were required to work were reasonably safe. The negligence relied on is set out in para. 7 of the statement of claim. That reads as follows:

"The accident was caused by the negligence of the defendants in the breach by them of the obligation and duty referred to in para. 3 in that they failed to inspect the said loft prior to the deceased working therein, and nevertheless required the deceased to work therein without removing the said steel plate, or taking any other steps to remedy the dangerous condition of the premises, and failed to take any steps or take reasonable care to see that the premises were safe, though they knew or ought to have known that the premises were dangerous as aforesaid".

Counsel for the defendants, on the other hand, has submitted to me that there

A is no duty on an employer to see that the premises where his workmen are required to work are reasonably safe. He accepts the position, of course, that the employer is under a duty to see that he devises a safe and proper system of work and that he is also under a duty to supply his workmen with suitable plant and material, but he submits that beyond that the employer is under no duty with regard to the safety of the premises. Counsel for the defendants relies on two cases. The first is *Taylor v. Sims & Sims* (1), which was a case tried by LEWIS, J. In his judgment the learned judge dealt with this question of the duty of an employer to ensure that reasonable steps are taken for the safety of his workman in a case in which the workman was working in premises which were not occupied by the employer. LEWIS, J., said ([1942] 2 All E.R. 377):

B "The argument of counsel for the plaintiff is this. This is a matter of common law negligence and involves the question of the duty of an employer towards his employee. I have no doubt that when counsel for the plaintiff put that forward he had in mind the case which has been cited to me and which justifies that position, namely, *Naismith v. London Film Productions, Ltd.* (2), which was not by any means on all fours with this case, but it has a bearing on this matter which is perhaps worth mentioning".

C Then the learned judge dealt with the facts of the case and proceeded to deal with the decision of the Court of Appeal in *Naismith v. London Film Productions, Ltd.* (2), and he said (*ibid.*):

"It was held that the direction to the jury was wrong",

D the jury having been directed that the obligation which the defendants owed to the plaintiff was that owed to an invitee. LEWIS, J., continued (*ibid.*):

E "GODDARD, L.J., who was a member of the court, agreed with SIR WILFRID GREENE, M.R., and said ([1939] 1 All E.R. 797): 'In the first place, the standard of duty was not correctly stated to the jury, though it is only fair to point out that *Wilsons & Clyde Coal Co., Ltd. v. English* (3), which has done so much to clarify the law on that point, was not cited to LORD HEWART, L.C.J. The relationship of the parties was not that of invitor and invitee, but that of employer and employee, and it follows that the jury should have been directed that the defendants' duty was not merely to warn against unusual dangers known to them, and not to the plaintiff, but also to make the place of employment, and the plant and material used, as safe as the exercise of reasonable skill and care would permit'. It seems to me that, if in that case GODDARD, L.J., was saying that the position was not that of an invitor and an invitee although the premises upon which the accident happened belonged to the invitor or were in the occupation of the invitor, it can hardly be said that the position of invitor and invitee arose where, in my view, the defendants were not the occupiers of the premises where the accident happened. That case, as I have said, is a case exemplifying the doctrine that an employer has got to see that the plant which he asks his employees to use is reasonably safe, or, in other words, to take reasonable precaution to see that it is safe. In my view *Naismith v. London Film Productions, Ltd.* (2), is, as GODDARD, L.J., clearly said, a case like *Wilsons & Clyde Coal Co. v. English* (3), where the defendants were found to be liable because they had not taken reasonable care to see that the plant—if I may use that expression with regard to a lady's dress—which the employee was told to use at the performance was proper equipment. When I say that there was a duty upon the defendants to provide proper equipment, the equipment in such a case may be a dress but in other cases in which the expression 'defective plant' has been used the plant has been a crane or some sort of tool which the employee had been called upon by the employer to use. Therefore this case falls to be decided upon what are the duties of the

defendants in the circumstances of this case towards the plaintiff. The words I have just read from a judgment of GODDARD, L.J., in that case and also the words of GODDARD, L.J., in *Patel v. Colne Valley Electricity Supply Co., Ltd. & British Insulated Cables, Ltd.* (4) would seem to bear out this proposition. The common law duty of an employer towards his employees is to provide a safe place for their work. In other words, having in mind similar expressions by other judges, which I need not go into—and with this counsel for the plaintiff agrees—it is to take reasonable care to see that the premises are safe.

"I confess that I am very troubled as to whether, when GODDARD, L.J., used the expression 'provide a place which is safe' and the other expressions used in the cases, that means anything more than that the premises belonging to or occupied by the employer upon which the employee is to work ought to be safe. Of course I leave out of consideration, in saying that, that it is long settled that, if an employee is asked to work with defective tools or tools as to which the employer has not taken reasonable care to see that they are efficient, the employee has a cause of action although he may be working with these tools or plant quite away from the employer's premises. Similarly, of course, *Wilsons & Clyde Coal Co., Ltd. v. English* (3), makes it perfectly clear that, if an employer working on somebody else's premises, asks his workmen to do their work on an unsafe system, it does not matter where the premises are or to whom they belong upon which the workmen are asked to work. I confess, however, that I see very great difficulty in saying that there is a duty upon the employer to see that premises are reasonably safe upon which he asks his workmen to work when he has no control over those premises whatever. I have asked counsel to refer me to any case in which it was held that the plaintiff was liable for unsafe premises, quite apart from faulty system or unsafe plant, in which those premises were not in the occupation of the employer, that is to say, were not the employer's own premises, and the researches of counsel on each side, I understand, have been unable to find any such case.

"Applying, I hope, the common-sense test, it does seem to me a very curious proposition that, when a householder asks a contractor to come in and paint his house, unless the contractor goes over the whole house to see that every floor is safe or takes reasonable steps to see that the house is safe, he, the contractor, is liable if the floor collapses and one of his workmen is injured. It may very well be, of course, that in those cases the occupier of the house is personally liable by reason of an unusual danger, of which he knew or ought to have known and failed to warn the contractor or his workmen. All I can say is that it seems to me a great extension of the doctrine of reasonable care which an employer has got to take with regard to his men that, wherever they are sent out to work, he has got to go and see that the premises are reasonably safe for them to work upon. I have, therefore, as a proposition of law, very grave difficulty in seeing that there is any liability upon the employers in this case. If there be any such liability and it is the duty of the employer to take reasonable steps to see that the premises are safe although they are not his premises, I have to consider whether or not any such reasonable steps were taken in this case, assuming my view of the law is erroneous and that there was a duty."

I am bound to say that I entirely agree with that view of the law as stated by LEWIS, J. The question is whether I am entitled to take that view of the law in view of a case which was before the Court of Appeal, *Christmas v. General Cleaning Contractors, Ltd.* (5). But before I deal with that case I will mention the other case which is relied on by counsel for the defendants, *Robinson v. British Ace Walling Co., Ltd. & B. & N. Green & Silley Wear, Ltd.* (6). That was a case tried by HILLARY, J., and the learned judge said (1946) 1 All E.R. 961.

"On the evidence, I cannot find that any case is made out against the first defendants, the plaintiff's employers. The work in question was to be done by his employers in premises over which they had no control whatsoever. They were not occupiers of the premises; they were only a firm of contractors employed to do certain work in a ship which was then in the hands of the shipwrights for repairs, and they contracted to do that work for the shipwrights."

The learned judge dealt with the case on that basis, there being, of course, a difference to some extent between the facts there and the facts in the case that I have to deal with, because in *Hodgson's* case (6) the defendants made use of (and it was the custom for it so to be done) various tackle, scaffolds, and so forth that had been placed in position by other contractors. But, at all events, the learned judge made that observation:

"The work in question was to be done by [the plaintiff's employers] in premises over which they had no control whatsoever".

Counsel for the defendants dealt with *Christmas v. General Cleaning Contractors, Ltd.* (5). That is a case which counsel for the plaintiff relies on, because he says that it is binding on me and that DENNING, L.J., in his judgment, refers to *Taylor v. Sims & Sims* and indicates that he is not in agreement with it. He says ([1952] 1 All E.R. 41):

"The next question is whether the contractors are liable to their workman, the plaintiff. Counsel for the contractors argued that employers who send their men out to work on the premises of other people, have no responsibility for the safety of those premises. He cited *Taylor v. Sims & Sims* (1) in support of that proposition. He said that it was for the occupier to see that the premises were safe for the workman and not for the employer to do so. I cannot agree with that proposition. Until recently many people thought that an occupier was bound to use reasonable care to see that his premises were safe for workmen he invited on them, but that is no longer true. The decision of the House of Lords in *London Graving Dock Co., Ltd. v. Horton* (7) shows that an occupier can allow his premises to remain defective and dangerous with impunity so long as he gives the men warning of the risk or the danger is so obvious that they must be aware of it. If this is so, I think it must follow that it is for the employer, who sends his men to the premises, to take reasonable care to see that the premises are safe for the men or else take proper steps to protect the men from the dangers to which he sends them. There is a difference between a master-man and a journeyman. A master-man, working on his own account, who knows of the dangers, has a choice before him. He need not do the work if he does not wish to run the risk. But a journeyman, working for another, has no such easy choice. He has been sent to do the work and he may well feel that do it he must, even though he knows that it involves risk. If such a man has no remedy against the occupier—and *Horton's* case (7) shows that he has none—then it must be the duty of his employer to take reasonable care to protect him. This seems to me implied in the observations of LORD PORTER and LORD NORMAND in *Horton's* case (7) ([1951] 2 All E.R. 5, 11)."

The facts of *Christmas v. General Cleaning Contractors, Ltd.* (5) were as follows.

An occupier of premises contracted with a window cleaning company to clean the windows of his premises once a fortnight. An employee of the company stepped out on the sill outside a window of the premises, 6½ inches wide, and, holding on to the bottom cross-piece of the top and outer sash with his right hand he pushed that sash up to the top of the window frame. The lower sash, which was raised a few inches from the bottom of the frame, without being touched by the window cleaner, but by reason of its weight being ill-balanced, came down on his hand, so that he lost his balance, fell and was injured. Safety belts had been

provided by the employers, but the plaintiff did not use one, because no hooks were fixed in the structure of the premises to which a safety belt could be attached. No complaint about the window had been made by anyone. The window cleaner sued his employers and also the occupier, claiming damages for his injury. It was held that the occupier was not responsible, and it was said that it was the duty of the window cleaning company, who sent their employees to the premises, to see that the premises were safe for their employees or else to take proper steps to protect them from the dangers to which they were sent. It is to be observed that HODSON, L.J., who gave judgment also in the case of *Christmas* (5), did not state the proposition with regard to the obligation of the employer to see that the premises are safe that had been stated by DENNING, L.J., and LLOYD-JACOB, J., who was a member of the court, in his judgment expressed the matter finally in this way ([1952] 1 K.B. 153):

"As against the first defendants, on the judge's findings, the only question is whether they took reasonable care to provide a safe system of work for their servant. They admittedly required him to stand upon a ledge 6½ inches wide and twenty-seven feet from the ground with no protection from a fall . . ."

That case went to the House of Lords. It is to be observed that in the House of Lords the duty of the employer with regard to the safety of the premises was, apparently, only referred to, and, indeed, in their various speeches the learned Law Lords appeared to base their opinions on the observation to which I have already referred made by LLOYD-JACOB, J., in the Court of Appeal, on the question of the system of work. Counsel for the plaintiff says that the observations of DENNING, L.J., in which he disposes of *Taylor v. Sims & Sims* (1), are not obiter dictum but are part of the ratio decidendi. Counsel for the defendants, on the other hand, submits that they are obiter, and I am bound to say that I agree with his contention. I do not think, for the purposes of that case, that the observations of the learned lord justice were necessary, and, treating them with the greatest possible respect, I feel that, on the consideration of the whole case, and on what took place in the House of Lords, I am not bound by what the learned lord justice said with regard to *Taylor v. Sims & Sims* (1). Furthermore, in his judgment, DENNING, L.J., referred to *London Graving Dock Co., Ltd. v. Horton* (7), and it is to be observed when one looks at that case that what was decided was the question of the duty of an employer to an invitee. The invitor fulfils his duty by warning of danger, but an employer, with regard to his employee, has to go further than that, and that, as I understand *London Graving Dock Co., Ltd. v. Horton* (7), is what was decided. I, therefore, adopt the reasoning of LEWIS, J., in *Taylor v. Sims & Sims* (1), and, in my view, in the circumstances of the case which is before me, the employer was under no duty, having regard to the fact that his workman was not to work on the employer's premises—the premises occupied by the employer—to take all reasonable steps to see that the premises were reasonably safe.

In case I am wrong with regard to that view of the matter, I think it would be right for me to consider the case on the basis that the employer is under that duty, although the premises are not occupied by him. The question then arises (and I must deal with it) whether the evidence in this case indicates that the employer has fulfilled the duty which is stated by counsel for the plaintiff—and there can be no doubt as to the accuracy of the proposition of law—the duty to take reasonable care and to direct his mind to prevent foreseeable dangers of which he knew or ought to have known.

What is the evidence with regard to the performance of that duty owed by the employer, assuming that he owes that duty, in the case of premises which he does not himself occupy? This steel plate was live, and was in this loft where it had been, so far as one could tell, for a number of years; it was put in by the occupier as protection against fire bombs. The premises were a dwelling house.

The defendants were local builders and contractors who would be expected to know something of the property in the neighbourhood. The work that the defendants had to do was plumbing work on the ground floor. They also had some electrical work to do, it is quite true, and they employed for that purpose a sub-contractor, but this accident happened when they were carrying out their plumbing contract. Evidence has been given (which, of course, is not necessarily conclusive, but it is evidence from people in the trade) to the effect that this was a most unexpected thing to occur. Mr. James, of the defendant company, who has been in the trade for forty years and whom I thought a reliable and honest witness, said that when he was given this work to do he went to the house. It was empty and he looked round the lower floor. He said:

"On my inspection, having regard to the work that was to be done, there was no reason to suspect any kind of danger or that there was anything wrong with the house, and I then submitted my estimate and I received instructions to do the work. So far as my experience in the building trade is concerned over these forty years, it is not normal practice to carry out a preliminary inspection of premises, unless the premises appear to be dangerous."

Obviously if the builder is asked to do work on a house which is in imminent danger of tumbling down, then plainly, if the builder knows that, it would be his business to inspect it. If he knows the condition of the premises, or ought to have known it, then his duty is not to subject his workmen to unnecessary risks and he would have to devise, according to the work that required to be done, a system of work having regard to the dangers that were present. Mr. James said:

"Here is a perfectly ordinary normal dwelling-house. It is true that there had been bombing in that neighbourhood during the war, but there had been bombing in most neighbourhoods during the war. One bomb had done a good deal of damage to this house and to about four hundred other houses at the time it fell. Reinstatement work had been done and there was the house, apparently a perfectly ordinary and normal dwelling-house, and it is not normal practice to carry out a preliminary inspection. I have never heard myself of an inspection to find electrical faults, and if a plumber is to work upon a tank it is not normal to cut off the electric current."

I am bound to say that that all sounds to me like common sense. I cannot imagine that we have yet reached the stage, if a householder finds that his storage tank in the loft is overflowing and there is obviously something wrong with the ball-cock or the valve and he, therefore, sends for his builder and tells him that he wants a plumber to attend to this, that the builder would then have to go into the house and test every electrical point and, perhaps, see whether the roof of the loft was quite safe or whether it was likely to fall in when the plumber went up to attend to the tank. Among other things it would, I should have thought, make attention to a ball-cock a prohibitive item for any householder. If the builder knew that the roof was likely to fall or that the floor was likely to fall out of the loft, or that all the electrical wiring in the house was frayed, then it would be very different, but what I have to determine is whether there is evidence here which demonstrates that the defendant failed to take reasonable care and to direct his mind to prevent foreseeable danger, of which he knew or ought to have known. If he did not know of this danger, nobody did, and even the electrician, the contractor employed by the defendants, went up into the loft and he said that he did not see this steel plate lying on the floor as it was dark in the loft. It is quite true, he said, that if he had seen it he would have removed it, because he said that, undoubtedly, the condition of the loft was dangerous. That is, unfortunately, only too true, but it is like locking the stable door when the horse has departed. He said:

"The condition of the loft was dangerous. There is always a possibility of leakage from conduit pipes."

I suppose that is a truism also. He said that steel plates on the conduit pipes are dangerous, and this plate should have been moved. But all those observations are, of course, counsels of perfection. What I have to ask myself is: Would a reasonable employer, exercising due care for the safety of his workmen, be expected to foresee such a remote possibility as a steel plate lying on top of a conduit pipe which has become defective and is, therefore, sending a charge of electricity through the plate, when all that he is required to do by the terms of the contract is to attend to some matters of a plumbing nature on the ground floor, with, of course, the possibility, I suppose, that some attention might have to be given to the tank in the loft? I cannot find myself able to say that it was a foreseeable matter, and I cannot find myself able to say that a reasonable employer would know, or ought to have known, of any such danger as this. Neither can I find myself able to say that it was his duty to carry out a complete inspection of the premises in order to ensure that all was absolutely safe before his workmen began to work.

Mr. James said and Mr. Fowler, also in the building trade, said:

"It is not the practice for plumbers to have the electric current turned off when they have to do a plumbing job. I have never heard of such an accident as this before."

I am bound to say that, in the unusual nature of this accident—the remote possibility of such a state of affairs existing—I find it quite impossible to think that that state of affairs could have been present to the mind of any employer, no matter how he was trying to foresee the possible dangers in which his workmen might be required to work. For all those reasons it seems to me that this action must fail.

Judgment for the defendants.

Solicitors: *Fielder, Jones & Bull* (for the plaintiff); *Davies, Arnold & Cooper* (for the defendants); *F. C. Yates* (for the third party).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

STANGA v. STANGA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), February 18, 1953.]

Divorce—Infant—Guardian ad litem—No guardian appointed—Service of petition on infant—Validity of decree—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 64 (3), (9).

The wife was born on Apr. 23, 1931, and on Sept. 6, 1951, the husband presented a petition for divorce on the ground of her desertion. The petition was served by post on the wife, who signed and returned the acknowledgment of service, but did not enter an appearance. On Nov. 8, 1951, the petition was heard undefended and a decree nisi was granted. On Apr. 16, 1952, a guardian ad litem was appointed for the wife. On Apr. 23, 1952, the wife attained her majority. On an application for a re-hearing of the husband's petition,

Held: the provisions of r. 64 (3) of the Matrimonial Causes Rules, 1950, relating to the service of a petition on an infant, and those of r. 64 (9), relating to the appointment of a guardian ad litem were mandatory; they had not been complied with; and, therefore, the decree would be set aside and a re-hearing of the petition ordered.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 64, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 226.

Cases referred to:

[1] *Wiles v. Wiles*, [1900] P. 17; 69 L.J.P. 26; 81 L.T. 823, 27 Digest, Replacement, 268, 2148.

(2) *Burnett v. Burnett & Purdy*, (1922), 39 T.L.R. 111; 27 Digest, Replacement, 458, 3934.

(3) *Leaver v. Torres*, (1899), 43 Sol. Jo. 778; 33 Digest 233, 1469.

APPLICATION by the wife under the Matrimonial Causes Rules, 1950, r. 36 (1), for the re-hearing of the husband's petition for divorce which had been heard undefended by His Honour JUDGE WRANGHAM, sitting as a special commissioner in divorce, on Nov. 8, 1951.

A The wife was born on Apr. 23, 1931, and the parties were married on July 10, 1947. On Sept. 6, 1951, when the wife's age was twenty years, the husband presented a petition for dissolution of marriage on the ground of her desertion, alleging that at the material time he and the wife were domiciled in England. The petition was served by post on the wife who returned by post the acknowledgment of service. On Nov. 8, 1951, the petition was heard undefended and the commissioner granted a decree nisi in favour of the husband. Before the decree was made absolute the husband's solicitors discovered that the wife was still an infant, and on Apr. 16, 1952, the Official Solicitor was appointed the wife's guardian ad litem. On Apr. 23, 1952, the wife attained her majority. On Apr. 24, 1952, the Official Solicitor received the copy of the order of his appointment. The Official Solicitor being satisfied, as a result of his inquiries, that at all material times the wife had been an infant, and that the Matrimonial Causes Rules, 1950, r. 64 (3) and (9), had not been complied with, brought the matter to the attention of the court.

Horner for the Official Solicitor.

G. H. Dixon for the husband.

D LORD MERRIMAN, P., stated the facts and continued: Under the Matrimonial Causes Rules, 1950, r. 64 (3):

“Where . . . the person on whom service is to be effected is an infant, the document shall, unless otherwise directed, be served on the father or guardian of the infant or, if he has no father or guardian, upon the person with whom he resides or under whose care he is, and service so effected shall be deemed good service on the infant ”.

E It is clear, therefore, that since the wife was still an infant there was no proper service on her of the petition, in spite of the acknowledgment of service, which appears on the face of it to be regular. There is no suggestion that those conducting the case on behalf of the husband have been guilty of any impropriety or concealment in this matter. On the contrary, it was as a result of the disclosure to the district registrar by the solicitors for the husband, after the decree nisi had been pronounced and when steps were being taken to make it absolute, of their discovery that at the material time the wife was an infant that the registrar advised that even at that late stage the Official Solicitor ought to be made a guardian ad litem to see what steps, if any, could be taken to put the matter right. The order appointing him guardian was made on Apr. 16, 1952. F The wife attained her majority on Apr. 23, 1952, and on the next day the Official Solicitor received the copy of the order of his appointment. By that date, of course, the reason for his appointment had ceased. Having completed his investigations and having satisfied himself that the wife had been an infant at all material times and that the rules had not been complied with, the Official Solicitor appeared ex parte before me in chambers and I encouraged him to bring the matter to the attention of the court, notwithstanding that, by the intervening majority of the wife, he was, strictly speaking, functus officio. I have been assured by both counsel that they are in no wise embarrassed thereby. H

Rule 64 (9) assumes that a petition has been served on an infant. Since I doubt whether the petition in this case has been served, at any rate within the meaning of r. 64 (3), it may be said that this condition precedent to the application of r. 64 (9) was not fulfilled, but a form of service was gone through, and the wife

did, in fact, receive the petition. No appearance, however, was entered by her or on her behalf. It is laid down by r. 64 (9) that

"the party at whose instance the petition . . . was served shall, before proceeding further with the cause, apply for an order that some proper person be assigned guardian of the infant . . . by whom he may appear and defend or intervene in the proceedings".

The question is whether or not the terms of r. 64 are such that this non-compliance with the directions in sub-r. (3) regarding service or those in sub-r. (9) about the appointment of a guardian (directions which are said to be mandatory), vitiates the whole proceedings. So far as I am aware, the earliest rule dealing with infants is in the Matrimonial Causes Rules, 1924 (S.R. & O., 1924, No. 126), being the last complete code of rules governing divorce proceedings in this Division which was issued simply on the fiat of the President without his being obliged to submit it, as is now the case, to the Supreme Court Rules Committee. Rule 74 contains the only specific provisions relating to infants. Rule 74 (a) provides that a minor who has attained the age of seven years may elect his own guardian, (b) deals with the appointment of a guardian for an infant under the age of seven years, and (c) lays down:

"The election, the consent of the guardian to act, and an affidavit showing fitness and no contrary interest, must be filed in the registry before an elected guardian can be permitted to file a petition or enter an appearance on behalf of the minor".

The Matrimonial Causes Rules, 1937, were drafted by a committee on which all interests were represented, including, I think for the first time, the managing clerks of two firms who were versed in these matters. It was pointed out that we had not dealt sufficiently with the cases of infants and persons of unsound mind. With regard to such persons it is clear from *Giles v. Giles* (1), and *Burnett v. Burnett & Purdy* (2), that this Division had to rely on R.S.C., Ord. 13, r. 1, for power to appoint the Official Solicitor as guardian ad litem of a lunatic. Accordingly, SIR WILFRID GREENE, M.R., and CLAUSON, J., undertook to draft r. 64, which has, in substance, remained unchanged to this day.

I do not think there can be any doubt, and, indeed, counsel for the husband made it clear that he is not prepared to argue that there is any doubt, that r. 64 is mandatory. R.S.C., Ord. 13, r. 1, was held by DARLING, J., in *Leaver v. Torres* (3) to be mandatory. Although the order of the court was stayed pending an appeal, it appears from the text-books that there never was an appeal. Counsel for the husband has drawn our attention to a point which in this case reinforces the necessity for a strict compliance with the rules, for it appears that the husband's advisers have been made aware that in spite of the fact that as an infant the wife allowed the proceedings instituted by the husband to go by default, she now wishes to contest the whole matter. It is not necessary for us to say whether, apart from this rule, it is a case in which we should have felt obliged to set the decree aside, notwithstanding that she deliberately stood by (if that can be said of an infant), which is a proposition for which there is abundant authority. The ground of this application is that r. 64 was not complied with. That is not disputed, and it seems to me that it follows that it is our duty to set this decree aside, and to give such consequential directions as are appropriate.

DAVIES, J.: I agree.

Solicitors: *Official Solicitor*; *Rye & Eyre*, agents for *Sydney Payne & Trench*, *Leicester* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re LEWIS AND SMART, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), April 5, 6, 1954.]

Company—Misfeasance summons—Service while company dissolved—Effect of order avoiding dissolution—Companies Act, 1948 (c. 38), s. 352 (1).

On Feb. 5, 1952, a contributory of a company which had gone into voluntary liquidation pursuant to a resolution of the creditors in June, 1951, issued an originating summons against the promoters alleging that they had made a secret profit on the promotion of the company. On July 10, 1952, before the summons was served, the company was deemed to be dissolved under the Companies Act, 1948, s. 300 (4). On Oct. 5, 1953, after the summons had been served, an order was made under s. 352 (1) of the Act declaring the dissolution void.

HELD: misfeasance proceedings, being brought for the benefit of the company with the object of swelling its assets, necessarily came to an end when the company was deemed to be dissolved under s. 300 (4) of the Act of 1948 as it would be impossible to obtain judgment while the dissolution remained effective, and so, on the dissolution of the company in July, 1952, the proceedings started by the originating summons abated; the order of Oct. 5, 1953, declaring the dissolution void under s. 352 (1) did not validate any acts done on behalf of the company while it was dissolved; and, therefore, the proceedings could not be treated as having been revived by that order.

Morris v. Harris ([1927] A.C. 252), applied.

AS TO AVOIDANCE OF DISSOLUTION, see HALSBURY, Simonds Edn., Vol. 6, p. 732, para. 1473; and FOR CASES, see DIGEST, Vol. 10, p. 1034, Nos. 7174-7177, and Digest Supps.

Cases referred to:

- (1) *Morris v. Harris*, [1927] A.C. 252; 96 L.J.Ch. 253; 136 L.T. 587; Digest Supp.
- (2) *Carendish Bentinck v. Fenn*, (1887), 12 App. Cas. 652; 57 L.J.Ch. 552; 57 L.T. 773; 10 Digest 902, 6161.
- (3) *Re Dixon, Ltd.*, [1947] 1 All E.R. 279; [1947] Ch. 251; [1947] L.J.R. 783; 177 L.T. 127; 2nd Digest Supp.

MOTION by Josiah Ednam Parsons, a contributory of Lewis and Smart, Ltd., to discharge or vary an order made by the registrar on Feb. 4, 1954.

On June 11, 1951, the company went into voluntary liquidation and the fourth respondent, Ronald Frederick Bendall, was appointed liquidator. On Feb. 5, 1952, the applicant issued an originating summons for a declaration that Fred Victor Ward Lewis, Mary Constance Carless, and Terence Patrick Smart (the first, second and third respondents), were jointly and severally liable to contribute to the assets of the company a sum of £3,071 2s. 6d., being the amount of a secret profit made by them on the promotion of the company in 1947. On July 10, 1952, the company was deemed to be dissolved under the Companies Act, 1948, s. 300 (4). Between that date and Oct. 5, 1953, the summons was served on the respondents. On Oct. 5, 1953, the dissolution was declared void. When the summons came before the registrar he expressed the opinion that it had abated on the dissolution of the company and was not revived by the order declaring the dissolution void.

J. G. Monroe for the applicant.*Shelford* for the second respondent, Mrs. Carless.

The first, third and fourth respondents did not appear.

WYNN-PARRY, J.: This motion raises a short but interesting question. It comes before me in these circumstances. The company went into voluntary

liquidation on June 11, 1951, the liquidation being a creditor's voluntary liquidation. On Feb. 5, 1952, the applicant issued an originating summons joining as respondents the liquidator of the company and three persons who, according to the form of the summons, he alleged to have been concerned in the promotion of the company and, in connection with that promotion, with the making of a secret profit. Only one of those respondents, namely, the second respondent, Mrs. Carless, appears before me today. On Apr. 7, 1952, the liquidator called the first meeting. On Apr. 10, 1952, he filed the usual return, and three months later, on July 10, 1952, the company became dissolved under the provisions of the Companies Act, 1948, s. 300 (4). On Oct. 5, 1953, an order was made by this court under s. 352 (1) declaring the dissolution void. Between the date of the dissolution and that order the summons was served on the various respondents. On Nov. 18, 1953, the originating summons was before the registrar for the purpose of obtaining directions. It was stood over for three weeks in order that the evidence, directed to be by way of affidavits, might be completed. During that period it was intimated to those representing the applicant by those representing the respondent, Mrs. Carless, that the point would be taken on her behalf that the effect of the dissolution had been to cause the originating summons to abate and that the effect of the order declaring the dissolution void was not to revive the summons. On Feb. 4, 1954, the summons came before the learned registrar, who accepted that submission on the authority of *Morris v. Harris* (1). In his order the registrar expressed the opinion that the originating summons abated on the dissolution of the company and was not revived by the order of Oct. 5, 1953, declaring the dissolution to have been void, and, therefore, he made no other order than for the costs of the applicant and of one of the respondents, Terence Patrick Smart, to be taxed as between solicitor and client under the provisions of the Legal Aid and Advice Act, 1949. It is by way of appeal from that order that this motion comes before me.

In *Morris v. Harris* (1) the distinctions between s. 223 and s. 242 of the Companies (Consolidation) Act, 1908, now, respectively, s. 352 and s. 353 of the Companies Act, 1948, were exhaustively considered. I quote from the speech of LORD BLANESBURGH, which, in my respectful view, most clearly emphasises the distinction between the two sections. Referring to s. 223 of the Act of 1908 (now s. 352 of the Act of 1948), LORD BLANESBURGH said ([1927] A.C. 268):

"It is true that a declaratory order under the section unqualified in terms does, and it was in my judgment essential, if many difficulties which readily occur to the mind were to be avoided, [provided] that such an order should have the effect of restoring to the revived company its corporate existence as from the very moment of the dissolution thereby declared 'to have been void.' But the expository words which follow carefully and, as I think, advisedly refrain from adding that such an order is to have the effect of restoring to the company from the same moment, not its corporate existence only, but its corporate activity also. On the contrary, these expository words import, as I think, that it is only after the order has been made—it is 'thereupon' but not before—that any active consequences are to ensue. I think, my Lords, that the terms in which these consequences are described are exhaustive and emphatic. They are intended to show that an order under the section made, it may be, as long as two years after a dissolution which up to that moment was completely effective, is not at once and as of course to nullify acts done during the interval, which, if done at all, must necessarily have been acts of mere usurpation, by a liquidator or other purported agent with no office knowingly done on behalf of a company which had no existence. On consideration, it appears, I think, clear that automatically to validate such acts as being the acts of a duly constituted—those on behalf of a duly incorporated company might involve consequences too disastrous to be even envisaged. These are avoided by the terms of the

A section. The company is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution to have been void. Then, and only then, is the company restored to activity. And now is made apparent the reason for the difference in phraseology and effect between s. 223 and s. 242 (6). A dissolution under s. 242, as I have said, is preceded by no winding-up, and the section had to envisage a dissolution which might have taken place without the knowledge of any one concerned in the company. Hence the wide powers given to the court by sub-s. (6). Section 223, on the other hand, is confined to cases where the dissolution succeeds the complete winding-up of the company's affairs and cannot take effect at all except at the instance or with the knowledge of the liquidator, the company's only executive officer. The legislature has not seen fit to make provision for validating any intermediate acts done on behalf of such a company so dissolved".

B LORD BLANESBURGH then stated his conclusion (*ibid.*, 269):

C "In my judgment, accordingly, the arbitration proceedings which abated on the dissolution of the old company thereby became abortive and have in no sense been reconstituted as a result of ASTBURY, J.'s order".

D It is clear from the passages which I have read that the question to which I must direct my mind is whether or not the proceedings started by the originating summons abated on the dissolution of the company in July, 1952. For this purpose I think it is necessary to consider what is the real nature of misfeasance proceedings. In *Cavendish Bentinck v. Fenn* (2) LORD MACNAGHTEN said (12 App. Cas. 669):

E "Section 165 of the Act of 1862 [the misfeasance section, now s. 333 of the Act of 1948] has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company. Apparently it has not been judicially determined that the applicant is bound to show that he is interested in the result of the application, but I think it must be so. I cannot think that Parliament intended that a person who happens to come under the description of a creditor or a contributory may take upon himself the functions of a public prosecutor in a matter with which he has really no concern. It was therefore, in my opinion, necessary for the appellant to prove that Mr. Fenn has committed a breach of trust, or a misfeasance in the nature of a breach of trust, as a director of the Cape Breton Company, and that by reason of that misfeasance the company has sustained loss; and it was also necessary for him to show that he has an interest in the result of the application".

H The object of any misfeasance proceedings, by whomsoever they are brought, is to swell the assets of the company by the recovery of damages. The successful fruits of misfeasance proceedings must be paid to the company or its liquidator in a liquidation for the purpose of distribution among those who are interested in the assets. But, if the company for the benefit of whom, or for whose creditors and contributories, misfeasance proceedings are started becomes dissolved under s. 300 (4) of the Companies Act, 1948, it follows, in my view, that those proceedings are necessarily at an end, because so long as the company remained dissolved it would be impossible to carry the proceedings to judgment, for no effective order, having regard to the nature of the proceedings, could be made. It, therefore, appears to me that the true conclusion is that, on the dissolution

of the company in July, 1952, the proceedings started by the originating summons abated. Taking that view, it appears to me that this case is directly covered by the reasoning and the conclusion of LORD BLANESBURGH in *Morris v. Harris* (1).

I was referred to *Re Dixon, Ltd.* (3), where VAISEY, J., had to consider the effect of an order declaring the dissolution of a company to have been void in regard to a property which, on the dissolution, was supposed to have been vested in the Crown as bona vacantia, but, in my view, that case does not touch the present case. VAISEY, J., held in regard to that subject-matter that the dissolution was avoided ab initio, and I respectfully agree. That decision was necessary in that case to produce an effective order, having regard to the fact that on the dissolution the property was taken to have vested in the Crown, and, as I read the judgment, that is really the basis of it. VAISEY, J., said ([1947] 1 All E.R. 281):

"Anyone can declare a dissolution to be void as a mere matter of utterance, but when the court is given power to declare that something has happened, I apprehend that the legislature must inevitably intend to give the court power to make a declaration which is effective".

It seems to me that that decision can have no relation to a case, such as the present, concerning proceedings which, on the view which I take of the matter, abated on the dissolution. Those proceedings, having abated, cannot, in face of the clear reasoning of LORD BLANESBURGH in *Morris v. Harris* (1), be treated as having been revived by the order declaring the dissolution void. Therefore, for those reasons, I hold that the motion fails and must be dismissed.

Order accordingly.

Solicitors: *Langhams & Letts*, agents for *Philip Baker & Co.*, Birmingham (for the applicant); *Whitlock & Storr* (for the second respondent).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re UNION OF THE BENEFICES OF WHIPPINGHAM AND EAST COWES. DERHAM AND ANOTHER v. CHURCH COMMISSIONERS OF ENGLAND.

[PRIVY COUNCIL (Lord Porter, Lord Tucker and Sir John Beaumont), February 15, 16, 17, 18, March 30, 1954.]

Ecclesiastical Law—Union of benefices—Scheme—"Consultation" between pastoral committee and parochial church council—Need of vote of council—Need of opportunity for members to ask questions and express views—Consideration of interest of diocese as a whole—Pastoral Reorganisation Measure, 1949 (No. 3), s. 3 (1), s. 3 (2) (a).

To constitute, where a union of benefices is proposed, "consultation" between the pastoral committee and the incumbents and parochial church councils concerned within the meaning of the Pastoral Reorganisation Measure, 1949, s. 3 (1), it is not necessary that a vote of the council should be taken, nor is it essential, though it is desirable, that whoever represents the pastoral committee in consulting the council should state in terms that he has been requested to see and consult the council, to ascertain their views, and to report them to the committee, but a full and sufficient opportunity must be given to the members of the council to ask questions and to submit their opinions.

Observations of BURKITT, L.J., in *Hollo v. Minister of Town & Country Planning* ([1948] 1 All E.R. 17), applied.

In considering whether a proposed scheme complies with the requirements of s. 3 (2) (a) of the Measure relating to the making of the best possible provision for the ministry of the Word and Sacrament in the diocese it must

be appreciated that stress is laid in the Measure on the interest of the diocese as a whole or in part, and so the advantages of the individual parishes must be considered in connection with that wider outlook, as also must the need of the provision of reasonable remuneration for persons engaged in the cure of souls.

FOR THE PASTORAL REORGANISATION MEASURE, 1949, s. 3 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 469.

A Cases referred to:

(1) *Rollo v. Minister of Town & Country Planning*, [1947] 2 All E.R. 488; [1948] L.J.R. 23; 111 J.P. 534; *affd.* C.A., [1948] 1 All E.R. 13; [1948] L.J.R. 817; 112 J.P. 104; 2nd Digest Supp.

(2) *Re Great Massingham & Little Massingham, Benefices of*, [1931] A.C. 328; 100 L.J.P.C. 93; 144 L.T. 654; Digest Supp.

B (3) *Re Westoe & South Shields, St. Hilda, Union of Benefices*, [1939] 1 All E.R. 282; [1939] A.C. 269; 108 L.J.P.C. 35; Digest Supp.

APPEAL by Erl King Hammond Derham, secretary of Whippingham parochial church council, and Reginald Albert Stark, a member of the council and a churchwarden, against a scheme for the union of the benefices of Whippingham and East Cowes in the Isle of Wight.

Sir Frank Soskice, Q.C., and *J. G. Le Quesne* for the appellants.

MacKenna, Q.C., and *F. G. King* for the respondents.

Mar. 30. LORD PORTER: Their Lordships have in this instance to determine what advice they shall tender to Her Majesty in the matter of a proposed scheme for the union of the benefices of Whippingham and East Cowes in the Isle of Wight—a scheme which has been objected to by the parochial church council of the former parish. The actual appellants are Mr. Erl King Hammond Derham, who is secretary of the council, and Mr. Reginald Albert Stark, who is a member and also a churchwarden. The appellants now have the support of all the other members of this council, though at one time one at least was opposed to the prosecution of the appeal on the ground of expense.

Before coming to the grounds of opposition it is, in their Lordships' opinion, necessary to set out the procedure by which a scheme is prepared, certified and brought into operation. The relevant provisions, so far as is material to the first objection put forward on behalf of the appellants, are to be found in s. 3 (1) of the Pastoral Reorganisation Measure, 1949, which reads:

"It shall be the duty of the [pastoral committee appointed under s. 1 (1)] from time to time as may be directed by the bishop to make a general survey of the diocese either as a whole or in sections, and after consultation so far as is practicable with the incumbents and parochial church councils concerned to make recommendations for the better provision for the cure of souls within the diocese or any part thereof. In particular the committee may in relation to any two or more benefices or parishes recommend—
(a) the exercise of any one or more of the powers contained in the Union of Benefices Measures, 1923 to 1936, including power—(i) to unite two or more benefices . . ."

On the wording of the earlier part of the sub-section it is contended on behalf of the appellants that it is imperative before making a scheme that the pastoral committee should consult with the parochial church council, that such consultation involves at least the knowledge of the council that it is being consulted and asked for its views, that in the present instance no such consultation took place, and that without such consultation the scheme is null and void. The incidents to be considered took place some three years ago, and not unnaturally there is a considerable divergence of recollection as to what actually took place.

The question of a union came under consideration some years ago when the

bishop of the diocese visited Whippingham in July, 1950, and, though it is apparent that a certain amount of discussion had already taken place in the parish, their Lordships do not think it necessary to trace the history of the case before that date. Some of the objectors take the view that the bishop on that occasion stated that an amalgamation with East Cowes would only be a temporary measure, but on a careful reading of the minute of that meeting it is clear that the word "temporary" was used with reference to the appointment of the vicar of East Cowes as sequestrator and priest in charge of Whippingham until amalgamation or union took place. Obviously, such an appointment must be a temporary measure, whereas it is plainly impossible that a union of benefices should take that form, and, if any members of the parochial church council thought that the bishop's observations went beyond the intervening period, nothing was said from which such a conclusion could be drawn, and, indeed, the minute itself shows that the bishop continued his remarks by saying that the measure would be temporary until either an amalgamation or union took place, or the appointment of another rector, of which he was doubtful. During the next year the pastoral committee was engaged in preparing a provisional scheme, and on Sept. 4, 1951, after it was completed the archdeacon of Portsmouth, who is, *virtute officii*, a member of the pastoral committee, visited the island accompanied by Mr. Ward who was chairman of the Isle of Wight sub-committee of the pastoral committee of Portsmouth. There they met the Rev. E. F. King who was vicar of East Cowes and priest in charge of Whippingham. At that interview Mr. Ward went through and explained the scheme to Mr. King and the latter agreed to put it before the councils of East Cowes and Whippingham at their next meetings. The archdeacon, though he took the view that, if the provisions of the scheme were fully appreciated and understood and approved by the two councils, it would be unnecessary for him to visit them, yet thought it essential that he should come unless it was clear that they were fully satisfied and he so informed the vicar.

In fulfilment of his promise Mr. King, at a meeting of Whippingham parochial church council held on Sept. 24, 1951, read out the provisional scheme and explained that the proposal involved a union of benefices, not of parishes. The minutes of this meeting have been exhibited and end with the words:

"A discussion took place about the subject and the future status of the rectory, and it was decided to ask the archdeacon to come over in the near future and make the subject plain to us."

It should be explained that the council had expended a considerable sum on the repair and re-arrangement of the rectory, were proposing to spend more, and were anxious that at least the two main rooms should be left to be used for parish purposes, and that at this meeting a discussion had already taken place on this subject before the union of benefices came up for consideration. As a result of this intimation Mr. King wrote to the archdeacon asking him to come to a meeting of the parochial church council and explain the scheme.

In compliance with this request the archdeacon went to Whippingham and attended a meeting of the council on Oct. 10, 1951. The minutes of this meeting have also been produced. It is stated to have been informal, as, indeed, it may well have been, since no written notice of it appears to have been given. But all its members knew of it and all attended except Mr. Fass, whose affidavit has been in evidence and who makes no complaint of ignorance that it was to be held. As the meeting was informal, the minute was informal also, and, accordingly, Mr. King, as chairman, thought it should not be signed by him. It was, therefore, signed by Mr. Derham, but for some reason which was unexplained, the signature is dated Oct. 10, 1951, the day on which the meeting took place and not at the next meeting at which Mr. King declined to sign. The material portion runs as follows:

"The archdeacon explained the whole proposition as regards the living

and rectory house. Questions were asked and answered by the archdeacon who assured the council that Whippingham would still have its own churchwardens, council and management of its own affairs under the new scheme and that the title would be the United Benefice of Whippingham and East Cowes and the minister would be rector of Whippingham and vicar of East Cowes and would reside in the vicarage of East Cowes."

A To this minute there is attached an addendum signed on Oct. 19, by Mr. Derham, headed: "Recorded as record only", and containing the following words:

"The archdeacon informed the council that any objection of any nature could only be discussed after the official notice of union or amalgamation had been posted on the church door."

B Mr. Derham whose affidavit has been filed states that he is sure this record is accurate, but does not explain why it was inserted after the minutes, why it is so dated, or when he signed it, or state whether or not it was shown to any of the members of the council. So far as certain other portions of Mr. Derham's affidavit are concerned, it appears that he either misunderstood the proposal, or, not unnaturally, has forgotten the exact details. The archdeacon could not, as Mr. Derham states, have said that any objection of any nature could be discussed only after the official notice had been posted, though, no doubt, as C Mrs. Jolley says and Miss Harvey indicates, both of whom are members of the council, he told them, and told them accurately, that formal objections must be made after the scheme had been published. Similarly, Mr. Derham must be mistaken in supposing that the archdeacon said the scheme was temporary or spoke of a five years' period. The scheme was, of course, provisional until D promulgated by the respondents, the church commissioners, but never was or could be temporary, nor could any question of five years arise. From both his and the affidavits of the other members of the council, it is obvious that there was an underlying opposition to the scheme, but it is notable that no one says that the scheme was opposed—all that they say is that no one spoke in its favour. It is clear at least that the archdeacon was fully and closely questioned, perhaps E particularly as to the effect of the scheme on the use of the rectory. Mr. King stated that, though he does not remember exactly in detail what took place at the meeting of Sept. 24, yet he is positive that he read the scheme from beginning to end and explained to the members that their views were required. The archdeacon, on his part, while being doubtful of the sequence in which the matters were discussed, has no doubt of his having gone through the scheme, F talked about it, and said that he was ready to answer questions and discuss and hear the views of the members of this council. On this evidence their Lordships are of opinion that the members had ample opportunity to state their views and should have known that their opinions were required. There was, undoubtedly, a full spate of questions and the opponents appear to have freely made inquiries about the scheme as a whole and the particular matters about which they were G concerned. Moreover, Mr. King and the archdeacon were fully persuaded that the council knew that their views were being asked in order that they might be reported to the pastoral committee.

H It was put, however, to their Lordships that in order to constitute a consultation (i) the members of a council must know that they were being consulted, and, even if their failure to recognise what was taking place was entirely due to their own mistake, no consultation such as is prescribed by the Measure could be held to have taken place unless they understood that their views were required; (ii) the consultation must be with the council, and, consequently, the views of individual members, even if freely and fully expressed, were not sufficient compliance with the enactment; a vote of the council itself was required. Their Lordships cannot accept this argument. In case, however, a parochial church council should not fully appreciate that the views of its members were required, they think it would, as a rule, be desirable that whoever represents

the pastoral committee in consulting the council should state in terms that he has been requested to see and consult the council, to ascertain their views, and to report them to the committee. In their Lordships' opinion, however, although advisable, so elaborate and meticulous a proceeding is not essential. A full and sufficient opportunity must be given to the members of the council to ask questions and to submit their opinions in any reasonable way, but that is all that is required. In reaching their conclusion their Lordships would point out that, whereas under the Union of Benefices Measure, 1923, s. 2 (1), a public inquiry was enjoined, a much less formal procedure was prescribed in the Measure of 1949. The natural inference is that thereafter the strict and elaborate provisions contained in the earlier Measure were intended to be succeeded by a more elastic and flexible procedure in the future. They do not find themselves able to lay down the rule that some exact wording should be used or specific statements made. It is enough, as they think, that the substance of the requirement should be complied with. In the present case they are not satisfied that a failure to consult the parochial church council has been made out. The result is that a valid scheme has been put forward and approved by the respondents. They would add that it is not necessary that a vote should be taken. It would have been easy to require a resolution of the council if that was intended, whereas the more informal word "consultation" is used.

There is no direct decision under the Union of Benefices Measures, 1923 to 1936, but attention was called to the decision of MORRIS, J., and of the Court of Appeal in *Rollo v. Minister of Town & Country Planning* (1). The observations in that case relied on by the present appellants are best exemplified by a quotation ([1948] 1 All E.R. 17) from the judgment of BUCKNILL, L.J., which runs as follows:

"... consultation [in the New Towns Act, 1946, s. 1 (1)] ... means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice".

The scheme, its objects, and the provisions for bringing it into force differ in the case of the Measure now under consideration from those of the New Towns Act, 1946, but, even if the words of BUCKNILL, L.J., be given their full significance, their Lordships are of opinion that his injunction was carried out in the present instance.

There remains, however, the further question whether or not the scheme itself is one which in the words of the Measure of 1949, s. 3 (2) (a), makes

"... the best possible provision for the ministry of the Word and Sacraments in the diocese as a whole, including the provision of appropriate spheres of work and conditions of service for all persons engaged in the cure of souls and the provision of reasonable remuneration for such persons."

In the course of the hearing before their Lordships' Board certain cases by which it was urged that their decision should be guided were brought to their notice. *Re Benefices of Great Massingham & Little Massingham* (2) was decided under s. 2 (6) of the Measure of 1923 and *Re Westoe & South Shickels, St. Hubbs, Union of Benefices* (3) under that Measure (as repealed and re-enacted by the Union of Benefices (Amendment) Measure, 1936, s. 2.) In the latter it was held that the amendment in s. 2 (1) of the Measure of 1936 did not affect the construction of the earlier sub-section [s. 2 (6) of the Measure of 1923] and though their Lordships have, in fact, carefully taken into consideration the circumstances and interest of the parishes affected they would point out that in the Measure of 1949 particular stress is laid on the interest of the diocese as a whole or in part, whereas in the later Measure, the advantages of the individual parishes must be considered in connection with that wider outlook.

In their petition the opponents of the scheme point out that the two parishes differ in type, Whippingham being in the main agricultural whereas East Cowes is industrial; that the latter parish was originally carved out of the former, which is an ancient parish and, having had and having still a royal pew and chapel reserved for the Princess Beatrice, attracts a large number of visitors; and that it has a vigorous church life and that they fear a starvation of the spiritual life of the parish if the two benefices are united. In their submission the result would be that the attention of the incumbent and a curate would be centred too much in East Cowes, and that for that parish alone there is need of a parish priest free from other duties. Moreover, they maintain that Whippingham is increasing in population and itself requires an independent incumbent. Their Lordships appreciate and have considerable sympathy with the feelings of the opponents of the scheme. Nevertheless, they feel constrained humbly to advise Her Majesty to affirm it. To some extent, no doubt, the type of parishioner in the one parish varies from the type of parishioner in the other and Whippingham is becoming more populous, but the two parishes are still to retain their identity and the increase in the numbers of Whippingham is taking place on the border of East Cowes and constitutes, if anything, an addition to the urban rather than to the agricultural population. If the suggestions were that the two parishes should be united, their Lordships would have grave doubts as to the propriety of the step, but each keeps its identity and institutions, and the real question is whether the union of benefices and consequent provision of an incumbent and a curate form an adequate provision for the supervision of the church life of the parish of Whippingham and for the conduct of its services.

No doubt, if there were ample resources and an abundant supply of clergy, the two benefices might with advantage remain separate. Their Lordships, however, like the pastoral committee, are obliged to take into consideration, not only the individual parishes, but also the diocese as a whole and the provision of reasonable remuneration. No suggestion is made by the appellants for the provision of any further endowment for East Cowes, apart from the scheme, and though two clergy may still be required, one will be a curate, and together they can work the two parishes more efficiently than if each is left to the exertions of its own parish priest. It was at one time, apparently, feared that under the scheme Whippingham would lose its parsonage house, but this is not so, and it has now been assured that the respondents will offer the rectory to the diocesan board of finance at a nominal figure so that the rectory may be used at the board's discretion for parochial purposes. For these reasons their Lordships do not think that the appellants have shown sufficient grounds to lead them to reject the scheme, and, accordingly, they will humbly advise Her Majesty to affirm it.

Appeal dismissed.

Solicitors: Warren & Warren agents for Buckell & Drew, Newport, Isle of Wight (for the appellants); Milles, Day & Co. (for the respondents).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

TOOL METAL MANUFACTURING CO., LTD. v. TUNGSTEN ELECTRIC CO., LTD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), February 18, 19, 22, 23, 24, 25, 26, March 29, 1954.]

Contract—Variation—Temporary suspension of payments—Notice requiring resumption of payments—Form of notice—Counterclaim in previous action denying suspension.

The plaintiffs, who were the registered proprietors of certain British letters patent, by a licence and deed both dated Apr. 2, 1938, granted to the defendants a non-exclusive licence under those patents to import, make, use and sell "contract material" (i.e., hard metal alloys, made in accordance with the inventions which were the subjects of the patents) in consideration of the payment of certain royalties. Clause 5 of the deed provided that if, during any one month, the aggregate quantity of contract material sold or used by the defendants exceeded a named quota, the defendants should pay compensation to the plaintiffs. On the outbreak of war in 1939 it was agreed between the parties that, to stimulate production by the defendants in the national interest, the plaintiffs would not demand compensation under the deed of 1938, and no compensation was paid after Dec. 31, 1939. In an action commenced in July, 1945, in which the defendants claimed damages against the plaintiffs for fraudulent misrepresentation and breach of contract, the plaintiffs delivered a counterclaim in which they alleged that since Mar. 31, 1942, the defendants had sold and used contract material, but (in breach of their obligations under the deed of Apr. 2, 1938) had not since that date paid the sums due as compensation. In the present action the plaintiffs claimed £84,000 which they alleged to be due to them as compensation in respect of the period Jan. 1, 1947, to Jan. 26, 1950, and they contended that the counterclaim in the first action was a sufficient notice of their intention to determine the suspensory arrangement and to enforce payment of compensation.

Held: there was no relevant difference for present purposes between a licence and a suspensory arrangement such as was brought into being in the present case in 1939; whether any and what restrictions existed on the power of a licensor to determine a revocable licence must depend on the circumstances of each case; in the present case justice required that the resumption by the plaintiffs of legal rights which had been suspended for a period must be preceded by an express and unambiguous notification to the defendants of their intention to terminate the arrangement, specifying a date at which that intention would take effect; the counterclaim did not satisfy those conditions; and, therefore, the plaintiffs' claim failed.

Canadian Pacific Ry. Co. v. Regem ([1931] A.C. 414), and *Minister of Health v. Bellotti* ([1944] 1 All E.R. 238), applied.

AS TO REVOCATION OF LICENCE, see HALSBURY, Halsbury Edn., Vol. 20, p. 10, para. 6; and FOR CASES, see DIGEST, Replacement Vol. 30, pp. 539-542, Nos. 1725-1763.

Cases referred to:

- (1) *Hughes v. Metropolitan Ry. Co.*, (1877), 2 App. Cas. 439; 40 L.J.Q.B. 583; 36 L.T. 932; 31 Digest, Replacement, 556, 6757.
- (2) *Birmingham & District Land Co. v. Ladbroke & North Western Ry. Co.*, (1888), 40 Ch.D. 268; 60 L.T. 527; 31 Digest, Replacement, 505, 6830.
- (3) *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 31 Digest, Replacement, 347, 6227.
- (4) *Canadian Pacific Ry. Co. v. Regem*, [1931] A.C. 414; 100 L.J.P.C. 129; 145 L.T. 129; Digest Supp.

(5) *Cornish v. Stubbs*, (1870), L.R. 5 C.P. 334; 39 L.J.C.P. 202; 22 L.T. 21; 31 Digest, Replacement, 481, 6067.

(6) *Mellor v. Watkins*, (1874), L.R. 9 Q.B. 400; 31 Digest, Replacement, 586, 7061.

(7) *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238; [1944] K.B. 298; 113 L.J.K.B. 436; 170 L.T. 146; 30 Digest, Replacement, 540, 1747.

APPEAL by the defendants from an order of PEARSON, J., dated Nov. 16, 1953.

A PEARSON, J., gave judgment in the plaintiffs' favour on a claim by them for £84,000 which they alleged to be due to them under the provisions of a deed dated Apr. 2, 1938.

Beyfus, Q.C., Kenneth Johnston, Q.C., and Warshaw for the defendants.

Beney, Q.C., and T. G. Roche for the plaintiffs.

Cur. adv. vult.

B Mar. 29. ROMER, L.J., read the following judgment. I propose, for the sake of convenience, to refer in this judgment to the plaintiffs as T.M.M.C. and to the defendants as TECO. The action is brought by T.M.M.C. to recover from TECO a sum of over £84,000, which they allege to be due to them in respect of the period Jan. 1, 1947, to Jan. 26, 1950, under the provisions of a deed dated Apr. 2, 1938, and for an account and payment of further sums alleged to be payable under the same deed in respect of the period from Jan. 26 to July 27, 1950.

C This is the second action between these parties. In the first action, in which the writ was issued on July 17, 1945, TECO and another company called Tungsten Industrial Products, Ltd., sued T.M.M.C. for damages for fraud and damages for breach of contract. Those proceedings, which came first before DEVLIN, J., and subsequently before this court, have a bearing on the present litigation, although the question which is now in issue between T.M.M.C. and TECO was not in issue then. The facts which gave rise to the action in 1945 were carefully and elaborately marshalled in the judgment of DEVLIN, J., and the events which have subsequently occurred are stated with sufficiency and accuracy in the judgment of PEARSON, J., from whose order this appeal has been brought. In these circumstances, no useful purpose would be served by rehearsing again in any detail the origin or history of the business and contractual relations which existed between T.M.M.C. and TECO for many years. I will confine myself, therefore, to stating in the briefest possible outline the matters which are relevant to the particular point on which I am of the opinion that this appeal should be decided in the appellants' favour.

E In 1931 T.M.M.C. was incorporated in this country by Krupps of Essen, the well-known German firm, for the purpose of developing, as their subsidiary, certain patents which Krupps had acquired from the Osram Company in relation to tungsten carbide. Under these patents T.M.M.C. manufactured articles which were, in the main, machine tool tips and they marketed them under the name of Wilmet. In or about 1934 T.M.M.C. brought proceedings against the British Thomson-Houston Company (whom I will call B.T.H.) for the infringement of their patents, but these proceedings were settled after two years' negotiation on the terms of an agreement into which the parties entered and the effect of which is stated in the judgment of DEVLIN, J. For present purposes it is only necessary to say that B.T.H. acknowledged the validity of T.M.M.C.'s patents (which they had previously challenged) and were granted an exclusive licence to manufacture under such patents in territory which included the United Kingdom. One result of this was that T.M.M.C. could only grant subsequent licences under the patents in this country with the consent of B.T.H. T.M.M.C. were, however, themselves entitled to continue to manufacture under the patents and it was in contemplation between the parties, in entering into the agreement, that they should co-operate in the exploitation of the patents in England. Some little time later the activities of TECO, who were carrying on business in this country, came to the notice of T.M.M.C., who took the view that

TECO were infringing their patents. A gentleman named Dr. Louis was at that time the head of Krupp's patent department and was a director of T.M.M.C. and controlled that company's policy in relation to patents. Dr. Louis was not minded to enforce a patentee's full rights against an infringer, but was content to permit TECO to continue in business provided that terms could be arranged on a basis that would be mutually acceptable. After some negotiation a meeting accordingly took place on Apr. 7, 1937, between Dr. Louis and others on behalf of T.M.M.C. and representatives of TECO, who included a Mr. McLeod, a shareholder and director of that company. The result of the meeting was that Dr. Louis offered TECO a licence more or less on the lines of the agreement between T.M.M.C. and B.T.H., and the broad effect of Dr. Louis' proposal was that TECO should be authorised to continue to manufacture under the patents, but with a quota of fifty kilograms a month and that TECO should pay a ten per cent. royalty and a penalty or compensation of thirty per cent. on production in excess of the quota in respect of material not supplied by T.M.M.C. B.T.H. gave their consent to the proposal and a further meeting was held on Apr. 21, 1937, between Dr. Louis, Mr. McLeod and others, and it was at this meeting principally that Dr. Louis was alleged to have made the misrepresentations which formed the subject of the first action. Following on this further meeting, a considerable amount of discussion took place between the respective parties and between Mr. McLeod and other members of the board of TECO. Ultimately, on June 1, 1937, heads of agreement to be made between T.M.M.C. and TECO were signed by a Mr. Muller for T.M.M.C. and by Mr. McLeod on behalf of TECO. I do not propose to consider these heads of agreement, which are set out in detail in the judgment of PEARSON, J., and which incorporated the principal features of the offer which Dr. Louis had made, because they were in substance reintroduced into the more formal documents which were executed by the parties on Apr. 2, 1938. From June, 1937, to the end of March, 1938, TECO continued in active production under the heads of agreement and made monthly returns of their output to T.M.M.C. Such output was in every month considerably in excess of fifty kilograms and, indeed, for the last month (March) of this period amounted to 168 kilograms. The formal documents of Apr. 2, 1938, consisted of a licence and of a deed which was expressed to be executed contemporaneously therewith. Each of the instruments was made between T.M.M.C., of the first part, TECO, of the second part, and Tungsten Industrial Products, Ltd. (who were TECO's distributing associate), of the third part.

So far as relevant the provisions of the licence were as follows. It recited that the grantors, T.M.M.C., were the registered proprietors of British letters patent, short particulars whereof were set forth in the schedule, and had agreed to grant to TECO and TECO had agreed to take a licence under such patents for the consideration and on the terms and conditions thereafter mentioned, and it recited that Tungsten Industrial Products, Ltd., were the distributors of the products of TECO and that in the construction of the licence certain definitions were to apply. The first one was:

"The United Kingdom of Great Britain, Northern Ireland and the Isle of Man shall be called 'territory A'".

The second one was that "territory B" should comprise the Dominions and certain other territories. The third definition was that *land used allways made in accordance with the inventions, the subjects of the said patents, or any of them, whether made before or after expiry of such patent or patents, should be called "contract material"*. The licence continues:

"Now this deed witnesseth as follows. (1) In pursuance of the said agreement and in consideration of the execution by TECO of a deed bearing even date herewith and made between the parties hereto and of the royalties received by, and the covenants on the part of TECO contained in the said deed the grantors hereby grant unto TECO a non-exclusive licence under

the said patents to import, make, use and (subject as hereinafter provided) sell contract material in territory A and also to sell contract material in or for export to territory B upon and subject to the conditions herein and in the said deed contained. (2) This licence shall commence as from June 1, 1937, and shall continue until Sept. 18, 1947, and thereafter until terminated by either the grantors or TECO giving to the other six months' notice in writing terminating this licence, provided that the grantors shall be at liberty to terminate the same by giving to TECO six months' notice in writing at any time during the continuance of this licence or by giving immediate notice in writing in the event of liquidation or insolvency of TECO or unremedied breach by TECO of the terms hereof or of the said deed. (3) The licence hereby granted to sell contract material shall only extend to cover: (i) The sale by TECO directly or through Industrial [Tungsten Industrial Products Ltd.] of contract material for use otherwise than for drawing dies to the following companies so long as each shall remain bound by the terms of the memorandum appended to the said deed . . ."

Then it sets out a number of named companies, and continues:

"And TECO and Industrial shall not sell or otherwise dispose of any contract material except to the person or companies aforesaid (hereinafter called 'TECO customers') and for the purposes above mentioned (save that TECO may sell to Industrial for re-sale to TECO customers)".

Then it was provided that TECO should impose on each of its customers certain obligations as therein set forth. Then in the schedule to the licence there are specified fifteen letters patent with their numbers and their respective dates of sealing and their respective titles. Finally in the schedule there is set out one patent application with its date and title.

By the accompanying deed of the same date, after reciting that

"TECO have heretofore made and sold hard metal alloys of a composition and by a process which (as the grantors allege and TECO and Industrial for the purpose only of these presents and of the licence hereinafter referred to admit) fall within the scope of"

the letters patent therein mentioned, it was provided, so far as is material, as follows:

"(2) The grantors hereby waive all claims against TECO and Industrial and TECO customers in respect of the sale or use of contract material manufactured by TECO prior to June 1, 1937. (3) TECO shall pay to the grantors in the manner hereinafter set forth a royalty of ten per cent. on the net value of all contract material sold or used by TECO and/or Industrial (other than contract material supplied to TECO by the grantors or any licensees under the said patents) during the continuance of the said licence and made in accordance with one or more of the said patents (other than or in addition to [a certain letters patent]) which shall be in force at the date of sale or use thereof by TECO and/or Industrial such royalty being payable in the case of contract material sold by TECO to Industrial only upon its use or sale by Industrial. (4) (a) The grantors shall from time to time after consultation with TECO fix minimum prices and terms and conditions for the sale of contract material to the various classes of customers in territory A and territory B. During the continuance of the said licence TECO and Industrial shall comply and shall impose an obligation upon and shall cause TECO customers and [a certain customer therein named] to comply with the prices and the terms and conditions of sale fixed as aforesaid. (b) During the continuance of the said licence the grantors shall observe and shall cause their other licensees to observe the same minimum prices and terms and conditions for sale of contract material as are fixed pursuant to para (a) of this clause. (c) Should TECO and/or Industrial at any time

during the continuance of the said licence place upon the market any other hard metal alloy or alloys not being contract material TECO and/or Industrial shall inform the grantors forthwith what other hard alloy or alloys are or are being so placed upon the market and the provisions of para. (a) of this clause shall apply to such alloy or alloys as if the same were included in the definition of contract material".

Clause 5 is an important clause.

"If in any month during the continuance of the said licence the aggregate quantity of contract material sold or used by TECO and Industrial (other than contract material supplied to TECO by the grantors or any licensees under the said patents) shall exceed a quota of fifty kilograms TECO shall, whether all or any of such materials shall be subject to royalty hereunder or not, pay to the grantors compensation equal to thirty per cent. of the sum which represents the excess net value, that is to say, the average net value per kilogram of all contract material sold or used by TECO and Industrial in the said month, multiplied by the weight in kilograms of all such contract material as aforesaid sold or used by TECO and Industrial during such month in excess of fifty kilograms, provided that contract material sold by TECO to Industrial shall only be taken into account for the purposes of this clause on the occasion of its sale or use by Industrial".

Clause 6 defines the meaning of net value of contract material. Clause 7 provides:

"Within the twenty days next following the first day of each month TECO shall send to the grantors a written report setting forth for each brand or kind of contract material (distinguishing contract material supplied to TECO by the grantors or licensees under the said patents from other contract material) sold or used by TECO and Industrial respectively during the preceding month the following information . . ."

Then there is set out what the information is to be. Clause 8 provides:

"Within forty days next following the first day of each month TECO shall pay to the grantors all sums due in respect of the preceding month by way of royalty and compensation".

Clause 9 provides for the keeping by TECO and Industrial of books of account in England. Clause 10 reads:

"Neither TECO nor Industrial shall at any time hereafter dispute the validity of the said patents or any of them or the novelty or utility of the inventions, the subjects thereof, and shall not in any way assist any other person so to do."

Clause 12 reads:

"In the event that during the continuance of the said licence the grantors shall become entitled to grant licences under patents in territory A or territory B covering any improvement upon or modification of the inventions the subjects of the said patents or any of them the same shall be regarded as included in the expression 'the said patents' for the purposes of this deed and the said licence".

By cl. 15 there was a provision for terminating the arrangement between the parties if TECO or Industrial committed any breach of their respective obligations and allowed the same to remain unremedied for thirty days. Finally, by cl. 17 it was provided that T.M.M.C. should not grant any other licence under the said patents

"without first consulting with TECO and Industrial and TECO customers as to the advisability of so doing".

As stated by PARSONS, J., in his judgment, the effect of the compensation or

penalty provisions in cl. 5 of the deed, having regard to the respective lives of the various patents, was as follows:

" June 1, 1937, to March, 1939: Both the iron grades and the steel grades are protected by patents, and bear royalty, and also bear compensation on the excess over the quota. For the period March, 1939, to December, 1941, the iron grades are still protected by the patent No. 4 in the schedule, they do not bear royalty, but they bear compensation on the excess over quota. The steel grades are still protected by patents and still bear royalty and compensation on the excess over the quota. In the third period, December, 1941, to July, 1947, the iron grades are not protected by any patent (unless possibly there might be some later patents under cl. 12), they do not bear royalty, but they do bear compensation on the excess over the quota. The steel grades are protected by patents, or at least one patent, and bear royalty and bear compensation on the excess over the quota. Then there is the fourth short period, July to September, 1947, and both the iron grades and the steel grades are unprotected by patents (unless conceivably there might be some later patents under cl. 12) and they do not bear royalty but they do bear compensation on the excess over quota. The overall rate of compensation on the total output, including both the quota and the excess over quota, varies according to the size of the output, steeply at lower levels, gradually at higher levels. This is shown by the compensation rate curve on the graph which was produced and proved by Mr. Bateman. If the total output in any month is a hundred kilograms the overall compensation rate is fifteen per cent. If such output is 150 kilograms, the overall rate is slightly under twenty per cent. If the output is two hundred kilograms, the rate is about $22\frac{1}{2}$ per cent. If the output is three hundred kilograms, the rate is about $25\frac{1}{4}$ per cent. If the output is five hundred kilograms, the rate is twenty-seven per cent."

Shortly before the outbreak of war in 1939 arrangements were made and carried into effect for T.M.M.C. to shed its German control and to be taken over by Messrs. Kleinworts, and soon after the war began the shares in T.M.M.C. were acquired from that banking house by A. C. Wickman, Ltd. (who had been T.M.M.C.'s distributors) and by Firth Brown & Co. in equal proportions. In the meanwhile Mr. McLeod, who had originally viewed the agreements of Apr. 2, 1938, with some contentment, had discovered that the anticipation which he had formed that TECO's distributors would absorb the compensation or penalty rates which had been imposed was erroneous and that these rates were bearing very hardly, as he thought, on TECO themselves. The company's production before the war was already in the order of 150 kilograms a month (in July, 1939, it was 180 kilograms), but the seriousness of the position, in Mr. McLeod's view, was greatly enhanced by the very considerable production which resulted almost at once from the outbreak of hostilities. Even before the war Mr. McLeod had complained to Dr. Louis of the impact of the penalty rates on TECO and a draft supplemental agreement had been prepared with a view to easing the position somewhat, but nothing came of it. When Mr. McLeod discovered the ever increasing burden which accompanied the growing production which resulted from wartime requirements he renewed his complaints and, as Dr. Louis had vanished from the scene, directed them to Mr. Wickman, on behalf of A. C. Wickman, Ltd. Discussions ensued between these gentlemen and also other persons interested in the industry, all of whom had formed themselves into an association. As a result T.M.M.C., under its new control, decided that it would not continue to demand payment of the compensation under their licensees' agreements because it was clearly in the national interest that production of hard alloy material should reach the highest possible level; and in fact T.M.M.C. did not enforce this payment throughout the war. It seemed, however, desirable to Mr. Wickman and his associates that the principle of compensation should be

preserved (subject to its suspension during the war), but that the sums paid should be distributed among the licensees themselves instead of going into the coffers of T.M.M.C. Mr. McLeod, however, refused to accept this new policy, but exacted, as he said, a promise from Mr. Wickman that, so far as TECO were concerned, compensation should be "washed out" altogether. Draft agreements were eventually (sometime during 1944, I think) prepared to give effect to the new arrangement with regard to the compensation by the various licensees, but Mr. McLeod, on behalf of TECO, refused to accept the draft which was sent to them. Negotiations and discussions ensued, but ended in a deadlock, and on July 17, 1945, TECO and Tungsten Industrial Products, Ltd., issued their writ against T.M.M.C.

The gravamen of their case as pleaded was that Dr. Louis, on behalf of T.M.M.C. had more than once represented to Mr. McLeod, and, in particular, at their meeting on Apr. 21, 1937, that the terms which were subsequently embodied in the licence and deed of Apr. 2, 1938, relating to royalty, quota and compensation were on a par with or were at least as favourable to TECO as the corresponding terms of the licence which T.M.M.C. had previously granted to B.T.H. and that, having regard to that licence, they were the best terms that T.M.M.C. were in a position to offer; that TECO had entered into the licence and deed on the faith of such representations; and that the representations were false. By para. 10 of their statement of claim, TECO alleged that they had paid certain sums for compensation under the said deed and that

"thereafter the plaintiffs and defendants agreed that no sums should be payable in respect of compensation after Dec. 31, 1939, or alternatively that the defendants would accept the amount of the royalties in full satisfaction of all sums payable under the said deeds as from Dec. 31, 1939".

TECO claimed damages for fraud and also certain other relief in respect of alleged breach of contract which is immaterial. T.M.M.C., by their defence, denied the charges of fraudulent misrepresentation and with regard to para. 10 of the statement of claim they denied the agreements therein alleged. In para. 8 they said:

"Further the said agreements, if made, (which is denied) would be agreements not to be performed within a year or alternatively variations of the deeds of Apr. 2, 1938, which were agreements not to be performed within a year either from the date thereof or from the alleged variation thereof. There is no written memorandum of the alleged oral agreements and the defendants will rely upon the provisions of the Statute of Frauds. Further, if the alleged agreements were made, (which is denied) there was no consideration therefor."

By their counterclaim (which was delivered with the defence on Mar. 26, 1946) T.M.M.C., after setting forth cl. 3, cl. 5 and cl. 7 of the deed of Apr. 2, 1938, alleged in para. 17 that since Mar. 31, 1942, TECO had sold and used contract material, some of which was made in accordance with the relevant patents, but, in breach of their obligations under the deed, had not since that date rendered any accounts or paid the sums due for royalties or compensation. By the same paragraph they further pleaded:

"The defendants do not desire to enforce payment of compensation in respect of deliveries made after Dec. 31, 1939, but before the end of hostilities with Germany".

They claimed an order on TECO to deliver accounts of all contract material sold or used by either plaintiff since Mar. 31, 1942, an inquiry as to the sum due from TECO in respect of royalties during the period covered by the said accounts, and for compensation for the period since June 1, 1945, and an order on TECO to pay to T.M.M.C. the sum found to be due on the said inquiry. By para. 2 of their reply and defence to counterclaim the plaintiffs, TECO, pleaded that there was good consideration (which they specified) for the agreement which

they had alleged by para. 10 of the statement of claim. They further pleaded that the said agreement had been part performed in that subsequent to its date TECO had not paid any compensation and had received no complaint or demand from T.M.M.C. in respect of such non-payment. As to para. 17 of the counterclaim TECO admitted that they had not, since Mar. 31, 1942, rendered accounts nor paid any sum to T.M.M.C., but save as aforesaid they did not admit the allegations contained in the said paragraph. No rejoinder was delivered by T.M.M.C.

On these pleadings, then, the substantial issue as between TECO and T.M.M.C. in the action was whether T.M.M.C. were liable to pay damages for fraudulent misrepresentation. TECO had introduced into their statement of claim the alleged oral agreement for the discontinuance of compensation after Dec. 31, 1939, only as being relevant to the amount of damages which they would recover if they were successful. They were not founding any claim to alternative relief on it if they failed on the issue of fraud. Nevertheless, T.M.M.C. denied that the agreement had ever been made and this question, accordingly, became a direct issue between the parties on the counterclaim for an account and inquiry as to sums due for royalties and for compensation.

DEVLIN, J., dismissed the action, being well satisfied that TECO had failed to establish the charges of fraudulent misrepresentation by Dr. Louis which formed the basis of the plaintiffs' claim. With regard to the counterclaim the learned judge came to the conclusion that an arrangement was in fact made between Mr. Wickman and Mr. McLeod in or prior to 1942 for the discontinuance of the payment of compensation by TECO, and that such arrangement was a temporary one pending the formulation of different terms in the new agreement, that is, the agreement which was some time later accepted by T.M.M.C.'s other licensees but rejected by TECO. In his judgment, he summed up his conclusions on the matter as follows:

"The result is that I reject the view that there was any agreement that was intended to continue, which was to vary the original agreement. The agreement that was made was, in my view, one of two things. I do not think there was anything in it which could be said to limit its operation for the duration of the war, although that may have been the intention of the defendant company. But I think it fairly emerges, from the language which Mr. Wickman was heard to use, that it was intended to be a temporary modification pending the new agreement. Accordingly, I think that when the new agreement was presented to Mr. McLeod and was rejected by him the temporary relief which he had been granted came to an end. I do not mean that it came at once to an end. It is obvious that it would be a reasonable provision that he should have some reasonable notice in order to make the necessary alterations. Compensation is now claimed from June, 1945, which is some nine months after the new agreement was presented to him, and I think that gives him sufficient time. If I should be wrong about that view, then I should hold that it was a temporary arrangement which was made subject to the right of the defendant company to terminate by giving reasonable notice. I should regard the presentation of a new agreement in such circumstances as amounting to a reasonable notice. I do not think that in this type of case it is necessary that the notice should be express. The rule that protects a party in circumstances such as these is a broad rule of equity and justice. It is not thought right that a man who has indicated that he is not going to insist upon his strict rights, as a result of which the other party has altered his position, should be able to turn round at a minute's notice and insist upon his rights, however inconvenient it may be to the party who thought he was temporarily relieved. Equity requires that he should give reasonable notice that he is going to resume his strict rights. But all that is necessary to comply with that broad rule of equity

is that the notice should be such as to put an ordinary person clearly in mind that the other party is going to resume his strict rights. I think it is plain that when a man is served with a draft of a new agreement which shows that the compensation provisions are going to be set in force again he should understand from that that he must either accept the new agreement or return to the strict position under the old agreement."

In the result the learned judge gave judgment for T.M.M.C. on the counterclaim.

TECO appealed to this court, both from the order of the learned judge dismissing the action and from the order in T.M.M.C.'s favour on the counterclaim. The court consisted of SOMERVELL, COHEN and SINGLETON, L.JJ., and judgment was delivered on Apr. 4, 1950. The plaintiffs' appeal from the dismissal of their claim failed, this court agreeing with the conclusions at which DEVLIN, J., had arrived on the issue of fraudulent misrepresentation. On the counterclaim the Lords justices agreed with DEVLIN, J., in holding that the arrangement for suspension of compensation at which Mr. Wickman and Mr. McLeod had arrived, whether legally enforceable or not, brought into play, in TECO'S favour, the principle of equity which was enunciated by LORD CAIRNS in *Hughes v. Metropolitan Ry. Co.* (1) (2 App. Cas. 448) and was formulated by BOWEN, L.J., in *Birmingham & District Land Co. v. London & North Western Ry. Co.* (2) (40 Ch.D. 286) in the following terms:

"It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before".

It seemed clear to their Lordships on the evidence that (in the words of COHEN, L.J.)

"there was the plainest possible indication by the defendants that they did not intend for the time being to claim compensation, and that they conveyed that intimation in terms which amounted to an invitation to the plaintiffs to continue to conduct their business on the basis that until something was done, until notice was given, no royalty would be demanded",

and that that invitation was acted on by TECO in the various ways to which their Lordships referred, which included the basing by TECO of their production policy on the footing that only the ten per cent. royalty would be payable whilst the arrangement continued in force.

The next question, therefore, which had to be considered was the manner in which T.M.M.C. could terminate the arrangement and whether (as DEVLIN, J., had held) they had in fact terminated it by presenting the new draft agreement to TECO. The court held (differing from the learned judge on this point) that the presentation of this draft did not operate to determine the arrangement and it is necessary to state the terms in which SOMERVELL and COHEN, L.JJ., respectively expressed their views on this matter. SOMERVELL, L.J., said:

"The question then is when does the arrangement come to an end. It is not suggested that the promise covered the whole of the remainder of the contractual period and, no doubt, the defendants hoped that everybody would accept the new draft agreement which, after three and a half years' labour, finally came to light. It is said, and this is the view which the learned judge, I think, has taken, that the presentation of that draft terminated the position with regard to the thirty per cent. I find a difficulty about that. I do not see how the presentation of the draft by itself could do so. You must allow, as it seems to me, some time for negotiations. Drafts are presented, not as final documents, but as documents to be discussed, and,

therefore, I find a difficulty in accepting that conclusion. Then it is said: 'Well, when negotiations broke down'. I do not take that view. I take the view in this case, having regard to the fact, as it seems to me, that Mr. Wickman throughout had plainly indicated that the defendants were going to re-organise this business, the basis of the old agreements in one way or another as they had been entered into for the licences by Krupps had really gone, and there were very good reasons for saying so. Here we were in a war when everybody, I should think, would be encouraged to produce, anyway, as much as was wanted of these types of metal. I think, against that background, the plaintiffs were entitled to an express notice if the old terms were to be enforced again according to their literal provisions. If you read the correspondence, the plaintiffs wrote objecting to the agreement. There was ample opportunity for the defendants to say: 'Well, you know, if you do not like this agreement we shall withdraw our terms of not collecting the thirty per cent. and you will be back on the letter of the old pre-war contract'. They not having done that, I do not think they can rely on anything until we come to the counterclaim. That plainly indicates the view that they were taking. I think the plaintiffs would be entitled to a reasonable time after that. We were asked to say what that reasonable time was, but I do not think we can do that; it is not in issue in these proceedings, but the defendants have already addressed their mind to this question when they decided at what time after the new agreement had been served they thought it proper to begin claiming their compensation. I think it was about nine months. It may be on that matter they made a good guess, but it is impossible, I think, for us to decide that as a matter binding on the parties in these proceedings."

COHEN, L.J., said:

"That being the arrangement, I am unable to agree, however, with the learned judge that any reasonable notice was given bringing to an end the temporary suspension of the right to compensation until the counterclaim was delivered in this action. As my Lord has said, the new draft licence was not submitted until September, 1944, correspondence ensued, and the last material letter was that written by the plaintiff company to Mr. Bateman on Nov. 7, 1944, which starts with this paragraph: 'Have you by any chance overlooked the fact that we have been expecting a letter from you in full reply to ours of Sept. 29 last?' and ending with the paragraph: 'May I have your assurance, please, that these and the other matters referred to in our Sept. 29 letter will have attention within some definite time?' I think that the plaintiffs were clearly entitled to an answer to that letter, and in so far as the correspondence before us goes, they never got one. I think the plaintiffs were entitled not only to expect a reply, but to receive notice if the defendants were proposing to enforce a right to compensation which had been in suspense for five years or thereabouts. So far as I can see, nothing equivalent to such notice was given before, as I have said, the counterclaim was delivered, and, in my opinion, therefore, compensation did not become payable until a reasonable time after delivery of the counterclaim."

SINGLETON, L.J., agreed with the judgments of SOMERVELL and COHEN, L.JJ., and did not deliver a separate judgment of his own.

A discussion subsequently took place on the question of costs and as to the form of the order which would be appropriate to give effect to the decision of the court, and, in the course of it, COHEN, L.J., said: "I suggest the order should be that TECO are not liable to account for compensation calculated in accordance with the terms of the said deed until the expiration of a reasonable time from the delivery of the counterclaim, because that is what we have decided. I do not know whether it is desirable for that to go in. I was wondering whether

we could do what junior counsel for T.M.M.C. suggested." SINGLETON, L.J.: "It was not an issue." Counsel for TECO: "It was not an issue, my Lord . . ." The order, accordingly, contained no declaration on the lines which COHEN, L.J., had suggested and was confined (so far as the present point is concerned) to striking out from the order made by DEVLIN, J., the declaration that TECO were bound to account for compensation as from June 1, 1945.

We have been supplied with the transcript of part of a discussion which took place on an interlocutory application which was made to DEVLIN, J., subsequently. On that occasion Mr. Warshaw was appearing for TECO and T.M.M.C. were represented by Mr. Barry. The shorthand note records the following:

"Mr. Warshaw: If I might intervene for a moment, it is perfectly true that one of the lords justices expressed the opinion that the delivery of the counterclaim would be such a notice as to bring the arrangement to a conclusion, the arrangement not to claim compensation, but the matter was not argued by my learned leader, Mr. Beyfus, at all, and we expressly reserved the right in any future proceedings to maintain that the delivery of that counterclaim was not and could not be a notice bringing the arrangement to an end. DEVLIN, J.: The Court of Appeal must have varied my order in some way, must they not? Mr. Barry: I am going to draw your Lordship's attention to the order in a moment. I entirely agree that what my learned friend has said is correct. The Court of Appeal did not formally decide any matters for the future; they were not before the court. All that they held was that, in fact, up to the date of the counterclaim no notice requiring the payment of compensation had been made and on the authorities, which your Lordship will remember were cited by DENNING, J., in *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (3), on the authority of those cases that we had not brought the suspension properly to an end. In those circumstances, we were not entitled to recover compensation on our counterclaim. I am not suggesting that there is any binding decision that we are entitled to recover it afterwards. That would be, of course, a matter for argument in some future litigation."

In these circumstances it is, I think, quite clear (nor, indeed, has it been disputed) that TECO were not precluded by the order of this court, or by anything that was said in the judgments of the lords justices, from contending in future proceedings that the arrangement which was concluded between Mr. Wickman and Mr. McLeod was not determined by the delivery of the counterclaim, and TECO have so contended in the present action. By para. 4 of their defence they plead:

"In or about March, 1943, and on an occasion prior thereto, which the defendants cannot now more particularly specify, the plaintiffs agreed to forego the payment of compensation by the defendants until a reasonable time should elapse after notice given by the plaintiffs to the defendants to resume such payment. No such notice has been given to the defendants. Alternatively, if such notice has been given to the defendants, a reasonable time thereafter had not elapsed by Jan. 1, 1947, or by any date during the currency of the 1938 deeds."

These allegations are answered by T.M.M.C. in para. 5 of their reply as follows:

"T.M.M.C. do not admit there was any contract or agreement with TECO to the effect stated in para. 4 of the defence. Further, there was no consideration therefor and T.M.M.C. will if necessary rely on the Statute of Frauds. T.M.M.C. admit however that upon some occasion between March, 1940, and March, 1943, which T.M.M.C. cannot particularise, they had intimated to TECO that as a temporary measure they would not for the time being enforce payment of compensation and that the effect of such intimation

was to preclude T.M.M.C. from enforcing payment of compensation until they had intimated to TECO they desired and/or intended to enforce payment and until the lapse of a further reasonable time after such intimation or in respect of any period prior to the end of such reasonable time. Further, both parties are estopped by the judgment of the Court of Appeal in the first action from contending that the effect of the arrangements between them as to compensation were otherwise than as stated in the last sentence.

A The counterclaim in the first action was a sufficient notice or intimation of T.M.M.C.'s desire or intention to enforce payment of compensation and the time between the delivery of the counterclaim and Jan. 1, 1947, was a reasonable time. Alternatively, if such period was not sufficient, a reasonable time had elapsed by some date (which T.M.M.C. will ask the court to fix) between Jan. 1, 1947, and the issue of the writ herein."

B In dealing with this issue PEARSON, J., said that *prima facie* the judgments of this court in the first action appeared to decide that the suspensory arrangement came to an end on the expiration of a reasonable time after the delivery of the counterclaim in that action, but that it appeared to him that there was at least a real doubt whether the expressions of opinion in those judgments should be regarded as conclusive, and the arguments accordingly proceeded on

C the basis that they were not. The substance of the arguments which counsel for TECO presented to the learned judge was, first, that the suspensory arrangement had to be determined by a notice of termination; secondly, that such notice must be a proper prospective notice; and, thirdly, that, as the counterclaim satisfied neither of these requirements, it could not, and did not, operate so as to determine the arrangement. After considering these contentions and reviewing

D the authorities which had been brought to his attention, the learned judge came to the conclusion, independently of the views which the members of this court expressed on the appeal in the earlier action, that the delivery of the counterclaim in that action effectively terminated the temporary, or suspensory, arrangement. He expressed his decision on this question in the following words:

E "The result of [the authorities] in my opinion is that, where the rule of equity applies, the period of suspension comes to an end when it is in all the circumstances equitable that it should come to an end, and that is, normally at any rate, according to the circumstances, either at, or within a reasonable time after, the termination of the state of affairs which is the cause or basis of the suspension. It is not necessary that the person whose legal rights

F have been suspended should give a notice purporting to terminate the suspension, although of course it would be fair and reasonable and advisable for him to do so. In this case the state of affairs which was the cause or basis of the suspension would have been, according to the view taken in the court of first instance in the former action, the continuance of the negotiations for new licensing arrangements, but, according to the view of the Court of

G Appeal, the state of affairs was, I think, the attitude of T.M.M.C. in not requiring payment of the compensation for the time being. When that attitude was reversed, a reasonable time for resumption of compensation payments began to run. The making of the counterclaim in the first action clearly involved a reversal of the previous attitude, and therefore it started running a reasonable time for resumption of compensation payments.

H Finally, having come to that conclusion on an examination of the earlier authorities, I am entitled to pray in aid of that conclusion the expressions of opinion given by the Court of Appeal in the first action. Even if they must be regarded as *obiter dicta*, these expressions of opinion must carry great weight. On the question whether the nine months which T.M.M.C. proposed to allow was a reasonable time in this case, counsel for TECO elected to present no argument. As under the deeds T.M.M.C. were entitled

to terminate the licence by a six months' notice, I held that the nine months' period proposed to be allowed was a sufficient period."

As a preliminary to considering further the decision of the learned judge on this issue, it would be convenient to say a word or two about the views which the lords justices expressed in relation to the matter in their judgments on the previous appeal. It has not been, and could not be, contended that the question constituted an issue as between TECO, on the one hand, and T.M.M.C., on the other, in the litigation which was then before the court. The issue on the counterclaim, as plainly appears from the pleadings, was whether, as TECO alleged and T.M.M.C. denied, the obligation imposed on TECO to pay compensation had been "washed out" (as Mr. McLeod said) by agreement with Mr. Wickman. DEVLIN, J., held that it had not, but that the result of equitable intervention, on the facts as proved, was to establish a suspensory arrangement which was determinable on notice given by T.M.M.C. Such an arrangement had not in fact been pleaded by way of alternative defence to T.M.M.C.'s claim for an account. The learned judge further held that such arrangement had been determined previously to the litigation and the only question for decision by the Court of Appeal was whether this latter finding of the learned judge was right or wrong. This court held that it was wrong and gave effect to its decision by discharging the declaration which DEVLIN, J., had made. The alternative possibility that the delivery of the counterclaim in the action might have terminated the arrangement emerged, it seems, at some time during the hearing of the appeal, but was not argued by counsel on either side. Indeed, so little was this point regarded as being before the court as an issue between the parties that I gather that, at one stage of the argument, counsel for TECO intimated by way of a casual concession, as it were, that the counterclaim might have had the suggested effect, although he formally reserved the rights of his clients on the matter on the following day. It is true that the members of the court did, in their judgments, express opinions to the effect that the counterclaim terminated the arrangement and that view would certainly seem at first sight to be the logical outcome of the reasoning which led them to their decision on the issue which was before them. That those opinions were intended to be no more than provisional, however, necessarily follows from the fact that the question was not before the court and from the consequential absence of any argument on it.

In my opinion, accordingly, PEARSON, J., was perfectly right in thinking that, in so far as the judgments in the previous appeal dealt with the counterclaim as a factor relevant to the ending of the suspensory arrangement, they should be regarded as no more than obiter.

As a result of the careful and elaborate arguments which have now been presented to us on this appeal, I have, for myself, arrived at the conclusion that the arrangement for suspending payment of compensation by TECO was not terminated by the delivery of the counterclaim in the previous action. I respectfully agree with the view of SOMERVELL, L.J., as expressed in his judgment on the former appeal, that TECO

"were entitled to an express notice if the old terms were to be enforced again according to their literal provisions".

A return to the former policy of exacting compensation in accordance with the deed of 1938 would have such far reaching effects on TECO's production policy and would involve decisions of such importance by those in charge of the management of the company that a notification by T.M.M.C. of their intention to revert to the old regime must at least be communicated in unequivocal terms. But, further than this, it appears to me to be consistent both with fair dealing and with authority that such notification should specify either some future date, or at least a reasonable period, from which, or on the expiration of which, the payments were to be resumed. TECO had been for many years past manufacturing and selling their products in quantities which by far exceeded the quantity

laid down in the deed and they had been doing so on the basis of the suspensory agreement. If the benefit of this agreement were to be withdrawn, T.E.C.O. would be confronted with the necessity of considering and ultimately deciding on their future course of action. To continue their existing production in face of the re-imposition of the penalty provisions might be quite impracticable commercially. Alternatively, to such continuance, three, and, perhaps, more, ways of dealing with the problem might be open to them. First, they could decrease their production and sales. Secondly (and either alone or in conjunction with the first), they could increase the prices to their customers. But neither of these changes could be brought about without a reasonable period for discussion and planning and re-organisation. Moreover, manufacturers frequently sell ahead, which adds to the difficulties of putting into immediate effect such drastic changes of policy as alterations in production and prices. Finally, the company would have to consider whether the best solution might not be to terminate the licence, which they could only do on six months' notice to T.M.M.C.

In my opinion, although in many cases the equity, to which *Hughes v. Metropolitan Ry. Co.* (1) gave recognition and high authority, is satisfied by merely conforming to the terms in which LORD CAIRNS (and subsequently BOWEN, L.J.) formulated it, there are other cases where justice requires that the resumption of legal rights which have been suspended for a period must be preceded by a notification to the other party concerned specifying a fixed period of grace during which that party can put his house in order, and that in such cases a notification such as that will be a condition precedent to the valid re-assumption of the owner's legal rights. Such a case was *Canadian Pacific Ry. Co. v. Regem* (4). In that case the appellants had erected certain poles, carrying telegraph wires, on property which belonged to the Crown. Some of the poles had been erected between 1905 and 1910 without leave or licence; others had been erected in 1893 and 1911, in each case while agreements were in negotiation, though none was eventually concluded. In 1926 the Crown proceeded against the appellants for trespass and damages, and, in the alternative, asked for a declaration of the appellants' rights, if any. The Privy Council held, on the facts, that at the date of the proceedings all the poles were on the property with the licence of the Crown.

On this finding three points then fell to be decided: (i) whether the licence was revocable; (ii) if so, whether it had been revoked either before action or by the institution of the proceedings; and (iii) if revocable, but unrevoked, how and in what circumstances the licence was revocable. On the first question the Judicial Committee decided, for reasons which are not material for present purposes, that the licence from the Crown was revocable. The next question, then, was whether it had been in fact revoked before action brought. This depended on certain discussions and correspondence which had taken place between the parties concerned. In 1917 an agreement had been submitted to the appellants which was designed to regularise the position, but nothing effectual came of it and the matter was then allowed to lapse for six or seven years. On Mar. 20, 1924, Mr. Edwards (representing the Department of Justice of Canada) wrote to the appellants' president, Mr. Beatty, as follows:

"I have been instructed by the Department of Railways and Canals to take up with you the question of certain lines of telegraph wires and poles belonging to you which are situate on the lands of the Canadian Government Railway, and which lines extend from the City of St. John to the City of Halifax; from Truro to Sydney, and from Painsie Junction to Point du Chene. I am instructed to inform you that all offers of settlement or otherwise, heretofore made to the Canadian Pacific Railway Company or to the Canadian Pacific Telegraph Company by the government, or any one on its behalf are withdrawn and to say that the wires and poles must be removed from off the government railways' lands, and that otherwise the said poles

and wires will be removed. No time has been fixed within which you must effect this removal, but unless you agree to act at once in the matter, a date will be fixed by the Department of Railways and Canals."

After further negotiations Mr. Edwards, on Jan 29, 1926, wrote to the appellants' solicitor:

"Referring to previous correspondence with regard to the demand of the Department of Railways and Canals that the lines of telegraph wires and poles operated by your company on the lands of the Canadian Government Railways be removed therefrom, or satisfactory arrangements made with the department for the rental thereof, I understand that certain negotiations have taken place between officials of your company and of the government, but that it has not been found possible to reach an agreement, and I am instructed therefore to inform you that it is the intention of the department to at once proceed with the action outlined in my letter to Mr. Beatty of Mar. 20, 1924."

Notwithstanding the peremptory and compelling nature of these letters from Mr. Edwards, the Privy Council held that they did not operate as a revocation of the licence. LORD RUSSELL OF KILLOWEN, in delivering the judgment of the Board, said ([1931] A.C. 431) that the first letter amounted at most to an intimation that a date would in future be fixed for the removal of the telegraph line, i.e., it was an intimation that the licence would be put an end to at some future time, and all that the second letter did was to state the intention of the department at once to proceed with the action outlined in the first letter, viz., to fix a date, and no date was ever fixed. Their Lordships' conclusion, therefore, was that the licence had not been determined prior to the action and the judgment then passed to the question whether the institution of the proceedings ipso facto determined the licence. This inquiry in effect formed part of the third question above referred to, viz., how and in what circumstances was the licence revocable? On this LORD RUSSELL OF KILLOWEN said, in delivering the judgment (*ibid.*, 432):

"Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case. The general proposition would appear to be that a licensee whose licence is revocable is entitled to reasonable notice of revocation. For this proposition reference may be made to *Cornish v. Stubbs* (5) and *Mellor v. Watkins* (6), in the latter of which cases BLACKBURN, J., states (L.R. 9 Q.B. 405) that a person giving a revocable licence 'is bound to give the licensee reasonable notice'. When the exercise of the rights conferred by the licence involves nothing beyond, there can be no reason to urge against the existence of a power to determine the licence *brevi manu* at the will of the licensor. But the exercise of the rights may have involved the licensee in obligations in other directions, which the determination of the licence would disable him from fulfilling, unless the licence were determined after a notice sufficient, in point of time, for the making of substituted arrangements. In such circumstances the licensee would, their Lordships conceive, be entitled to breathing space sufficient for this purpose. The case before the Board would appear to be peculiarly a case in which grave injustice might ensue if the Crown were at liberty by the mere institution of legal proceedings to determine summarily the rights of the appellant, and turn the appellant's occupancy into trespass. For the appellant is not the only one concerned; the telegraph line is part of a system in the existence and continuance of which the public has a very considerable interest. It appears to their Lordships that this is a case in which the licence can only be effectively ended, after notice has been served upon the appellant determining the licence on such a specified date in the future, as will give the

appellant an interval of time between the service of the notice and the specified date, sufficient not only to allow the removal of the poles and wires from off the property of the Crown, but also to enable the appellant to make arrangements for the continuance of the telegraph line by the erection of poles and wires elsewhere than on Crown property. Their Lordships are accordingly of opinion that the appellant's licence was not determined by the institution of the proceedings . . . Their Lordships feel little doubt that as between the Canadian Pacific Railway Company and the Crown suitable contractual arrangements will be made which will obviate further litigation. If, however, this anticipation proves to be ill-founded, it will be for the Crown to determine the licence by service of a notice the sufficiency of which, if called in question, will have to be decided, upon proper evidence, in subsequent proceedings. It will be for the Crown, at its risk, to fix the length of notice."

Canadian Pacific Ry. Co. v. Regem (4) was considered by this court in *Minister of Health v. Bellotti* (7). The facts in that case were as follows. To house the defendants and other persons evacuated from Gibraltar in 1940 for reasons connected with the war, large blocks of flats were requisitioned and furnished by the Commissioner of Works and then handed over to the Minister of Health who granted licences to evacuees to reside in them. Difficulties as to discipline having arisen, letters dated June 8, 1943, were sent on behalf of the Minister to the defendants requiring them to leave their rooms together with their dependants, taking all their possessions with them, within one week. Attempts to expel them having failed, the Minister commenced proceedings on Sept. 11, 1943, for damages for trespass and an injunction. It was held (i) that the Minister was entitled to bring such an action by virtue of s. 7 of the Ministry of Health Act, 1919, although he held the flats for the Crown; (ii) that, in the special circumstances that the defendants had been brought away from their homes and friends and needed time to find rooms for themselves, their families and belongings, a week was not a reasonable time to allow them for leaving their rooms; and (iii) that, although the time allowed was unreasonable, the letters were valid notices revoking the licences, and as, by the time the proceedings were commenced, sufficient time had elapsed for the defendants to vacate their rooms, the Minister was entitled to injunctions restraining the defendants from trespassing in the blocks of flats. LORD GREENE, M.R., in his judgment, said ([1944] 1 All E.R. 240) that it was agreed that the defendants were in the position of licensees, though not gratuitous licensees, as, by the payment or contribution which they made under a scheme which was set up by the Minister, they were entitled to be regarded as licensees paying a consideration in money for the licence which they enjoyed. The Master of the Rolls then referred in some detail to the circumstances in which the defendants, who had been resident in Gibraltar, had been removed with their wives and families by governmental action and given accommodation in this country; and he said that it was unthinkable that in those circumstances the government should act otherwise than under a very strong sense of responsibility for the care and welfare of the individuals concerned, and that the grant of the licence to use the accommodation provided was incumbent on the Minister. Then he said (*ibid.*, 242):

"I refer to that for this reason, because it appears to me that, where a licence is granted and a question arises as to the lawful method of terminating it, the circumstances in which the licence came to be granted are matters most relevant to consider . . . Where a licence is granted under a contract, it may very well be that the contract will make express provision for those matters. Where it does, those express provisions . . . must be observed. But what is to happen in a case where the contract is silent on those matters? I cannot take the view that there is some cast-iron principle of law which lays down for every type of contract, whatever the circumstances

and whatever the purposes for which it was entered into, some rule which is always to operate. In my opinion, the true rule is that the implications of the contract on those matters are to be determined in view of all the relevant circumstances of the case. I may cite here a very short passage from the judgment of the Privy Council in *Canadian Pacific Ry. Co. v. Regem* (4). In that judgment the following paragraph appears ([1931] A.C. 432): "Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case". That is the only proposition of general application which I find it possible to extract from that authority . . . and although the case, of course, is not binding upon this court, in my opinion . . . the law is there laid down with complete accuracy."

Then the Master of the Rolls, after saying that the Minister's letters to the defendants requiring them to give up possession operated as a clear determination of the licence at the expiration of one week, said that such operation was valid, but that the time limit attached to it was too short, having regard to all the circumstances of the case, including the necessity of the defendants searching for and obtaining other accommodation. He later returned to the *Canadian Pacific Ry. Co.* case (4) and again rejected the view that that case purported to lay down any general rule that in all cases of a revocable licence the licensor can only determine it by a notice specifying a reasonable date in the future for it to become effective and that if he fails to do so or gives insufficient time to the licensee the notice would be a bad notice. It was, he said ([1944] 1 All E.R. 244), a special case and:

"It is quite clear to my mind that the judgment was directed, and directed only, to the special facts of that case, and is not of general application in laying down a rule that in every case of licence the notice to revoke must specify a time at the licensor's risk."

MACKINNON and GODDARD, L.JJ., did not express views on this point which differed from those of the Master of the Rolls.

In the *Canadian Pacific Ry. Co.* case (4) the question was as to the revocation of a licence, but, in my opinion, there is no relevant difference for present purposes between a licence and a suspensory arrangement such as was brought into being in the present case. And, in my opinion, the reasoning and principles which the Judicial Committee applied are equally applicable to the position which existed between TECO and T.M.M.C. after the arrangement between them was made. The Canadian Pacific Railway would have been subjected to the most grievous hardship by a sudden revocation of the licences which they had for so long enjoyed, and justice required that they should be informed with precision, and a reasonable time before-hand, of the date from which the enjoyment of these licences was to be forfeited. So here, for the reasons which I have earlier explained, it was imperative that TECO should be notified in advance of a reasonable period which would be available to them for decision and planning and re-organisation before the strictness of their contractual obligations was re-imposed on them. *Canadian Pacific Ry. Co. v. Regem* (4) is not binding on this court, and I have no hesitation in accepting the view expressed in *Bellotti's case* (1) that the principle on which it was decided is not applicable to all cases. On the other hand, it was, if I may respectfully say so, quite rightly decided, in my judgment, on the facts which founded the decision, and I think it clearly points the way to the decision of the present case.

On the assumption, then, that the counterclaim by T.M.M.C. could in other respects be regarded as notice of their intention to terminate the arrangement, it was not, in my opinion, effectual for the purpose, in that it neither specified a date nor indicated a period (whether reasonable or unreasonable) from and after which the obligations of TECO in the matter of compensation would commence to be enforced. For myself, I do not think that, even apart from this deficiency

in the counterclaim, it could be regarded as a notice to determine the arrangement; for, as I have previously indicated, such a notice must at least be express and unambiguous. All that the counterclaim did was to deny the agreement which TECO had alleged for a suspension of the compensation arrangement and it cannot, in my opinion, be said that the denial operated as a notice (much less an express notice) of their intention to terminate the alleged suspension. I know of no authority for the proposition that a licence is ipso facto determined by the licensor's denial that the licence was ever granted. But, further than this, it is to be observed that the agreement which TECO alleged and which T.M.M.C. denied was an irrevocable agreement and not the terminable arrangement which both DEVLIN, J., and this court subsequently held it to be; that arrangement, which resulted from the application of equitable principles, was not pleaded by TECO and could not, therefore, have been, and was not, denied by T.M.M.C. in their defence and counterclaim. It is, accordingly, difficult to see how on any view the denial of an irrevocable agreement can constitute notice of determination of a different and terminable arrangement which was not present to the mind of either party at the time.

It seems to me extremely difficult to hold, consistently with the rejection by the Privy Council in the *Canadian Pacific Ry. Co.* case (4) of the arguments founded on the institution of the proceedings and the letters which preceded them, that the delivery by T.M.M.C. of their counterclaim had ipso facto the indirect and vicarious effect of determining an arrangement to which it did not even refer. I have, accordingly, for the above reasons, reached the conclusion that the arrangement was not determined by the counterclaim, and as it was not determined in any other way previous to the bringing of these proceedings the action necessarily fails and should have been dismissed, and this appeal should be allowed. [HIS LORDSHIP then mentioned the further points relied on by counsel for TECO, viz., that cl. 5 of the deed of April, 1938, (a) constituted an unlawful restraint of trade, (b) imposed penalties from which the court could and should give relief, and (c) infringed the provisions of s. 38 (1) of the Patents and Designs Act, 1907, and said that, as the appeal, in his judgment, succeeded on the ground that the suspensory agreement was never determined, they could be dealt with shortly, and he held that they failed.]

SOMERVELL, L.J.: I agree.

BIRKETT, L.J.: I also agree.

Appeal allowed.

Solicitors: *Hancock & Willis* (for the defendants); *Bristows, Cooke & Carpmael* (for the plaintiffs).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

Re VON DEMBINSKA. *Ex parte* THE DEBTOR.

[COURT OF APPEAL (SIR RAYMOND EVERSHED, M.R., BIRKETT and ROMER, L.J.J.),
March 24, 1954.]

*Bankruptcy—Public examination—Adjournment—"From time to time"—
Examination adjourned generally with liberty to restore—Bankruptcy Act,
1914 (c. 59), s. 15 (3).*

Owing to the illness of a debtor against whom a receiving order had been made, her public examination under the Bankruptcy Act, 1914, s. 15 (1), was adjourned from July 7, 1953, to July 21, 1953. On July 21 a medical certificate having been produced on her behalf stating that she would be unfit to attend the court for "four to five weeks at least", the registrar made an order adjourning the public examination generally with liberty to apply to restore. As the debtor made no application to have the examination restored, on Nov. 4, 1953, on the application of the official receiver, an order was made adjudicating her bankrupt, pursuant to s. 18 (1) of the Act of 1914. On an application by the debtor to have the adjudication annulled, she claimed, *inter alia*, that the order of July 21, 1953, was *ultra vires* the court, in that there was no power under s. 15 (3) to adjourn generally, that the adjournment was made under the Bankruptcy Rules, 1952, r. 192, and that the provisions of the rules in respect of such an adjournment had not been complied with.

HELD: the power to adjourn a public examination "from time to time", under s. 15 (3) of the Act of 1914, was not confined to adjourning from one specific date to another specific date, but was a power to adjourn for such periods of time, or generally, as the court might think most convenient: the adjournment made by the order of July 21, 1953, was an adjournment "from time to time" within the sub-section, and was not an adjournment *sine die* within the meaning of the Bankruptcy Rules, 1952, r. 192, which was of a penal character; and, therefore, the order was validly made.

AS TO PUBLIC EXAMINATION OF DEBTOR, see HALSBURY, *Simonds Edn.*, Vol. 2, p. 331, para. 640.

FOR THE BANKRUPTCY ACT, 1914, s. 15, s. 18, and s. 109 (2), see HALSBURY'S STATUTES, *Second Edn.*, Vol. 2, pp. 340, 345, 420.

APPEAL by the debtor from a decision of Mr. Registrar BOWYER, dated Jan. 14, 1954, refusing to annul an adjudication order made by the late Mr. Registrar PARTON on Nov. 4, 1953.

On May 7, 1953, a receiving order was made against the debtor and the date for her public examination was fixed for July 7, 1953. The debtor being ill on that date, and a medical certificate having been produced to the court on her behalf, the public examination was adjourned to July 21, 1953. On July 21 a medical certificate was produced on behalf of the debtor stating that she would be unfit to attend the court for four to five weeks at least, and the registrar thereupon adjourned the examination generally with liberty to apply to restore. On Oct. 12, 1953, the official receiver wrote to the debtor asking her if she wished to have the public examination restored, but she did not reply to the letter, nor did she apply to have the examination restored. On Nov. 4, on an application by the official receiver, the debtor was adjudicated bankrupt, pursuant to the Bankruptcy Act, 1914, s. 18 (1). She applied to have the adjudication annulled on the ground, *inter alia*, that the order of July 21, 1953, which was expressed to be the result to the order of adjudication, was bad, in that the adjournment thereby made was not an adjournment "from time to time", within s. 15 (3) of the Act, but was an adjournment *sine die* within the Bankruptcy Rules, 1952, r. 192, and was not made in accordance with the rules. Mr. Registrar Bowyer held that the adjournment was not under r. 192, but under s. 15 (3) of the Act.

and, being of the opinion that there was power to adjourn generally under the sub-section, he refused to annul the adjudication.

F. H. Collier for the debtor.

Muir Hunter for the official receiver.

SIR RAYMOND EVERSLED, M.R.: On Nov. 5, 1953, the late Mr. Registrar PARTON made an order adjudicating one Olga Natalie Franciszka Lubranska von Dembinska a bankrupt. The order was in the following terms:

" This being the day appointed for the hearing of the official receiver's adjourned application for an order of adjudication against the above-named debtor pursuant to s. 18 of the Bankruptcy Act, 1914. And upon hearing the official receiver and the debtor not being present or represented. And it appearing that the debtor has not set down an application to reinstate her public examination which was adjourned generally on July 21, 1953, and is not therefore in a position to make application to the court to approve her proposal for a composition which has been accepted by the creditors. It is ordered that the debtor . . . be and the said debtor is hereby adjudged bankrupt ".

The circumstances which gave rise to the recital which I have read were, briefly, these. A suggested scheme or composition had been put forward by or on behalf of the debtor and on Sept. 4, 1953, at a meeting of creditors summoned for the purpose, the creditors resolved to accept the proposal, but in the meantime the public examination of the debtor which was required to be held under the terms of the Bankruptcy Act, 1914, s. 15 (1), had been adjourned. On July 21, 1953, the court, having in its possession certain evidence as to the state of the debtor's health, instead of again adjourning the public examination to some future fixed date, proceeded to make an order adjourning it generally with liberty for the debtor—and also, no doubt, for the official receiver—to apply to have it restored. The note of the proceedings with which we have been supplied indicates, as is the fact, that a further medical certificate had been produced stating that the debtor would be unfit to attend the court for " four to five weeks at least ". It is obvious, therefore, that the order made, if it were validly made, was the most sensible order which could have been made. On Oct. 12, 1953, the official receiver wrote to the debtor reminding her that the public examination had been standing over for a long time and asking her whether she desired to have it restored. I should have thought that it must have been quite plain by this time to the debtor that until the examination had been restored and concluded, or, alternatively, dispensed with altogether, it was impossible to have the proposal for composition effectively approved. The letter, however, remained unanswered, and, after three weeks or so had gone by, the official receiver proceeded to bring on again his application for an order of adjudication, the application having already been once or twice adjourned.

Counsel for the debtor has expressed the sense of grievance which his client feels, because, as events have turned out, she has been unable, so she says, to get the composition which was proposed formally approved, and she thinks that that is a hardship which she ought not to suffer. As a matter of fact, I think that she suffered no hardship and has no real cause for grievance whatever. I should have thought that she had been treated with great consideration, two adjournments having been granted. But whether she has suffered any kind of hardship is not the question which we have to decide. The question is whether, on the face of it, the order of adjudication is liable to be impugned, as counsel for the debtor contended.

The ground on which the debtor attacks the order is this. It was submitted on her behalf that the order made on July 21, 1953, adjourning generally the public examination with liberty for the debtor to restore, was *ultra vires* the

court, and that, therefore, the whole basis on which, on the face of it, the adjournment rested, goes. Section 15 (3) of the Bankruptcy Act, 1914, provides:

“The court may adjourn the examination from time to time”.

As BIRKETT, L.J., observed in the course of the argument, there is also a general power to adjourn under s. 109 (2), which provides:

“The court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose”.

In my judgment, s. 15 (3), on the face of it, manifestly gives power to the court to make an order, not only adjourning the examination from one fixed date to another, but also adjourning it generally with liberty to restore, and that prima facie view of the sub-section is, I think, strongly reinforced by the terms of s. 109 (2). It seems to me also to be in accordance with the plain and ordinary sense of the words used, and particularly the last four of them, “from time to time”, which I interpret as meaning: “as and when it is appropriate so to do”. Counsel for the debtor, however, contended that “from time to time” meant “from one fixed time to another fixed time”, and that the court could not do more than adjourn from one fixed date to another fixed date, save to the extent to which express power so to do was conferred. He submitted that the only express power to adjourn otherwise than from one fixed date to another fixed date was contained in the Bankruptcy Rules, 1952 (S.I., 1952, No. 2113), r. 192. I think that counsel is involved in considerable difficulty about this, because, if the words of s. 15 (3) are to be construed in the way for which he contended, so as to limit the court's power of adjournment to an adjournment from one fixed date to another, then r. 192 would appear to be ultra vires, since, on the face of it, it would give a power in excess of the power given by the statute.

Rule 192, however, and certain other rules which follow deal with what are called adjournments sine die. They provide that in certain events which are there specified—e.g., the debtor not making a full and true disclosure—events which have not happened and which are not applicable here, the court may adjourn the examination sine die, and in that event certain other consequences follow. Counsel for the debtor submitted that an adjournment sine die and an adjournment such as was made here were, necessarily, the same thing, and that, whatever the language used, the adjournment made by the order of July 21, 1953, was, in fact, an adjournment sine die and was bad, because it was not made in accordance with the rules. I entirely reject that argument. I think that the order was of the character which the notes of the registrar stated it to be—a common enough form of order which is, I think, well within the discretion of the court under the provisions of the statute, and which is commonly experienced in other branches of the administration of justice. It was an order adjourning the examination generally, with liberty for the debtor to apply to restore it. I need not refer again to the obvious convenience to the debtor, and in the consideration shown to her, in making an order in that form. Rule 192 of the Bankruptcy Rules, 1952, confers, within the general discretion, an express power to make an order in a particular form, called an order for adjournment sine die, in certain events. When such an order is properly made, certain other consequences, which are set out in the rules, follow, but r. 192 is in no way a limitation of the more general power under s. 15 (3), which, I am quite satisfied, was expressly and designedly exercised in this case.

The decision of that point adversely to the debtor disposes of this matter. In my view, Mr. Registrar BOWYER was clearly right in refusing to make the order for annulment, and I would dismiss the appeal.

BIRKETT, L.J.: I am entirely of the same opinion, and I think it is scarcely necessary to add anything to what SIR RAYMOND EVERSTED, M.R., has said. Perhaps, however, I should say a word or two on the principal point raised by counsel for the debtor.

[His LORDSHIP stated the facts and continued:] From an early stage in this case I took the view that the order of July 21 was a sensible and humane order. There was the history of illness, there was the factor of uncertainty as to when the debtor would be well enough to attend, and in the circumstances it would seem right and proper to say that it was impossible to fix any date with precision, and, therefore, that the matter would be adjourned generally with full liberty to restore it to the list. There could be no hardship or grievance in that, but
A counsel for the debtor submitted that there was, because the order adjudicating the debtor bankrupt was in these terms:

“ . . . it appearing that the debtor has not set down an application to reinstate her public examination which was adjourned generally on July 21, 1953, and is not therefore in a position to make application to the court to approve her proposal for a composition which has been accepted by the
B creditors. It is ordered that the debtor . . . be and the said debtor is hereby adjudged bankrupt ”.

The point taken by counsel for the debtor is that the order of July 21, 1953, adjourning the public examination generally with liberty to restore was made under a power which it was not proper for the registrar to use, and that there was
C no statutory authority enabling him to do so. Counsel contended that, on its true construction, s. 15 (3) of the Act of 1914, which reads: “ The court may adjourn the examination from time to time,” gave a power to adjourn only from one fixed day to another fixed day. I am clearly of opinion that, on their construction—and, indeed, as a matter of common English usage—the words “ from time to time ” cannot have that interpretation. I think they mean that an adjournment may
D be made as and when the occasion requires, and I do not think that they could possibly have been intended to bear the rigid interpretation for which counsel for the debtor contended. Counsel then submitted that the order of July 21 was, in effect, an order under r. 192 of the Bankruptcy Rules, 1952. That rule reads:

“ The court may adjourn the public examination sine die and may make
E such further order as it thinks fit, where—(a) it is of opinion that the debtor is not making a full and true disclosure of his affairs; or (b) the debtor, without showing any sufficient reason has failed to attend the public examination or any adjournment thereof, or to comply with any order of the court in relation to his accounts, conduct, dealings, or property ”.

First, it is clear that the matters set out in (a) do not apply to this case. I have
F heard nothing which leads me to suppose that an adjournment was ordered because a true and full disclosure of the debtor's affairs had not been made. Secondly, with regard to (b), “ without showing any sufficient reason has failed to attend the public examination ”, it is quite plain that the registrar accepted the medical certificates and acted on them, believing the debtor's state of health to be an adequate reason. The only importance of this matter is that Mr. Registrar
G BOWYER, against whose refusal to annul the order made by Mr. Registrar PARTON this appeal is brought, expressly disclaims, and disclaimed at the time, any such intention as is ascribed to him. He says that he did not bring into play the provisions of r. 192 (which, as counsel for the debtor says, is, in a sense, a penal provision), and that he adjourned the public examination under the powers given to him by s. 15 (3) of the Act. I think that the registrar was wholly right,
H and, therefore, on the main point on which the appeal has been argued, I am of opinion that it fails.

ROMER, L.J.: I agree with my Lords, and I only want to add a few words about s. 15 (3) of the Act of 1914, which says that the court can “ adjourn the examination from time to time ”. I agree with what my brethren have said about the sub-section. The power to adjourn, under the sub-section, is not confined to adjourning from one specific date to another specific date. It is a

power to adjourn for such periods of time, or generally, as the court may think most convenient. I would like to draw attention to the similarity of the language which is used in R.S.C., Ord. 52, r. 7, which reads:

"The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the court or judge shall think fit".

It is a matter of common practice, and of common knowledge to anyone who knows anything about what goes on in the courts, that applications, summonses and motions are constantly stood over or adjourned generally with liberty to restore, in the same way that the public examination was adjourned generally in the present case. I think that it would be most unfortunate, both from the point of view of the creditors and from the point of view of the debtor and of everyone concerned, if there was not that power, which gives a flexibility to the proceedings and without which, as I think, there would be considerable difficulty in carrying them through to a successful conclusion; and I am quite satisfied that there is such a power. I am satisfied that the registrar acted on that power and not under the special power conferred by r. 192—that is made plain by the opinion which has been expressed by the registrar—who, indeed, may be regarded as the mouthpiece of the court. The court says that that is the power which was exercised. I am well assured that it was the power which was exercised, and that great care was taken, and deliberately taken, to avoid action under r. 192, which is a penal provision, and which, in a sense, puts a debtor rather in the position of somebody who is in contempt and who can only be heard after satisfying the court that the misdemeanours which have resulted in his ostracism have been removed and that he has made out a proper case that the application should proceed. There are various formalities attendant on r. 192, and I am certain, apart altogether from what Mr. Registrar BOWYER has said, that there was never any intention on the part of the registrar to act under that rule. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Simmonds, Church Rackham & Co.* (for the debtor); *Solicitor, Board of Trade* (for the official receiver).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE.

PHILLIPS-HIGGINS v. HARPER.

[COURT OF APPEAL (Somervell, Morris and Romer, L.J.J.), March 30, 31, 1954.]

Account—Action for—Defence—Account agreed and settled—Oral agreement as to final figure.

Limitation of Action—Postponement of limitation period—Action for relief from mistake—Claim for account—Underpayment of money due under contract—Limitation Act, 1939 (c. 21), s. 26 (c).

APPEAL by the defendant from an order of PEARSON, J., dated Dec. 10, 1953, reported [1954] 1 All E.R. 116.

From 1938, when she was admitted as a solicitor, until 1950 the plaintiff was in the defendant's service as his assistant under an oral agreement by which she received a basic minimum salary plus a yearly sum based on the annual net profits of the practice. In 1951 a dispute arose over the amounts which the plaintiff had been paid, and on Oct. 1, 1951, she issued a writ claiming an account from Apr. 1, 1938, to Mar. 31, 1950. At the end of each of those accounting years the defendant had orally informed her of the amount due to her and she was then paid that amount. The defendant contended, inter alia, that for each of the years in question, the account between them had been agreed and settled, and he pleaded the Limitation Act, 1939, which the plaintiff contended did not apply by reason, inter alia, of s. 26 (c) of that Act which provided that the periods of limitation prescribed by that Act should not begin to run in a case where the action was for relief from the consequences of a mistake until the plaintiff had discovered the mistake. PEARSON, J., held that a settled and agreed account might have been constituted by the parties orally agreeing a final figure for the account as distinct from agreeing a written account, but that on the facts there was no agreement, oral or in writing, of an account, and, therefore, no settled or agreed account. He held further that s. 26 (c) of the Limitation Act applied only where the mistake was an essential ingredient of the cause of action, e.g., where the money had been paid or a contract entered into in consequence of a mistake and appropriate relief was sought; the present action was for an account to ascertain the amount still due to the plaintiff and was not an action for relief from the consequences of a mistake within the meaning of s. 26 (c); and, therefore, the Limitation Act, 1939, s. 2 (2), applied to bar any account in respect of any year before 1945-46.

The defendant appealed from the judge's decision on the facts as found in the plaintiff's favour. There was no cross-appeal by the plaintiff that her claim for an account for the years prior to 1945-46 was barred by the Limitation Act, 1939, s. 2 (2).

THE COURT OF APPEAL affirmed the decision of PEARSON, J., and dismissed the defendant's appeal.

Appeal dismissed.

Heathcote-Williams, Q.C., and Platts-Mills for the defendant.

R. M. Wilson, Q.C., and Comyn for the plaintiff.

Solicitors: *Edwin Cox & Calder Woods* (for the defendant); *Walters & Hart* (for the plaintiff).

P.P.

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WRIGHT AND ANOTHER v. PEPIN.

[CHANCERY DIVISION (Harman, J.), March 23, 24, 25, 1954.]

Limitation of Action—Land—Recovery—Acknowledgment of plaintiff's title—Acknowledgment by agent of defendant—Mortgage—Acknowledgment by mortgagee's solicitor—Limitation Act, 1939 (c. 21), s. 4 (3), s. 23 (1) (a).

By a legal charge dated Nov. 10, 1928, the defendant mortgaged her leasehold premises, 101, Mountview Road, Harnsey, in consideration of a loan of £200, interest thereon to be paid quarterly. In September, 1940, the premises were damaged by enemy action, the interest on the loan due on Nov. 1, 1940, was not paid, and no payment of interest was made thereafter. By letter dated Oct. 19, 1949, the solicitors to the plaintiffs (who were executors of the transferee of the mortgage), wrote to the defendant's solicitor: "Re 101 Mountview Road . . . As mortgagees' solicitors we shall be glad if you will advise us fully on the present position of the matter, whether the property is to be re-built . . ." In subsequent letters the plaintiffs' solicitors stated that the plaintiffs wished the mortgage to be discharged. On Aug. 4, 1950, the defendant's solicitor wrote to the plaintiffs' solicitors: "Re 101 . . . Mountview Road . . . I understand that [the defendant] will shortly be making an appointment to see you with regard to her accounts with you for some time past. She has several questions she wishes to raise. Steps are being taken to re-build 101, Mountview Road. Plans have been prepared and submitted to the local authority, and as soon as the work is in hand I will let you know when [her] position can again be reviewed . . ." On a summons for possession dated June 4, 1953, the defendant contended that as no payment of interest had been made since August, 1940, the period of twelve years under the Limitation Act, 1939, s. 4 (3), had run, and that the plaintiffs' cause of action was statute-barred.

HELD: the letter which the defendant's solicitor wrote on Aug. 4, 1950, when looked at in the light of the claims being made against the defendant by the plaintiffs' solicitors, who described themselves as the mortgagees' solicitors, was an acknowledgment of the existence of the mortgage; it was given within twelve years of Nov. 1, 1940; the defendant's solicitor, although not expressly authorised to acknowledge the mortgage debt, was authorised to take the steps needed to put the defendant's affairs in order, and so to write the letter of Aug. 4, 1950; and, therefore, the plaintiffs' cause of action was not statute-barred, and they were entitled to possession.

Stansfield v. Hobson (1853) 3 De G.M. & G. 620 and *Bowring-Harburg's Trustee v. Bowring-Harburg* ([1942] 1 All E.R. 516) and ([1943] 1 All E.R. 48), considered.

AS TO SUSPENSION OF OPERATION OF STATUTE, see HALSBURY, *Real Estate* Edn., Vol. 29, pp. 618-621, paras. 777-784; and FOR CASES, see DIGEST, Vol. 32, pp. 349-351, Nos. 318-341.

Cases referred to:

- (1) *Stansfield v. Hobson*, (1853), 3 De G.M. & G. 620; 22 L.J.Ch. 657; 20 L.T.O.S. 301; 43 E.R. 244; 32 Digest 480, 1430.
- (2) *Sanders v. Sanders*, (1881), 19 Ch.D. 373; 51 L.J.Ch. 276; 45 L.T. 637; 32 Digest 458, 1250.
- (3) *Smith v. Webster*, (1876), 3 Ch.D. 49; 45 L.J.Ch. 528; 35 L.T. 44; 40 J.P. 805; 12 Digest, Replacement, 177, 1173.
- (4) *Griffiths (John) Cycle Corp., Ltd. v. Humber & Co., Ltd.*, [1899] 2 Q.B. 414; 68 L.J.Q.B. 959; 81 L.T. 310; *reversd. on other grounds* H.L., sub nom. *Humber & Co. v. Griffiths (John) Cycle Co.*, (1901), 85 L.T. 141; 12 Digest, Replacement, 178, 1189.

(5) *Grindell v. Bass*, [1920] 2 Ch. 487; 89 L.J.Ch. 591; 124 L.T. 211; 12 Digest, Replacement, 151, 958.

(6) *Bouring-Hanbury's Trustee v. Bouring-Hanbury*, [1942] 1 All E.R. 516; [1942] Ch. 276; 111 L.J.Ch. 152; 167 L.T. 188; *affd.* C.A., [1943] 1 All E.R. 48; [1943] Ch. 104; 112 L.J.Ch. 37; 168 L.T. 72; 2nd Digest Supp.

A SUMMONS for possession of leasehold premises known as 101, Mountview Road, Stroud Green, Hornsey, comprised in a legal charge dated Nov. 10, 1928, and made between the defendant, Gertrude Minna Pepin, and Frederick Adlard Wright.

By this charge it was agreed that, in consideration of £600 being paid to Mrs. Pepin by the mortgagee, Mrs. Pepin would pay to him on Feb. 1, 1929, £600 with interest at 6½ per cent. per annum, and that, if the said sum were not paid, she would continue to pay interest at the same rate by equal quarterly payments. The said charge contained an attornment clause in the usual form. Frederick Adlard Wright died on Sept. 5, 1933, and his executors by a transfer of mortgage dated Jan. 17, 1935, transferred the benefit of the legal charge to one Alice Pilley. Alice Pilley died on July 15, 1939, having by her will appointed Thomas William Mitchell and the plaintiffs to be her executors. Thomas William Mitchell died on Sept. 8, 1946, and on Aug. 19, 1952, a grant of double probate was made in favour of the second plaintiff. Accordingly, the benefit of the legal charge was vested in the plaintiffs as personal representatives of Alice Pilley. The property was destroyed by bombing in September, 1940, and no interest was paid under the charge after Aug. 1, 1940. In 1941 Messrs. Pilley & Mitchell (the solicitors who acted on behalf of the mortgagor, the mortgagee and the transferee, Mrs. Pilley), made a claim to the War Damage Commission, as solicitors for the mortgagor, for compensation in respect of the damage to the dwelling-house. In that claim there was a mention of the mortgage, but no more. In 1944 the War Damage Commission wrote to Mrs. Pepin and also to the plaintiffs saying that a value payment of £930 would be made. In 1945, however, the War Damage Commission wrote again saying that, subject to the consent of all parties interested, a cost of works payment would be made instead of a value payment, that letter being sent to Messrs. Pilley & Mitchell on behalf of both the mortgagor and the mortgagee. There was no evidence that the consents were given, but the property was repaired on a cost of works basis and was at the date of the summons occupied by Mrs. Pepin.

On the death of Thomas William Mitchell the business of Pilley & Mitchell was taken over by the solicitors who were at the date of the summons acting for the plaintiffs, under the style of Elliot & Macvie. Mrs. Pepin then consulted a new solicitor, Miss Wyatt, and on Dec. 31, 1947, Miss Wyatt wrote a letter (addressed to Pilley & Mitchell) asking for accounts in respect of four properties, one of them being 101, Mountview Road. The letter was in the following terms:

"I understand from my client that you have dealt with these properties and collected rents from some of them at various times. She also states that you hold mortgages, but she has not received any accounts for many years past, and I shall be obliged if you will let me know how much is owing in respect of each property, what amounts have been received, and what payments made. I must request this information from you as my client wishes to know the full extent of her liability."

That letter was addressed to Pilley & Mitchell as the former solicitors of Mrs. Pepin, not as agents for the mortgagees. HIS LORDSHIP found that that letter could not be an acknowledgment of the existence of the debt by the mortgagor, and that it was merely a demand by Mrs. Pepin on her former solicitors for proper accounts. No satisfactory answer to that letter was received and Miss Wyatt wrote a further letter on Apr. 2, 1948, to the same effect, which also received no satisfactory reply. In April, 1948, accounts were eventually

furnished by Elliot & Macvie and nothing further occurred until October 19, 1949, when Elliot & Macvie wrote to Miss Wyatt in the following terms:

" Re 101 Mountview Road. Executors of Alice Pilley deed. The above was the subject of air raid damage. As mortgagees' solicitors, we shall be glad if you will advise us fully on the present position of the matter, whether the property is to be re-built, and, if so, what stage has the matter reached."

There followed a reminder in similar terms and telephonic communications with Miss Wyatt in November, 1949. On Jan. 2, 1950, Elliot & Macvie wrote as follows:

" The Hornsey Borough Council are continually communicating with us with regard to the disposal of this site or the leasing thereof. Will you please let us hear from you as to what has transpired ? "

The learned judge found that they were writing, as in October, 1949, as the mortgagees' solicitors. On Feb. 1, 1950, Miss Wyatt replied to the effect that an architect had been instructed to make plans for re-building the property, and she complained that the inquiries of the borough council had not been passed on sooner. Elliot & Macvie, by letter dated Feb. 1, 1950, said:

" From our clients' point of view as mortgagees, they would wish to have their mortgage paid off, as this is the only item holding up completion and winding-up of the estate of the late Mrs. Alice Pilley. Can anything be done in the matter, please ? "

Receiving no satisfaction they wrote again on Mar. 23: " Our clients wish their [mortgage] discharged ". On July 8, 1950, they wrote again:

" We shall be glad to know what is transpiring with regard to [the property], and whether there is any possibility of our clients' mortgage being discharged in the near future, as we have instructions to take proceedings."

Eventually, on Aug. 4, 1950, Miss Wyatt wrote as follows:

" Re 101 . . . Mountview Road. I thank you for your letter of the 31st ultimo. I understand that Mrs. Pepin will shortly be making an appointment to see you with regard to her accounts with you for some time past. She has several questions which she wishes to raise. Steps are being taken to re-build 101, Mountview Road. Plans have been prepared and submitted to the local authority, and as soon as the work is in hand I will let you know, when Mrs. Pepin's position can again be reviewed . . . "

There was no further correspondence.

On a summons for possession taken out by the plaintiffs as mortgagees on June 4, 1953, the defendant resisted the order on the ground that, since the interest on the mortgage had remained unpaid for over twelve years, she had a good defence to the claim under the Limitation Act, 1939, s. 4 (3).

Rubin for the plaintiffs, the mortgagees.

J. A. Gibson for the defendant, the mortgagor.

HARMAN, J., stated the facts and continued: The first question is whether there has been any and if so what acknowledgment by the defendant of the existence of the debt, so as to prevent time running under the Statute of Limitations as it otherwise would have done. The relevant statute is the Limitation Act, 1939. Section 4 (3) is in these terms:

" No action shall be brought by any other person [than the Crown] to recover any land after the expiration of twelve years from the date on which the right of action accrued to him . . . "

Section 18 deals with actions to recover money secured by a mortgage, *ibid.* s. 18 (4) provides:

Nothing in this section shall apply to a foreclosure action in respect of

mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action."

Section 23 deals with acknowledgments, and by sub-s. (1) provides:

"Where there has accrued any right of action (including a foreclosure action) to recover land . . . and—(a) the person in possession of the land . . . acknowledges the title of the person to whom the right of action has accrued . . . the right shall be deemed to have accrued on and not before the date of the acknowledgment or payment."

At first sight s. 4 (3) seems unsuited to an action for possession by a mortgagee, because at any moment the mortgagee has the right to enter into possession, and, therefore, in a sense the right first accrued when the mortgage was made. But so long as the mortgagor pays the interest that payment will prevent time under the statute from running, and the right would be deemed to have accrued when the last payment was made, or, perhaps, when it became due. In this case that would be Nov. 1, 1940. Since there has been no payment for twelve years from that date, s. 4 (3) will clearly apply unless there has been an acknowledgment in the meanwhile.

An acknowledgement is to some extent defined by s. 24 (1), which is in these terms:

"Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment. (2) Any such acknowledgment . . . as aforesaid may be made by the agent of the person by whom it is required to be made under the last foregoing section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged . . ."

Here the principals have made no acknowledgment one way or the other, and, if there be an acknowledgment, it must be in one of the letters to which reference has been made. In my judgment, the dealings with and by the War Damage Commission are irrelevant for this purpose and no acknowledgment was made on behalf of either side by Pilley & Mitchell, who were, indeed, solicitors for all parties. But it was a different matter when Miss Wyatt came on the scene. She was instructed by the defendant, Mrs. Pepin, who did not know her position vis-à-vis her creditors, and wished to have accounts from the solicitors who had in fact been managing her affairs, connected with former rent, interest, and so forth. So long as Miss Wyatt was merely asking Pilley & Mitchell, or the successors of that firm, as her client's former solicitors, for an account, I cannot think that there could have been any acknowledgment, but the matter seems to me to be different from 1949, when for the first time a claim was made on behalf of the executors of Mrs. Pilley to have information as mortgagees. It is quite clear that from Oct. 19, 1949, and onwards Elliot & Macvie were writing as the mortgagees' solicitors. Their position as such was, I think, impliedly acknowledged in Miss Wyatt's letter of Feb. 1, 1950. It is true that that is a letter complaining that documents had not been sent to her, but it seems clear that she would not have dealt with strangers on that footing, nor would it have been anything to do with her client's former solicitors. There is, however, no acknowledgment of the existence of the mortgage then. In my judgment, however, Miss Wyatt, in her last letter, dated Aug. 4, 1950, recognised that her client was or may have been a debtor in respect of 101, Mountview Road. Mrs. Pepin in effect admitted that there was a charge on 101, Mountview Road, and said by her solicitor that her "position can again be reviewed when the property has been re-built".

All that is necessary, as it seems to me, for an acknowledgment which takes the case out of the statute is that the debtor should recognise the existence of the debt, or that the person who might rely on the statute should recognise the rights against himself. As an example there was cited to me *Stansfield v. Hobson* (1). That case has been disapproved of for one purpose: it purports to decide that an

acknowledgment after the statute has run was, at any rate under the old law, sufficient to revive the claim, and that was disapproved of by the Court of Appeal in *Surrey v. Sanders* (2). But that is not the purpose for which I cite it. It was an action to redeem against the mortgagee in possession, who in response to a letter from the mortgagor's agent wrote this letter (3 De G.M. & G. 623):

"Sir,—I received yours of the 2d instant. I do not see the use of meeting either here or at Manchester, unless some party is ready with the money to pay me off."

That was a most casual reference to his position as mortgagee, but, of course, unless he was something of the sort the reference to "money to pay me off" was not sensible, and the lords justices concluded that that was a sufficient acknowledgment of the position. So here I think the letter that Miss Wyatt wrote on Aug. 4, 1950, when looked at in the light of the claims being made against her client by the plaintiffs' solicitors, who described themselves as the mortgagees' solicitors, is an acknowledgment of the existence of the mortgage. Consequently, that acknowledgment being within twelve years of November, 1940, the case is taken out of the statute, subject to one point, namely: Was there authority in Miss Wyatt to bind her client by such an acknowledgment? There is nothing here in the shape of the phrase "signed by some . . . person thereunto by him lawfully authorised", which are in the Law of Property Act, 1925, s. 40 (1), and in the Mercantile Law Amendment Act, 1856, s. 13, which deals with acknowledgments by agents. Nevertheless, a person is not an agent for the purpose of making an acknowledgment unless he is duly authorised to make it. It seems clear that it is not necessary that the agent should have authority to acknowledge, for instance, in this case, the existence of the mortgage. It seems to be enough that the agent should have authority to write the letter which she does in fact write, and that what is said in the letter is within the scope of the agent's authority.

There is a long line of cases on this subject, beginning with *Smith v. Webster* (3). There the solicitors who had instructions to settle a formal contract wrote to the solicitors on the other side enclosing a draft and mentioning in the covering letter that their client had told them that he had made an arrangement of a certain character. It was held that that was not within the scope of their authority, and, therefore, a contract could not be spelt out of such a letter. For one thing it would have made a contract which the clients had never authorised. All that they had authorised was a formal written contract between them and the other side, and to make an open contract by a letter written by their solicitors, whose only authority was to negotiate a different contract, was out of the question. It seems that that case has been taken to mean rather more than it should have done. One finds a good illustration of that in *John Griffiths Cycle Corp., Ltd. v. Humber & Co., Ltd.* (4), the headnote of which reads ([1899] 2 Q.B. 414):

"A letter written by an agent within the scope of his authority, which refers to and recognises an unsigned document as containing the terms of a contract made by his principal, is a sufficient memorandum of the contract within s. 4 of the Statute of Frauds, and it is not necessary, in order to satisfy the statute, that the principal should have authorised the agent to sign the letter as a record of the contract."

A. L. SMITH, L.J., says (*ibid.*, 417):

"It is undoubted law that the party to the contract himself may, by signing a document subsequent to that containing the terms of the contract, recognise the contract in the way required by s. 4 of the Statute of Frauds. It is also undoubted law that a signature to a document which contains the terms of a contract is available for the purpose of satisfying s. 4 of the statute, though put alio intuitu and not in order to attest or verify the contract."

He then deals with *Smith v. Webster* (3), and says (*ibid.*):

" . . . all that is decided by *Smith v. Webster* (3) is that, if reliance is placed on the signature of an agent, as satisfying s. 4 of the Statute of Frauds, you must, whether the document signed be a record of the terms or a document referring to and recognising the document containing the record of the terms, show that the agent signing was an agent 'thereunto lawfully authorised', but that is all that is necessary. In *Smith v. Webster* (3) the person said to be the agent thereunto lawfully authorised was a solicitor. He was not expressly authorised to sign any document recognising the document which in fact contained the proposed terms, and the court held that it was not within the scope of his authority so to do."

He held in the case before him that it was within the scope of the solicitors' authority. Therefore, an acknowledgment can be made or a memorandum signed by an agent although he does not realise he is signing a memorandum or producing any such effect.

The most surprising example of that is *Grindell v. Bass* (5), where counsel who signed a defence pleaded that a defendant could not fulfil a contract with the plaintiff because she had agreed to sell the property to a third party. The last thing that counsel thought he was doing in signing that pleading was that he was committing his client to a bargain with the third party. Nevertheless, the third party, who was joined by the plaintiff as a defendant, counterclaimed on the verbal agreement of which the only written evidence was the pleading, and that was held to be a memorandum signed by a person duly thereunto authorised, because counsel was authorised to sign the pleading and to include in it presumably anything which he in his discretion thought necessary as a defence for his client in the action then in suit.

I think I should have had no difficulty on this question of authority but for an observation of LORD GREENE, M.R., in *Bowring-Hanbury's Trustee v. Bowring-Hanbury* (6). That case first came before BENNETT, J., who decided that there was a good defence under the relevant statute of limitations, the Limitation Act, 1923. There was said there to be an acknowledgment, first, in the Inland Revenue affidavit sworn by the defendant and signed by his solicitors. That was, however, held to be no acknowledgment because it was not made to the creditor. Secondly, the defendant's solicitors sent a statement to the defendant's trustee in bankruptcy with a note appended to say that one of the assets in the bankruptcy might be a debt due to the bankrupt from his wife's estate, of which he was executor. On that the trustee in bankruptcy sued the defendant, for the existence of the debt was said to be acknowledged. BENNETT, J., rejected that claim, not on the question of the solicitors' authority, but on the facts. He says ([1942] 1 All E.R. 518):

" The document was sent by the solicitors for the executor to the trustee in bankruptcy, the plaintiff, for the sole purpose of informing the trustee in bankruptcy of the position of the estate of the defendant's wife and, when the note was appended to the foot of the statement, it was quite plain that there was no intention to be gathered from the words used of acknowledging the existence of a debt."

Whether that was right or not, it was not the ratio decidendi in the Court of Appeal; the second holding of that court was that in the absence of evidence of authority in the solicitors to acknowledge the debt the note to the trustee did not constitute such an acknowledgment. This was not a point taken by counsel; it was taken from the Bench. LORD GREENE, M.R., in the course of the argument said: Has the solicitor any authority to bind his client in this way? The answer was that the solicitor had a general authority. LORD GREENE then referred to the Mercantile Law Amendment Act, 1856, s. 13, to which I

have already made reference. The judgment of the court was read by Lord CLAUSON, who said ([1943] 1 All E.R. 50):

"As regards the letter written to the plaintiff by the husband's solicitors, BENNETT, J., held that the document disclosed no intention of acknowledging the existence of the debt. However this may be (and we express no opinion on the point) it is a complete answer to the plaintiff's plea based upon this letter that there was no evidence of any authority given to the solicitors by the defendant, to make any acknowledgment of the debt on his behalf."

It is said here that there is no evidence of any authority given by Mrs. Pepin to Miss Wyatt to make any acknowledgment of the debt on her behalf. It is admitted that there need not be express authority. One can infer that, but, in my judgment, it is not difficult here to infer that Mrs. Pepin had instructed Miss Wyatt to put her affairs in order, one item of her affairs being 101, Mountview Road, which was being re-built to her order and constituted an important part of her property. She wanted an account, and she instructed her solicitor to ascertain her rights. Her solicitor was approached by the mortgagees' solicitors, the time not having then run, and under pressure from them Mrs. Pepin's solicitor, as she is well authorised to do, says: "Please hold your hand until the property has been re-built, and then Mrs. Pepin's position can be reviewed." What is that but an acknowledgment that there is an obligation to the mortgagees in respect of the property and a request for forbearance? It seems to me that a solicitor who was instructed to put the lady's affairs in order had implied authority to make such a plea. In my judgment, Miss Wyatt was an agent duly authorised to make the acknowledgment which she did make—in other words, to write the letter which she did write—and that letter, as a matter of construction, in my judgment, amounted to an acknowledgment.

The consequence is that the plea under the statute fails and there must be an order for possession in the usual form.

Declaration accordingly.

Solicitors: *Elliot & Macvie* (for the plaintiffs); *Rees-Jones & Co.* (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re HILLIER. HILLIER AND ANOTHER v. ATTORNEY-
GENERAL AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.J.J.),
March 17, 18, 19, April 8, 1954.]

*Charity—Benefit to community—Public and charitable purpose—Appeal for
funds for erection and maintenance of voluntary hospital in certain area—
Failure of object of appeal—General charitable intention—Trusts affecting
funds.*

In 1938 a council known as the S. Bucks. and E. Berks. Voluntary Hospitals Council was formed, its immediate purpose being to raise funds for (i) the extension of the accommodation of the existing King Edward VII hospital at Windsor and (ii) the erection and maintenance of a new voluntary hospital at Slough. In the same year the Slough Hospital Committee was formed with the special object of furthering the purpose of erecting this new hospital, and under a trust deed dated Oct. 28, 1938, three trustees, known as the Slough hospital trustees, were appointed to be trustees of the committee's property. In 1939 the council published an appeal in the form of a brochure containing articles advocating the voluntary hospital movement, emphasising the need for the extension of hospital services in the area, explaining the work of the council, and stressing the need for financial assistance. It further referred to the need for and intention to build a voluntary hospital at Slough and the way in which the council hoped to improve existing services at King Edward VII hospital. Prospective donors were told that they could give either to the extension fund of King Edward VII hospital or towards the erection of the Slough hospital, and that they could earmark their subscriptions for either purpose. A pocket to the brochure contained printed forms to be used by intending donors. Two of the forms were immaterial to the present case, but the third read as follows: "I have pleasure in enclosing remittance value (blank) in respect of contribution as below". Then followed three columns, one marked "Capital donation", the second marked "Maintenance donation", and the third marked "Annual subscription", each column setting out the same three objects, viz., "Council's discretion"; "Windsor hospital"; or "Slough Hospital". The appeal met with general support. Further funds were raised by means of whist drives, dances, collecting boxes and the like. The court accepted that, as a result of the passing of the National Health Service Act, 1946, it had become impracticable to carry out the charitable purpose of building a voluntary hospital at Slough. On the question on what trusts were held the donations of the persons who had indicated that their donations were to be applied towards the proposed hospital at Slough,

HELD (ROMER, L.J., dissentiente): on the construction of the form and of the brochure, and in all the circumstances, although the donors had given their money for the establishment of a hospital at Slough, it was not of the essence of their gifts or their intention that the hospital should be a voluntary one, and they intended merely to promote the provision of a hospital in and for Slough; the intention was not to be imputed to them that their money should be returned to them if the proposed Slough hospital were not built; and the funds representing their contributions must be applied *cy-près*.

DICTUM OF PARKER, J., in *Re Wilson* ([1913] 1 Ch. 321), applied.

Decision of UPJOHN, J. ([1953] 2 All E.R. 1547), reversed in part.

AS TO CHARITABLE INTENTION, see HALSBURY, Simonds Edn., Vol. 4, p. 267, para. 562; and FOR CASES, see DIGEST, Vol. 8, pp. 291-297, Nos. 686-740.

Cases referred to:

(1) *Re University of London Medical Sciences Institute Fund*, *Fowler v. A.G.*, [1909] 2 Ch. 1; 78 L.J.Ch. 562; 100 L.T. 423; 8 Digest 291, 690.

- (2) *Re Welsh Hospital (Netley) Fund*, [1921] 1 Ch. 655; 90 L.J.Ch. 276; 124 L.T. 787; 8 Digest 349, 1444.
- (3) *Re North Devon & West Somerset Relief Fund Trusts*, [1953] 2 All E.R. 1932.
- (4) *Re Willsons*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 8 Digest 313, 948.
- (5) *Re Monk*, [1927] 2 Ch. 197; 96 L.J.Ch. 296; 137 L.T. 4; Digest Supp.
- (6) *Re British School of Egyptian Archaeology*, [1954] 1 All E.R. 887.

APPEAL by the Attorney-General against an order of Ungoed-Thomas, J., dated November 10, 1953, and reported [1953] 2 All E.R. 1547, made on an originating summons to determine, inter alia, whether the properties, investments and money donated and subscribed and held by the plaintiff, Sir Arthur Noel Mobbs, as surviving trustee under a declaration of trust dated May 25, 1946, setting out the said properties, investments and moneys, were still held on charitable trusts, and, if so, asking that it should be determined what such trusts were or whether any charitable trusts affecting the same had failed, and, if so, whether any donors or subscribers were entitled to repayment of the amounts given or subscribed by them. Ungoed-Thomas, J., held that the object of the appeal as a result of which the fund had been raised was to provide a voluntary hospital, and the intention of the donors who had indicated in writing that their bounty was to be applied to the provision of such a hospital at Slough was that their gifts should be used only in the manner indicated. It was impossible to infer any general charitable intention, and, therefore, as the purpose for which those subscriptions were made had wholly failed, those donors were entitled to repayment of their contributions. Ungoed-Thomas, J., further held that donors who had not so expressly allocated their gifts to the specific purpose of the provision of a voluntary hospital at Slough were not entitled to the return of their contributions.

Cross, Q.C., and *Denys B. Buckley* for the Attorney-General.

S. Pascoe Hayward, Q.C., and *Peter Foster* for the Official Solicitor representing the donors and subscribers.

J. L. Arnold for the trustee of the funds.

Cur. adv. vult.

Apr. 8. The following judgments were read.

SIR RAYMOND EVERSLED, M.R. (read by DENNING, L.J.): Not long before the outbreak of the second world war a number of public-spirited persons, who formed themselves into the "South Bucks. and East Berks. Voluntary Hospitals Council", drew attention to the serious shortage of hospital services in, and in the neighbourhood of, Slough, a town which (largely as a result of the first world war) had enormously outgrown its original dimensions. The council appealed to other public-spirited persons to provide money to meet the needs of the situation, which fell broadly under three heads, namely, (i) enlargement and better endowment of the King Edward VII hospital at Windsor (which mainly supplied the hospital needs of the whole area, including Slough); (ii) general assistance to other and smaller hospitals in the neighbourhood; and (iii) the erection of a new hospital in Slough itself. It is to the third of these heads that the difficult problem raised in the present appeal is particularly directed, and the question is whether any, and, if so, what numbers of those whose subscriptions were dedicated to the third of the heads ought now to be repaid their subscriptions, having regard to the impact on all hospital services of the National Health Service Act, 1946.

The efforts of the council had been so far successful that before the publication and issue in 1939 of the "brochure", which has proved to be by far the most significant fact in the case, a sum of over £6,000 had been collected for the third of the objects I have stated, viz., the erection of a new hospital in Slough; and the council had, with that money, acquired in Slough a piece of land which they had regarded as suitable for the erection of the hospital. It is important to

observe that there is no evidence of the particular circumstances in which any individual subscriber to the fund of £6,600 made his contribution beyond the bare facts which I have already stated.

To the terms of the brochure, on which so much depends, I must make some detailed references, though I am repeating much that is fully set out in the judgment of UPHOHN, J. The brochure was plainly the climax, before the outbreak of the war, of the council's appeal for funds, and it was widely distributed. On a number of the left-hand pages were printed short but arresting extracts from the speeches or writings of well-known men, both living and dead, which (and the purpose of which) the quotation attributed to the late Mr. John Burns sufficiently illustrates:

"The voluntary hospitals have saved in the course of a single generation a population equal to that of London or Australia."

The extracts from the report of the Sankey Commission on the future of the voluntary hospitals, which appeared on the last page, I shall later set out fully. The particular purposes of the appeal, and statement of the means whereby those purposes might be achieved, are set out on the right-hand pages. The first page was as follows:

"The council has been formed to appeal on behalf of Windsor, Slough and associated hospitals for the funds which are necessary for extensions, new buildings and annual maintenance. It hopes to carry out the recommendations of the Sankey Report (Report of the Voluntary Hospitals Commission, 1937), to avoid overlapping and wastage. By working in close contact with local and country administrative authorities it is hoped that an atmosphere of good will and mutual assistance will be established between such authorities and the voluntary hospitals, and that as a result really efficient, well-organised hospital services will be made available for all the people of South Bucks. and East Berks. Our voluntary hospital system is the envy of the world. The truly British characteristic of making provision, without force, for those in need of medical care is worthy of preservation. Without adequate finance the work of the honorary surgeons and physicians cannot go on. It is hoped that all will play their part in helping us to attain the objects that are detailed in the following pages. This booklet is intended to explain the work of the council and to make residents in this district individually conscious of the value of the voluntary hospitals. Will you therefore please read its pages and then consider how you can help us in our work?"

The second page stated the three aims or heads of appeal already noticed, under the three headings "King Edward VII Hospital, Windsor", "The Slough hospital" and "The smaller hospitals in the area." I need only cite what appeared under the second heading (the Slough hospital):

"The rapid industrial growth of Slough has thrown a heavy extra burden upon King Edward VII Hospital. The population has doubled in recent years and is still rapidly growing. To relieve the established hospital and to provide this industrial area with a hospital near at hand it has been decided to erect a new building at Slough on a site already purchased. The hospital, which will have sixty beds at its commencement, will be worked in close co-operation with King Edward VII Hospital, and will supply a further urgently necessary addition to the hospital services of the whole area. £45,000 is the estimated cost of the new hospital, and it will cost approximately £13,000 per annum to maintain."

On the seventh page was indicated a number of forms which donations might take, e.g., endowment of a bed, defraying the cost of special equipment, etc. From this page it appeared plainly that special collections were to be organised

at clubs, by dramatic societies, etc.; and, as will be seen, numerous, though relatively small, sums were in due course received from such sources.

I now set out in full — because of the significance attached to them in argument — the extracts from the Sankey Report printed on the last page of the brochure:

“The strength of the voluntary hospital system arises from two main causes; the first, the spirit that inspires it; and the second, the freedom that it possesses. The spirit that inspires it is the glory of the voluntary system. It has enabled all classes to come together in order that the more fortunate should help and give encouragement to their less favoured fellow citizens. This help has consisted, on the maternal side, in collections and gifts of large sums of money to found, equip and maintain the hospitals themselves. Complementary to this, there has been the willing service of generation after generation of doctors to serve the sick without fee and without reward. Further, there has been the co-operation of men and women of all classes and creeds to assist in the finance, the management and the carrying on of this great work. It would be a national loss if the country were deprived of this voluntary association of individuals without distinction of class, creed or politics, and if they were no longer to work together to achieve an end for the benefit of humanity. The freedom of administration which the voluntary system permits is also of fundamental importance: such freedom is an example of the dislike of over control and bureaucracy which is inherent in the genius of our race. Another asset of the voluntary hospital is that it has been responsible for medical education for many generations: medical education flourishes best in the atmosphere of freedom inherent in the voluntary hospitals. Co-ordinating authority suggested. Almost without exception the witnesses who gave evidence stressed the advisability of co-ordination in hospitals, *so that not only cottage hospitals but also special hospitals should be linked up with general hospitals*. The commission therefore conclude this general survey with an emphatic expression of their opinion that the continued existence of the voluntary system depends upon the voluntary hospitals of the country forming themselves into an association, regionally organized, which would be able on all matters of policy to express the considered views of its members and rely upon their loyal acceptance of its decisions.”

There was a pocket or folder in the cover of the brochure containing (besides an envelope) three forms. The first (which the learned judge called “document 1”, and to which he attached great importance) was a form to be filled in and signed by the intending donor whereon he could indicate his choice of object “as below”. There were three columns headed respectively “Capital donation”, “Maintenance donation” and “Annual subscription”; and under each heading were the three possibilities for selection: “£. s. d., Council’s discretion; £. s. d., Windsor hospital; £. s. d., Slough hospital”. We are concerned in this case with those benefactors who, by the appropriate erasures, indicated that their gifts were for the Slough hospital — either as a capital donation, maintenance donation, or annual subscription.

To the remaining two forms less attention was directed in argument, but I regard them as not insignificant. They were designed for use (by appropriate deletions) by those who wished their donations to be allocated by the achievement of a bed or cot, or towards the provision of special equipment *either at the Windsor hospital or at the (intended) Slough hospital*.

There was no evidence as to the numbers of these latter forms which were used. For the purposes of this case it must, I think, be taken that any persons who, using these forms, struck out the word “Windsor” and left the word “Slough” have been equated with those who, using “document 1”, allocated their donations to the Slough hospital, though the result is not, as I shall hope to show, entirely helpful to those represented by the Official Solicitor.

There was, finally, a form referred to by the judge as "document 2" appropriate to those who were willing to sign deeds of covenant for years in the form commonly used in the case of charitable donations. The covenantee, according to the form, was the secretary of the council, and the form provided that the covenanted sums should be

A "applied in such proportions as the council shall direct on my/our behalf for the augmentation of the income of the following: (a) Such hospital or hospitals in South Bucks. and/or East Berks. as the council may from time to time nominate on my/our behalf; (b) King Edward VII Hospital at Windsor; (c) the Slough hospital at Slough; (d) the . . . hospital at . . ."

In the margin opposite the items (a), (b), (c) and (d) were the words: "N.B.—Delete and initial the alternatives not desired."

B A number of persons who made use of the form, document 2, and entered, accordingly, into deeds of covenant, deleted the whole of (a), (b) and (d) (*supra*) and so left (c) only extant. I assume that the effect of so doing was to render of no effect the preceding words in the deed "in such proportions as the council shall direct." In any case the learned judge treated the persons who so made use of the deed of covenant as being in *consimili casu* with those who made use

C of document 1, erasing all the appropriate words other than the reference to "Slough hospital". In this court it became obvious that the treatment of the two classes above mentioned as (for relevant purposes) indistinguishable was open to the serious objection that there was, on the evidence, no ground for holding that those who signed deeds of covenant—a copy of the form of which had not been included in the pocket or folder—had ever seen the brochure.

D From what I have recited it follows that those who had given moneys to "the Slough hospital" (i.e., for the purposes of the intended Slough hospital as distinct from the King Edward VII, Windsor, hospital, or other objects of the appeal) may be broadly grouped into the following classes: (i) Those whose subscriptions had made up the £6,000-odd collected before the publication and issue of the brochure; (ii) those who had contributed to special collections

E made at sporting occasions, entertainments and the like; (iii) those who had signed deeds of covenant (in the form of the so-called "document 2"); and (iv) those whose subscriptions had been accompanied by forms of the so-called "document 1" with appropriate deletions—to which must be added those (if any) who made appropriate use of the other two forms enclosed in the pocket of the brochure. The effect of the learned judge's judgment was to hold that

F persons in the first two classes had no right, or interest in, or to a return of their donations, but that persons in the third and fourth classes were, in the events that had happened, entitled to a return of the sums contributed by them.

It is, however, reasonably plain that the classification above made would prove, on the fullest analysis, an over-simplification. Apart from those (and there are likely to have been at least some) who accompanied their gifts by

G some kind of special letter and those (and, again, there will have inevitably have been some) who failed to make correctly the deletions which document 1 suggested, there would be donors who preferred to remain anonymous and donors, in addition to contributors to collections, who accompanied their gifts by no written communication of any kind. Partly, no doubt, having regard to the limits of administrative convenience, UPJOHN, J., resolved these problems,

H in effect, by confining the class of persons entitled to recover their donations to those strictly falling within the last two heads already enumerated. Thus, the relevant declarations in his order were as follows:

"And this court doth declare that the assets now representing the funds subscribed (otherwise than anonymously) . . . which were at the time of such subscription allocated in writing by the donors thereof for the said projected hospital now belong to the subscribers of such funds in the proportions in which they subscribed the same. And this court doth declare that the

assets now representing the funds subscribed . . . for the purposes of the said projected hospital but which were not allocated thereto in writing signed by the donors thereof at the time of their subscription or were subscribed anonymously do not belong to such donors and that such donors now have no interest in the said assets."

There has been no appeal on the part of those excluded from the benefit of the order by its second recited paragraph. We have also been informed that the Treasury Solicitor makes no claim to any of the moneys as belonging to the Crown as bona vacantia. The only question before us has been whether the declaration in favour of those persons comprehended by the first recited paragraph of the order was rightly made.

Before proceeding to consider the grounds and validity of the judge's conclusion, I will add some further facts relating to the history of the appeal. The total sum collected from all sources for "the Slough hospital" has amounted to approximately £50,000. Of this sum approximately £30,000 is represented by donations falling under heads (ii), (iii) and (iv) above stated, and of that figure about one-half (£15,000) represents payments made under deeds of covenant in the form of document 2. It appears that the land acquired out of the original £6,000 was later sold (at a profit). The council, or trustees on their behalf, proceeded as late as 1948 (but before the coming into operation of the National Health Service Act, 1946), to buy another substantial estate (for the sum of £30,000) on the outskirts of Slough, and this property was (as to the greater part of it) let to, and is now held by, an institution called the Canadian Red Cross Memorial Hospital, which is in fact a general hospital now vested in the Minister of Health, on a yearly tenancy. The trustees also acquired (for £11,500 odd) a further property which is let to an institution known as the Slough Industrial Health Service, Ltd., and is used to provide accommodation for doctors, nurses and physiotherapists engaged in the health services of the area. The figure of £50,000 above mentioned included the profit made on the sale of the original property, and also the cost price of the two properties later bought.

The question of the rights of subscribers is, no doubt, not to be determined by reference to what the trustees may, or may not, have done in purported exercise of their powers as trustees—save to the extent that their actions might be said legitimately to reflect the intention of the donors, among whom the trustees were themselves numbered. The facts recited might, however, have been suggested to bear on the question whether the purposes for which the moneys were subscribed had, in any event, been wholly frustrated; and might also give rise to difficult questions of the exact rights of any subscribers where the investment of their subscriptions had resulted in a gain or a loss. No point was made during the argument of any of the kinds suggested. But I have referred to the facts as showing that the case is, to my mind, at least in some respects distinguishable from such a case as that of *Re University of London Medical Sciences Institute Fund* (1), where, the project for the intended Medical Sciences Institute having been totally abandoned as impracticable, no application (save for temporary investment) had ever been made of the funds subscribed, and such funds remained intact in the trustees' hands. I add at this point that (as appears from the evidence in the case) donations under the second and fourth (at any rate) of the above-stated categories continued to be received, though in relatively small amounts, in 1947 and 1948, i.e., at a time when it must be assumed that the effects of the Act of 1946 had become generally known, though there is no evidence of any receipts after the vesting date, July 5, 1948.

The basis of the judge's decision in favour of those categories of subscribers whom he regarded as entitled to a return of their contributions (i.e., categories (ii) and (iv) above) is that, on a proper interpretation of the documents amended and signed by the donors themselves, when read in the light of the brochure which invited their contributions, the intention of the givers was to give for

the single and exclusive purpose of contributing to the cost of erecting a voluntary hospital (as this term is commonly understood) and no other kind of hospital. As regards category (ii) the learned judge was of opinion that the circumstances in which the contributions were made (i.e., on occasions such as collections at a club or dance), including the circumstance of anonymity, the givers cannot have intended to reserve any right to a return of their contributions in any event whatever. In the case of this class of persons the judge followed particularly the reasoning of P. O. LAWRENCE, J., in *Re Welsh Hospital (Netley) Fund* (2), but he did not think that in the present case (as had been held in the *Netley Hospital* case (2) and also by WYNN-PARRY, J., in the later *Re North Devon & West Somerset Relief Fund Trusts* (3)), the circumstances and conclusions relating to gifts in the second category could have any material bearing on the intention, or presumed intention, of donors falling within the third and fourth categories.

I have said that there has been no appeal against the judgment so far as it related to any categories of donors other than those falling within the third and fourth categories, but as regards these last it has been contended on behalf of the Attorney-General, as appellant, that the view of the learned judge unduly emphasised the significance of the references in the brochure to the "voluntary" character of the proposed new hospital; and that on a true interpretation of the brochure and of the forms used and signed by the donors (as amended by their erasures) and in the light of all other relevant and admissible circumstances, the donors of categories (iii) and (iv) did not intend their gifts to be exclusively referable to the erection of a voluntary hospital so as to make them, in effect, conditional on such a hospital being erected, but rather that they intended to give their money for or towards the establishment of a hospital or for hospital services in and for Slough. Alternatively, counsel for the Attorney-General contended that if these donors intended, in giving, to assist in the erection of a voluntary hospital at Slough, there was, nevertheless, in their minds a more general charitable intention—i.e., the intention of promoting hospital services generally in the area, the proposed new hospital being but a preferred manifestation of that more general object.

As I have already sufficiently intimated—and notwithstanding the somewhat special facts already narrated in regard to the application in fact of the trust moneys—I assume that the project of erecting or establishing a voluntary hospital at Slough was never capable of being carried out, and is now wholly impracticable. Counsel for the Attorney-General drew attention to the fact that there is nothing in the Act of 1946 to prohibit the execution of such an enterprise or to cause automatic vesting in the Minister of a hospital "voluntarily" erected or established after July 5, 1948, but I agree entirely with UPJOHN, J. ([1953] 2 All E.R. 1552) that

"... it would now be quite impracticable for a voluntary body of persons to undertake the erection and maintenance of a voluntary hospital ..."; though I agree also with him when he added (*ibid.*):

"... but it is equally proved that not only is it possible, but it is contemplated that a new hospital will be erected in the Slough area by the Ministry of Health, and that work is, of course, as much a charitable work as is the erection of a voluntary hospital ..."

The question is, in the end, a matter of emphasis, when the relevant documents are examined and all relevant circumstances considered. Did the charitably minded subscriber respond to the request: "Please join with other volunteers in combining to build, ourselves and out of our own resources, a hospital of our own at Slough"? or to the request: "Please help to make good the absence of a hospital at Slough—and remember that our voluntary hospital system is one of the most characteristic and beneficent of all English institutions"?

When the case was first opened to us and the terms of the brochure were read, I confess that my inclination was somewhat strongly towards interpreting its appeal in the first of the two senses I have tried to express. But after hearing the whole argument I have reached, eventually, the opposite conclusion. In any case involving the existence of a charitable intention overriding a single specified objective I take as my guide the language of PARKER, J., in *Re William* (4) ([1913] 1 Ch. 321), which was applied and adopted in the two cases already mentioned of the *Netley Hospital* (2) and *Lynmouth* (3) charities. Substituting the word "donor" for "testator", is

"the paramount intention . . . to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires and intentions of the [donor] as to the manner in which the general gift is to be carried into effect?"

In the present case the appeal was a single appeal "on behalf of Windsor, Slough and associated hospitals" so that "really efficient, well-organised hospital services will be made available for all the people of South Bucks. and East Berks." (see p. 1 of the brochure already set out); and the subscriber, invited to "help the council" in one or other of the ways specified on p. 7, was told: "You can earmark your help for either of the hospitals, although you may send it to the council." In my judgment, there is, at least, a strong argument for the view that the "earmarking" by means of the appropriate use of document 1 was no more than a "grafting on to" a general gift in favour of the whole subject-matter of the appeal of "a direction as to the desires and intentions of the donor as to the manner in which the general gift" was to be carried into effect—a view to which the other circumstances later mentioned tend, in my judgment, to support.

But it is no doubt a striking and significant feature of the present case that those who availed themselves of document 1 and struck out all references other than "Slough hospital", may thereby be said not merely to have indicated a preference, but rather to have expressly negatived all other intentions except that in favour of the "Slough hospital". It was this aspect of the matter which most strongly impressed UPJOHN, J., and I, therefore, prefer to rest my conclusion on the first head of the argument on the Attorney-General's part, viz., that though the donors gave their money for the establishment of the Slough hospital (and not, I will assume, for the expansion or endowment of the Windsor hospital, or the other smaller hospitals, or as the council should, in their discretion, distribute it), still it was not of the essence of their gifts or their intention that the Slough hospital should be a "voluntary" hospital. The point may, perhaps, be put another way—if and so far as the donor intended to support a "voluntary" hospital, that was but the manner, the only manner then available, of giving effect to the more general intention of contributing to the provision of a hospital in and for Slough. So put, this head of the argument of counsel for the Attorney-General only differs from the alternative head in the character of the "general charitable intention" which, in this case, is a general intention to provide a Slough hospital, but in the other is a general intention to support hospital services in the whole area covered by the appeal.

In judging of the emphasis properly to be given to the word "voluntary" used in the appeal, it is, in my judgment, essential to bear in mind that, at the relevant date, all hospitals (other than those established and maintained by local authorities) were "voluntary", so that to describe a proposed new hospital to be erected, otherwise than by a local authority, as "voluntary" was, prima facie, to do no more than state one of its inevitable characteristics. To emphasise, therefore, the obvious and inevitable characteristic in an appeal of this nature, and the virtue of the existing "voluntary hospital system", may (at any rate) be fairly regarded as doing no more than to give cogent reasons why a "hospital

appeal " should excite the generosity of those to whom it was addressed. In support of this interpretation the Attorney-General particularly relied, for example, on the second half of the first paragraph on p. 1 of the brochure which emphasised the need, in the interests of efficient economy, of goodwill and co-ordination between the general " voluntary " hospitals in the area with the hospitals established and maintained by the local authorities. The Attorney-General likewise stressed the fact that the proposed hospital was described (e.g., on p. 3 of the brochure and in the all-important document 1) as " the Slough hospital " rather than " the Slough *voluntary* hospital "—its voluntary character being assumed, but not put forward as the essential object or condition of the solicited donations. And junior counsel for the Attorney-General added that if the voluntary character of the new hospital was of the essence of the matter in the sense I have indicated, then it is noteworthy that Sir Noel Mobbs, the surviving member of the council and himself a substantial donor, nowhere so stated in his affidavit.

In my judgment, therefore, the emphasis on the " voluntary " character of the proposed hospital was not such as to give to the appeal, in this respect, what counsel called a " partisan " quality, and I cannot, for my part, construe the cited extracts from the report of the Sankey Commission, and particularly the reference to " the dislike of over-control and bureaucracy which is inherent in the genius of our race ", as giving, in their context, such a partisan colour to the brochure as a whole. I think, moreover, that other legitimate considerations support the view which I have formed. Thus, if the judge's view is right, the result is to create a class of benefactors somewhat artificially distinguished from the rest—viz., that class (and that class alone) consisting of persons whose donations were accompanied by documents in the form of document 1 whereon references, other than one or other of the references to the Slough hospital, had been erased. The right or privilege of the class thus defined was not, in the first place, shared by those who had contributed the £6,000 originally collected by the council—the first of the four categories which I have earlier specified, for it is not shown what were the circumstances in which these contributions were made. Nor, in my judgment, was it shared by the signatories of deeds of covenant, the third of the stated categories, for, although the members of this class of donors, by making the appropriate deletion, indicated their intention of benefiting, exclusively, " the Slough hospital at Slough ", it is not established that they did so under the impulse of the brochure; and unless read with the brochure the wording of the deeds of covenant cannot be said to have emphasised the voluntary character of the Slough hospital so as to justify the inference that their gifts were conditional on the projected Slough hospital being a voluntary hospital. Counsel for the Official Solicitor did not, indeed, press us to the contrary in the course of his argument, and, in the result, the covenantors must, in my view, be in any case excepted from the first of the declarations which I have cited from the judge's judgment, reducing its scope, in value, by a half. Thirdly, the privilege or right is not shared, according to the terms of the judgment itself, by those who gave anonymously or without the accompaniment of a document in the form of document 1; for, apart from the administrative difficulty created by anonymity, the intention necessary to support the inference of a resulting trust required the combination of a signed and duly completed document in the form of document 1 and the terms of the brochure. For this reason I think there must also be excepted from the benefit of the judge's declaration those (if any) who made use of either of the two forms, other than document 1, which were enclosed in the pocket or folder of the brochure, for in these cases there is absent the express exclusion of the council's discretion on which *URSON, J.*, particularly relied, and I find it difficult to suppose that a resulting trust arises, or does not arise, according as the donor struck out the word " Windsor " or the word " Slough ". Fourthly, and last, there is excluded

from the right or privilege (as the judge held in his second declaration) those contributors to collections who constitute the second category above specified, for, apart from the almost insuperable administrative difficulty in the way of making a return to these persons occasioned by the circumstances of their gifts, and particularly their anonymity, it has been conceded that persons giving to such collections must be taken to have intended to part, out and out, with their money in any event—an inference inconsistent with an intention to benefit a limited and exclusive purpose, or with any but a general charitable intention.

The fact that there had been collections of this nature strongly assisted P. O. LAWRENCE, J., to the conclusion he reached in the *Natley Hospital* case (2) as regards other individual and named subscribers: and the same is true of the *Lymington* case (3). It is clear that UPHAM, J., did not regard as impressive an analogous argument in the present case—more particularly since in the *Natley* (2) and *Lymington* (3) cases the question had arisen only in regard to the surplus remaining after full effect had been given to what was, admittedly, the special object of all the contributors. I agree with the learned judge that, if the particular circumstances in which one donor has made his donation—including his own written statement at the time of making it—lead to a clear conclusion on the question of his intention, that conclusion cannot be changed because other persons giving to the same cause in different circumstances must be taken to have had a different intention. But where, as, I think, in the present case, the circumstances affecting the presumed intention of the first donor are, at best, equivocal, then, as it seems to me, it is a relevant and admissible fact in determining his true intention that when he contributed to the fund he must be taken to have known that his contribution would be mingled with thousands of others, substantial numbers of whom were contributing in circumstances which negatived any right or expectation on their part to any return of their money in any circumstances. I am, indeed, stating in another form what I have said already, viz., that, if counsel for the Official Solicitor is right, then there emerges a class of contributors whose isolation from their fellow contributors appears (to my mind, at any rate) to be not only unreal and contrary to common sense, but also unjust, for whatever emphasis can legitimately be placed on particular passages in the brochure and on the use made of document I, it is not in doubt that the appeal which brought in the whole of the £50,000 collected was a single appeal addressed to all who would lend their ears to it.

It will be appreciated that the process of elimination which I have employed will in any case have left in the class entitled to the benefits of the judge's first declaration considerably less, in value, than half the total of the benefactors. But there remain two further matters of fact still legitimately, in my judgment, to be considered. First, the donors who made use of document I include, as I have already stated, some at least who contributed at dates after, as it must be assumed, the effect of the National Health Service Act, 1946, already passed, had become clearly apprehended, and on the part of whom, therefore (on precisely the same material as is pertinent to the cases of earlier donations of the same category), a presumed intention to subscribe only towards the creation of a voluntary hospital cannot sensibly or easily be discerned. Secondly, when the present question came to be brought before the court, and when advertisement was made for any donor to permit his name to be joined as representing those donors who might claim to be entitled to a return of their donations, none was found ready to come forward and make such a claim. I make every allowance for natural embarrassment, but it (as the argument has suggested) donors were urged to give to the projected voluntary hospital at Slough from "the desire of over-control and bureaucracy which is inherent in the genius of our race". I find it difficult to suppose that none was found whose feelings in this regard were sufficient to overcome (without risk as to costs) mere anonymity or diffidence.

Domestic, therefore, as I do, the language of the brochure, even when taken in conjunction with document I, suitably employed, as at best in some degree

A equivocal. I come to the conclusion that the various other facts which I have
enumerated are relevant and admissible for consideration and render it impossible
to find or presume, as regards any class of donors, an intention such as to entitle
them, in the events which have happened, to a return of any part of their
donations. In my judgment, there is no good answer to the summary of his
argument which counsel for the Attorney-General put before us, which was to
this effect: It is sought to find a common intention, limited to a single and
specific object, among all givers of a particular category: the particular category
put forward is that of donors who, in response to the brochure, made use of
document I to specify the Slough hospital: but whatever might be the interpre-
tation properly put on these documents, as it were, in *vacuo*, the fact is that the
category selected not only included persons who subscribed after the passing
of the Act, but also consisted of persons who must be taken to have been aware
of the pre-brochure contributions, and aware also of the fact that their gifts
would be intermingled with those of others who would not in any circumstances
expect, or be entitled to claim, a return of their money: and, therefore, no
such intention can be found common to donors of a particular category differen-
tiating them from the rest of the contributors on whose part no claim for any
return could be substantiated. More briefly, but, in my judgment, no less
correctly, the matter was thus put by junior counsel for the Attorney-General
in reply when he said that where there are many sources of contribution to a
charitable fund, then all contributors should, in the absence of special circum-
stances, be taken to contribute on terms common to all, and the only such terms
possible in the present case deny any right to a return of their money to all
contributors.

D To this general conclusion, however, it is, I think, necessary to make one
exception: though for reasons which (because of the importance and complexity
of the case, and because I am differing from UPJOHN, J.), I have stated fully, I
am of opinion that the facts proved do not suffice to entitle any definable class
of donors to claim a return of their donations, it clearly remains possible that
some individual donor may have attached to his gift such special terms as would
enable him, distinguishing himself from his fellow contributors, to claim now a
return of his money. I see no reason, on administrative or other grounds, why
(if necessary) an inquiry should not be directed for that purpose, though, having
regard to my general conclusion and to the absence of any individual claimant,
so far, I do not regard it as likely that any such individual claims would be put
forward, or could be successfully made. On the other hand, I see no reason to
exclude their possibility.

F In my judgment, therefore, this appeal should be allowed and a declaration
made that the assets now representing the funds subscribed for the projected
hospital at Slough do not belong to the donors thereof, and that such donors have
now no interest therein: provided that such declaration is without prejudice to
the right of any individual to prove to the satisfaction of the trustees or (if
necessary) the court, that he is now entitled to a return of his donation on the
ground that the same was made and intended by him exclusively for the purpose
of the erection of a voluntary hospital at Slough. Subject to what learned counsel
may wish to say on the form of the order, it seems to me that the case should be
referred back to chambers for the purpose of any necessary inquiry or directions,
including the settlement of a scheme for the *ex-parte* application of the said assets.

H DENNING, L.J.: When an appeal was made to the public in 1939 for
money to build a new hospital at Slough, the only hospital in mind was a volun-
tary hospital. Naturally enough, those who made the appeal stressed the benefits
of the voluntary hospital system. A large sum of money was collected in
amounts, large and small—the large amounts by donations and seven-year
covenants; the small amounts by church collections, collecting boxes, and so
forth. The trustees with some of the money bought a suitable site for a hospital,

but they have never been able to build it. The coming of the National Health Service has made it practically impossible now to start a new voluntary hospital. So the question is: What is to happen to the money which the trustees have collected? The judge has drawn this distinction. He has held that those who made gifts in writing in favour of the Slough hospital get their money back; but those who put nothing into writing do not. I do not think this distinction is well founded.

Let me first state the law as I understand it in regard to money collected for a specific charity by means of a church collection, a flag day, a whist drive, a dance, or some such activity. When a man gives money on such an occasion, he gives it, I think, beyond recall. He parts with his money out and out. He can, of course, insist on it being used for the named purpose. If the trustees of the charity do not apply the money for that purpose when they could well do so, the giver can set the law in motion. He can get the Attorney-General to bring proceedings to see that the trustees do their duty, but he cannot get his money back.

The question is: What is to happen when the trustees cannot apply the money in the way intended? Suppose, for instance, they have got more than enough, what is to happen to the excess? It is, I think, well settled that if the money received by the trustees is more than is needed for the named purpose, they do not have to return the surplus to the givers. They must apply it under the directions of the court for a purpose as near as may be to the original purpose. The reason is not solely on the ground of inconvenience. It is not merely because it is practically impossible to find out who gave the money or to check the claimants. It is because they all gave their money without reserve, and no reserve will be imputed to them. It is useless to ask what was their intention, for a situation has arisen which they did not contemplate, and for which they did not provide. They had formed no relevant intention. So the law must provide. The law must say what is to happen to the money. It does it by making presumptions in favour of charity. It presumes that those who gave the money would wish that any surplus should be devoted to a charitable purpose as near as may be to the original purpose: see *Re Monk* (5), per SARGANT, L.J.; the *North Devon* case (3); and *Re British School of Egyptian Archaeology* (6), per HARMAN, J. ([1954] 1 All E.R. 892). Next, suppose that the specific charity fails before the money is spent at all. The trustees have the money in their hands, but the purpose cannot be fulfilled. What is to happen to the money which has been collected in church, on flag days, and so forth? The answer is, I think, the same as in the case of a surplus. The money has been given out and out. No one of those who gave it ever intended that it should be returned. If any one of them had been asked what was to happen to the money if the named purpose became impossible of fulfilment, he would have said: "If that should happen, I will expect you to use it for some other good cause, but I will not expect it back". The law gives him credit for the best of intentions and presumes that he would have wished it so.

Now let me turn from the church collections and flag days to the donations by cheques and deeds of covenant. These were allocated in writing by the donors, and the judge has held that they are entitled to their money back. He has refused in their case to make a presumption in favour of charity. This seems to me to take a rather harsh view of the donors. I do not myself think that the donors of large sums would wish to get their money back when those who give small sums do not. Those who give of their abundance are just as generously minded as the poor widows who give their mites, and all should be treated alike. All know that their moneys are given for the same purpose. All know that the moneys are held on the same trusts, whatever the form in which they are given, whether in pence in the church collection or in cheques from the wealthy industrialists. The law in all cases should make a presumption in favour of charity. It should impose on the trustees the same trust for all the money they

receive, viz., to apply the money for the named purpose or, that failing, to apply it for a charitable purpose as near as may be to the original purpose: see the *Welsh Hospital Fund* (2).

A There may be some exceptional cases where the donor makes it clear that if the main purpose should become impossible, he will want his money back. I regard the *Medical Sciences* case (1) as such a case. But in the absence of some such evidence, the law will, I think, make in every case a presumption in favour of charity.

B The present case shows how right the law is to make this presumption. Before the matter was brought before the court, the trustees issued many advertisements in the local papers inviting people to claim their money back. No one did so. The trustees even invited some of the larger subscribers to be parties to friendly proceedings to claim their money back, but none of them was willing to claim it. C As no one was forthcoming, there was nothing left to be done except ask the Official Solicitor to represent the donors, and he has done so. And it is significant that, even now, not a single person has come forward, not a single affidavit has been made, to rebut the presumption of charity. I cannot help thinking that all of them would prefer the court to apply the moneys for some charitable purpose as near as may be to the original, and that is what, I think, the court should do. I confess that when the present case was opened to us, I had a different impression. It looked as if these moneys were given specifically for the building of a voluntary hospital at Slough, and that the Crown was seeking to take them for a State hospital. In short, the Crown wanted to apply it for a purpose directly contrary to what the givers intended. But that is not correct. D Our ruling today does not mean that the moneys must of necessity go to a State hospital. In applying the money *cy-près*, the court will bear in mind that the money was provided not only for a hospital at Slough, but also for a voluntary hospital, and will seek out some purpose as near as may be to the original intention. The trustees have put forward a scheme which has the approval of the large subscribers. The proposal is that the piece of land (which the trustees E acquired for the purpose of a hospital) should be handed over to the Minister of Health so that he can build a new hospital there, and that the rest of the money should be used for voluntary hospital services. That seems to me to be a very appropriate way of using the money and, indeed, to be a way which the donors would have wished. I would allow this appeal so that this can be done.

F ROMER, L.J.: It is with regret that I find myself at variance with my brethren in the conclusions which they have expressed, but, for my part, I am not persuaded that the decision of UPJOHN, J., was incorrect. I think that in one respect the order which he made went too far, but that was due to the assumption, which has since been shown to be unwarranted, that the persons who signed the covenants in the form of exhibit "A.N.M.2." had received a copy of the brochure which is exhibit "A.N.M.1." The terms of these covenants G are not, in my opinion, sufficient in themselves to disclose the existence of a particular charitable intent, and nothing more, on the part of those who signed them, and it was not proved that the brochure was sent to these covenantors or that they ever saw them. The argument of counsel for the Official Solicitor before us was confined to establishing that donors who did receive the brochures, and made their gifts to the Slough hospital in response to the appeal which they H contained, are, in the events which have happened, entitled to have their money back. In my opinion, counsel was right in so limiting his case, because there is no guide (as distinct from guesswork) to show what the intentions of the other contributors may have been.

The question is, accordingly, a narrow one and depends on the intention which is reasonably to be attributed to persons who received the brochures and earmarked their donations to the Slough voluntary hospital by an appropriate use of one of the forms which were enclosed in the pocket of each brochure.

The Attorney-General says that the intention of these persons was to promote the establishment of a hospital in Slough, and if it was a voluntary hospital, so much the better. The contention of the Official Solicitor is that the intention was to promote a voluntary hospital in Slough and nothing else.

It is, in my opinion, a legitimate inference that these particular donors read the brochure which they received and made their gifts as a result of the appeal which it contained. Such an inference was, at any rate, drawn in *Faulder v. A.-G.* (1) to which I refer more particularly hereafter—and is, as I venture to think, a natural one. In my quest, therefore, for the probable intention of these particular contributors I look to the terms of the brochure to see what the proposal was to which they were being asked to subscribe. It was issued and distributed from 1939 onwards by the South Bucks. and East Berks. Hospital Council, which had its headquarters in Slough. By way of preface to what follows afterwards is a commendation by the council to the residents of South Bucks. and East Berks. of the following excerpt from a speech which Lord Horder had made at Liverpool in November, 1938:

"I believe that the voluntary hospital is an essential to this country's well-being today as ever it was. It still stands as a fortress of teaching, of research and of efficient treatment: and as a centre where the spirit of medicine can live in freedom, owing no allegiance to political doctrine nor State expediency."

These features of the voluntary hospitals which Lord Horder emphasised were also stressed in the Sankey Report, the recommendations of which the council hoped (as stated on p. 1 of the brochure) to carry out, and extracts from which are printed, as a conclusion to the appeal, on p. 12. I will not repeat them, but would draw attention to the following passages:

"The freedom of administration which the voluntary system permits is also of fundamental importance; such freedom is an example of the dislike of over-control and bureaucracy which is inherent in the genius of our race. Another asset of the voluntary hospital is that it has been responsible for medical education for many generations; medical education flourishes best in the atmosphere of freedom inherent in the voluntary hospitals . . . The commission therefore conclude this general survey with an emphatic expression of their opinion that the continued existence of the voluntary system depends upon the voluntary hospitals of the country forming themselves into an association, regionally organised, which would be able on all matters of policy to express the considered views of its members and rely upon their loyal acceptance of its decisions."

The appeal, accordingly, both opened and closed with reasoned tributes to the advantages in the way of medical teaching, freedom of administration and otherwise which derived from the voluntary system as distinct from what some people regard as the dead hand of "over-control and bureaucracy". In addition to the passages which I have cited, there are eulogistic references on almost every page to the voluntary hospital system, amongst which I will only quote Mr. John Burns's dictum, printed on p. 4, that

"The voluntary hospitals had saved in the course of a single generation a population equal to that of London or Australia."

In my judgment, the brochure is in pith and substance an appeal for the establishment of a hospital which is to possess an essential quality, viz., the quality of freedom of management as opposed to the control of bureaucratic officialdom. The local philanthropists to whom the appeal was sent were being asked for funds to provide a hospital enjoying the freedom of administration which the Sankey Report described as fundamentally important, and from which alone could spring the benefits on which Lord Horder and the report itself laid so much stress. Such a hospital would be, at all events potentially, an additional

unit in the association of voluntary hospitals which the Sankey Report envisaged as essential to the continued existence of the voluntary system itself.

In my opinion, the particular character of the purpose in aid of which the council sent forth their call for funds was of the essence of the appeal, and would be regarded as such by those who responded to it, and I think that it is a legitimate and reasonable inference that those persons who disclosed their preference, on any one of the forms provided, for the voluntary hospital at Slough would anticipate that their money would be devoted to the projected institution at Slough which was described in the appeal, and to that alone. If that project should become abortive, as in fact it did, these subscribers would, as I think, both expect and intend that their contributions would be returned so that they themselves could decide to what other purpose, charitable or otherwise, their money should be applied. It is difficult to suppose that a man whose "dislike of over-control and bureaucracy" was deep and fundamental would view with equanimity the diversion of his gift, without reference to himself, to a hospital controlled by the Ministry of Health; and such is the proposal in exhibit "A.N.M.12." in relation to Wexham Park. The feelings of such a man might well be compared to those of one who subscribes to a movement for liberating wild birds which are kept in captivity and finds his gift applied to the establishment of a municipal aviary.

I appreciate, I hope, the arguments which are urged against my view, but I do not, with respect, think myself that they convincingly support the Attorney-General's case. It is said that the public continued to subscribe even after the health scheme loomed up on the horizon. It is true that they did (though in markedly diminished numbers), but there is no evidence to show that the council continued to send the brochures out after it was known that the voluntary system was doomed; moreover, those who did know something of the proposals which were eventually embodied in the Act of 1946 did not necessarily appreciate that they involved the appropriation of the voluntary hospitals by the State. Then it is said that as all hospitals which the public were asked to assist were voluntary at the time when the appeals were sent the references in the brochures to the voluntary system were merely exhortatory. I do not take this view myself. In my opinion, these references were the very foundation of the appeal and were designed to secure the preservation and the development of the voluntary system and the avoidance of a bureaucratic system taking its place. It is further urged that the brochure revealed that funds would be raised by such means as the organisation of special efforts among sports clubs, dramatic societies, etc., and that persons who responded to such efforts would in no circumstances expect to recover what they gave. This, of course, is perfectly true, but I find it difficult to see how it really affects the matter. If a man contributes £5,000 towards the promotion of some particular purpose, his intention of getting back his money if the purpose fails is not lessened, I should have thought, by the knowledge that the organisers are also approaching the general public for coins through the medium, for example, of collecting boxes in the streets.

Finally, reliance is placed on the fact that none of the donors has asked for his money to be returned, or been willing to be made a representative defendant in these proceedings. I am not greatly impressed by this, for it needs some moral courage to ask for the return of money already subscribed, and still more to play the role of Shylock (for some people might so regard it) in litigation which is of considerable local interest.

In a recent case, *Re British School of Egyptian Archaeology* (6), HARMAN, J., observed ([1954] 1 All E.R. 892) in effect that in this field of law one case is not usually of much assistance in another, and I agree with him, for each case has to be decided on its own particular circumstances. The *Welsh Hospital Fund* case (2) and the *North Devon Relief Fund* case (3) were different from the present in at least two important respects. First, in neither case was it shown that the

donors, or any particular class of donors, had signed documents which disclosed so narrow and specific an intention as those which the donors in question signed in the present case. Secondly, each of those cases was concerned only with the surplus which remained after the primary purpose had been achieved; and, in my opinion, there is far less reason to suppose that a donor expects to receive back some small fraction of such a surplus than there is to suppose that he expects to get his contribution back if the whole object of his bounty fails before any money is spent on it at all.

In so far as an earlier authority does assist, it seems to me that *Faulkner v. A.G.* (1) has some bearing on this case. There the University of London resolved that

"steps be taken to secure a site and funds to enable the senate to establish an Institute of Medical Sciences in the near neighbourhood of the university."

Appeals were, it seems, accordingly, made to certain members of the public to assist financially in the project, but the proposal failed to take effect, for various reasons, and came to nothing. The senate thereupon returned to the subscribers the contributions which they had made, and both JOYCE, J., and the Court of Appeal expressed the view (it was not an actual issue in the proceedings) that the senate had acted correctly. On this point JOYCE, J., said ([1909] 2 Ch. 4):

"... that contributions towards a scheme which it is found cannot be carried out are returnable to the donors is a matter of course";

and FARWELL, L.J., said (*ibid.*, 8):

"I do not think that anybody who was not a lawyer could for one moment doubt that the university were bound to return at once to the living subscribers the moneys which had been sent to them for a scheme which they had abandoned . . ."

There is, in my opinion, nothing illogical in holding that the persons who received the brochure and earmarked their contributions to the Slough Hospital are entitled to repayment, although other subscribers are not, for it is a matter of ascertaining the intention of the donors, and it is only in relation to these particular subscribers that an intention can be discovered, as I think, from the terms of the appeal and the forms which they filled in so as to give expression to their wishes. If in fact any other donor, whether large or small, could prove that his intention was the same, even though he had not seen the brochure, he would be entitled to the same relief; but there is no evidence, on the material before us, from which a similar intention on the part of other donors can be inferred.

For the above reasons, I would dismiss the appeal (subject only to the question of the covenantors), but as my brethren take a different view the appeal will be allowed.

Appeal allowed: declaration accordingly.

Solicitors: *Treasury Solicitor, Official Solicitor; Kenneth Brown, Baker, Baker* (for the trustees).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. INDUSTRIAL DISPUTES TRIBUNAL. *Ex parte*
TECHNALOY, LTD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.JJ.), February 15, 16,
March 29, April 8, 1954.]

Master and Servant—Trade dispute—"Dispute"—"Issue"—Difference as to observation of recognised terms and conditions—Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), art. 1, art. 2, art. 9 (2).

The employers, a firm of iron-founders, were not members of the Engineering and Allied Employers' National Federation which, in November, 1951, came to an agreement with the Confederation of Shipbuilding and Engineering Unions, whereby it was agreed that they should pay increased rates of wages and grant sixteen days' holiday a year to members of the confederated unions. On learning that the employers were not paying the agreed rates to members of one of the confederated unions employed by them, that union reported the matter to the Minister of Labour, who referred it to the Industrial Disputes Tribunal for adjudication as a "dispute" under the Industrial Disputes Order, 1951, art. 1. On a motion by the employers for an order of prohibition prohibiting the tribunal from proceeding further with the reference made to them by the Minister,

HELD (per SOMERVELL and BIRKETT, L.JJ.): an "issue" within art. 9 (2) of the order was a controversy which involved the question whether an employer who was not bound by the recognised terms and conditions of employment within the industry should implement the established code of terms and conditions as a whole, whereas a "dispute" was a controversy confined to the implementation by an employer of a limited aspect of the code, e.g., wages and holidays; the controversy in the present case was limited to the question of increased wages and holidays; and so was a "dispute" and not an "issue"; (per ROMER, L.J.): an "issue" could not be rigidly confined to the question of enforcing a general code of terms and conditions in its entirety, and the failure of an employer to implement some part only of a general code could constitute an "issue" or a "dispute" within the meaning of the order and be dealt with as such; and, therefore, the matter had properly been referred to the tribunal as a "dispute" and the tribunal could properly hear and determine it as such.

Decision of DIVISIONAL COURT ([1953] 2 All E.R. 1338), reversed.

FOR THE INDUSTRIAL DISPUTES ORDER, 1951, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 7, p. 166.

Case referred to:

(1) *Hulland v. Sanders (William) & Son*, [1944] 2 All E.R. 568; [1945] K.B. 78; 114 L.J.K.B. 75; 172 L.T. 35; 2nd Digest Supp.

APPEAL by the Amalgamated Union of Foundry Workers from an order of the Divisional Court dated Oct. 8, 1953, reported [1953] 2 All E.R. 1338.

The employers, Technaloy, Ltd., moved the Divisional Court for an order of prohibition directed to the Industrial Disputes Tribunal to prohibit them from further proceeding on a reference made to them by the Minister of Labour on Dec. 4, 1952. The matter was referred to the tribunal in the following terms:

Employers: Technaloy Limited, iron-founders. Workers: Members of the Amalgamated Union of Foundry Workers of Great Britain and Ireland in the employment of the said employers. Description of the dispute: The dispute arises out of a claim made by the said workers that the company should implement the agreement between the Engineering and Allied Employers' National Federation and the Confederation of Shipbuilding and Engineering Unions dated Nov. 29, 1951, relating to wages and holidays with pay . . . The dispute was reported to the Ministry on Nov. 20, 1952,

by the Amalgamated Union of Foundry Workers of Great Britain and Ireland . . . ”

The reference to the tribunal arose in the following circumstances. On Nov. 29, 1951, an agreement was reached in the iron-founding trade between members of the National Federation and the confederation whereby an increase of 3d. per hour was to be granted to all members of the confederated unions by all members of the federation. Terms were also agreed for the provision and calculation of holidays. Shortly after this agreement was reached an official of the foundry workers' union, Mr. Cornwell, visited the offices of the employers in the present case and found that members of the union employed by the employers were not being paid the extra 3d. per hour. The attention of the employers was drawn to the matter. They were not members of the National Federation and so were not parties to the agreement of Nov. 29, 1951, and they contended that they were paying wages in excess of those generally paid in the trade, and that the conditions of employment of their workmen were in no way less favourable than the terms provided by the agreement of Nov. 29, 1951.

The tribunal heard the case and made an award on Jan. 8, 1953. That award was brought before the Divisional Court on a motion of certiorari and quashed on the ground that it was bad on its face as the tribunal had given an increase of wages retrospectively beyond the date covered by the agreement. Following the decision of the Divisional Court, the tribunal gave notice to the parties that they proposed to proceed afresh with the reference and the employers moved for an order of prohibition restraining them from further proceeding.

The Divisional Court held that the Industrial Disputes Order, 1951, distinguished between “ issues ” and “ disputes ” and laid down different procedures for the consideration by the tribunal of each; that the question to be determined was whether the applicants were bound by the agreement to which they were not parties, which was an “ issue ” within the terms of art. 9 (2) of the order; the matter had been referred to the tribunal as a “ dispute ”; and, therefore, the order of prohibition would go.

Pritt, Q.C., and D. J. Turner-Samuels for the union.

Beney, Q.C., and N. Lawson for the employers.

S. B. R. Cooke for the Ministry of Labour and National Service.

Cur. adv. vult.

Apr. 8. The following judgments were read.

SOMERVELL, L.J.: This case turns on the construction of the Industrial Disputes Order, 1951. Article 1 is headed: “ Reporting of disputes ”. Article 2 is headed: “ Reporting of issues concerning recognised terms and conditions of employment ”. Matters arising under either article can be referred by the Minister of Labour to the Industrial Disputes Tribunal. In the present case the tribunal are proposing to deal with a matter referred to them by the Minister as a “ dispute ”. The Divisional Court, at the instance of the employers, *Technaloy, Ltd.*, have issued an order of prohibition directed to the tribunal on the ground that the matter is not a dispute within the meaning of the order, but an issue. The respondents, the Amalgamated Union of Foundry Workers, appeal and the Ministry of Labour, who is rightly a party, appears before us.

I will read the relevant parts of the two articles: Article 1:

“ Where a dispute exists in a trade or industry or section of trade or industry or in an undertaking and that dispute is reported to the Minister in accordance with this order by— (i) an organisation of employers, on behalf of employers who are parties to the dispute; (ii) an employer, where the dispute is between that employer and workers in the employment of that employer; or (iii) a trade union, on behalf of workers who are parties to the dispute; and it appears to the Minister . . . ”

Then there are paragraphs which deal with the cases where there is machinery

for voluntary settlement and where there is no such machinery, and then the article continues:

“ . . . that dispute shall be dealt with in accordance with the subsequent provisions of this order.”

It may be dealt with in one way by voluntary machinery or otherwise referred to the tribunal. Article 2 says:

A “ Where—(a) in any trade or industry or section of trade or industry in any district terms and conditions of employment are established which have been settled by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry or section of trade or industry in that district (hereinafter referred to as ‘ recognised terms and conditions ’); and (b) an issue as to whether an employer in that district should observe the recognised terms and conditions (hereinafter referred to as ‘ an issue ’) is reported to the Minister in accordance with this order by an organisation of employers or a trade union; and (c) the Minister is of opinion that the organisation of employers or trade union reporting the issue habitually takes part in the settlement of terms and conditions of employment in the trade or industry or section of trade or industry concerned; that issue shall be dealt with in accordance with the subsequent provisions of this order.”

I have already stated it may be referred to the tribunal.

D Taking art. 2 first and assuming a trade or industry in which terms and conditions of employment have been established within the meaning of the article, A. is an employer who is not a member of the organisation of employers which has negotiated the terms and conditions and is not, therefore, bound by them as such. It seems to me clear that the question whether he should be bound by them as such is the matter with which art. 2 primarily deals. Under the later articles of the order the tribunal has power to order that A. shall be so bound in so far as the terms and conditions are applicable to him. One of the grounds on which the tribunal can refuse to make an order is that the terms actually observed by employer A. are not less favourable than the recognised terms. If the tribunal makes an award it can substitute for the recognised terms terms not less favourable. These I think all point to the code as a whole.

F The principal order which this order revoked and displaced was S.R. & O., 1940, No. 1305. Part I dealt with disputes on similar lines to art. 1 of the present order. Part III is headed: “ Recognised terms and conditions of employment.” Article 5 (1) of that Part reads as follows:

G “ Where in any trade or industry in any district there are in force terms and conditions of employment which have been settled by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry in that district (hereinafter referred to as ‘ recognised terms and conditions ’) all employers in that trade or industry in that district shall observe the recognised terms and conditions or such terms and conditions of employment as are not less favourable than the recognised terms and conditions.”

H There are later provisions as to what could be done if an employer failed to observe the terms which were considered in *Hulland v. William Sanders & Son* (1). Broadly speaking, what was mandatory under the old order now goes as an issue to the tribunal. It is reasonable to regard art. 2 as replacing art. 5 of the earlier order and the latter article was dealing with the terms as a whole. It was, I think, agreed that the question whether an employer, admittedly a party to the recognised terms and conditions, was carrying them out would be

a dispute. The recognised terms and conditions, like ordinary contracts, would give rise to questions of construction and application.

In the present case the union reported to the Ministry the failure of the employers to implement an agreement between the Engineering and Allied Employers' National Federation and the Confederation of Shipbuilding and Engineering Unions dated Nov. 29, 1951. That agreement provides for an increase of wages and for six bank and other holidays in addition to sixteen days' holiday. The employers were not a member of the federation. The court, in the course of the hearing, asked for and received further information as to the terms and conditions apart from this agreement. There are a large number of national agreements between the federation and the confederation dealing with industrial relations, working conditions, wages and other terms, and conditions of employment. There is a handbook of over six hundred pages. The employers are not members of the federation, and the union is not claiming or suggesting that the employers should be so bound. The difference is confined to the increase in pay and the holidays.

The employers alleged that there was no dispute with their workmen which is a condition precedent for a dispute although not for an issue. There were conflicting affidavits, but the Divisional Court held that there was such a dispute at the material time, and I agree. This, of course, does not on any view conclude the matter. I have said that there might be an issue whether employer A. should be bound by the recognised terms although his actual employees were perfectly content. On the other hand, in the more usual case the employees would, through the union, be raising the "issue". Although I have come to the conclusion that this was a dispute and should be allowed to go forward as such, the trouble has arisen in part from the form in which it was reported. This form persists to some extent in the formulation of the dispute in the reference by the Minister to the tribunal:

"The dispute arises out of a claim made by the said workers that the company should implement the agreement between the Engineering and Allied Employers' National Federation and the Confederation of Shipbuilding and Engineering Unions dated Nov. 29, 1951, relating to wages and holidays with pay."

That is the reference. The implementation of national agreements echoes the wording of art. 2 (b) of the order and suggests an issue. If one assumes a simple case, where there is added to a large body of agreed terms and conditions a one-line agreement to the effect that the working week should be reduced to forty-four hours, a company not bound by the terms and conditions continues to work a forty-six hour week and the employees complain to their union. The dispute here is clearly, in my view, the length of the working week in that particular factory. The national agreement is *prima facie* relevant evidence. The union would submit that these employers could do what the federated employers had agreed to. The employers might have an answer based on special circumstances or possibly other conditions more favourable than under the national agreements. If, in that case, the matter had been put forward as a demand that the employers should implement this agreement this would not, in my opinion, have made it an "issue" or altered its character. In other words, the question whether an employer not bound by the recognised terms should, in fact, carry out one or more of these terms, but not the terms as a whole (as far as applicable), is, I think, outside art. 2. In other words, what I have described as the primary purpose of art. 2 is, in my opinion, the only purpose, and I imply after the word "conditions" in art. 2 (b) the words "as a whole" or some such phrase. This is, I think, borne out by the words of art. 9 (2). The wording there indicates that the issue is concerned with the code as a whole.

I thought it convenient to deal first with the question of construction. In

fact, the matter as so referred came on originally before the tribunal, who made an award in the following terms:

"The tribunal have given careful consideration to the above-mentioned statements and submissions made on behalf of the parties. They find, and so award, that the company shall apply to the workers concerned the provisions of the agreement between the Engineering and Allied Employers' National Federation and the Confederation of Shipbuilding and Engineering Unions dated Nov. 29, 1951, relating to wages and holidays, with effect as from the date provided therein, namely, as from the beginning of the first full pay period following Nov. 23, 1951."

The employers applied to set this aside on the ground that the tribunal had no jurisdiction to make the award effective as from the date set out. No one sought to uphold the award as so made. The tribunal then gave notice to the parties that they proposed to re-hear the reference and it is in respect of that re-hearing that the order of prohibition is sought. I think the hearing should be allowed to proceed, but there is one matter on which I should like to add a comment. LORD GODDARD, C.J., in his judgment, said this ([1953] 2 All E.R. 1341):

"However, that is a matter for the tribunal. It appears from the affidavit of the managing director of the employers that when they were before the tribunal in January of this year, the tribunal refused to go into the question of the amount of wages paid by the company, stating that the only question to be determined was whether or not the company should be bound by the agreement. If that was the question, it was an issue, and it ought to be determined according to the provisions of art. 9 of this order."

Before us this was disputed and the tribunal's award on the face of it states that they had given consideration to the matters advanced by the employers, which include a reference to their own conditions of employment. It may well be, however, that the infelicities I have referred to in the wording led to a misunderstanding. Evidence as to the wages the employers pay to the employees must be relevant in considering whether there should be an increase. It is not conclusive. As counsel for the union submitted, it may be reasonable that there should be an increase even if the level of wages was higher in the employers' factory than generally, but if it was excluded it was, in my opinion, wrongly excluded. The same principle would apply as to holidays.

For these reasons I would allow the appeal. I would also like to suggest that the wording of the order might well be made clearer than it is. It would be unfortunate if it remained a happy hunting ground for prerogative writs. The fact that ROMER, L.J., takes a somewhat different view of its construction reinforces this suggestion.

BIRKETT, L.J., stated the facts and continued: The ground on which the Divisional Court acted was that the Ministry of Labour had referred the matter to the tribunal as a "dispute", whereas the matter should have been referred to the tribunal as an "issue". The Industrial Disputes Order, 1951, revoked the Conditions of Employment and National Arbitration Orders, 1940 to 1950, but it is plain from the provisions of these orders that their purpose was to prevent work being interrupted by trade disputes, and the National Arbitration Tribunal set up by the Conditions of Employment and National Arbitration Order, 1940 (S.R. & O., 1940, No. 1035), was empowered to deal with all trade disputes. But the order of 1951 made a distinction between "disputes" and "issues". Part I of the order is headed: "Reporting of Disputes and Issues", and art. 1 of Part I deals with reporting of disputes. A dispute is defined in art. 12, and the material words for the purpose of this appeal are:

" 'dispute' . . . means any dispute between an employer and workmen

in the employment of that employer connected with the terms of the employment or with the conditions of labour of any of those workmen."

If such a dispute is reported to the Minister by a trade union on behalf of workers who are parties to the dispute then the Minister must consider the matters set out in art. 1 (a) and (b) of the order and deal with the dispute in accordance with the other provisions of the order. In the present case the Minister referred the dispute to the tribunal under art. 8 of the order. But art. 2 of the order is headed: "Reporting of issues concerning recognised terms and conditions of employment", and as my Lord has already referred to it I will not burden this judgment by reading it again. The "issue", as distinct from a "dispute", has the meaning assigned to it in that article. The Divisional Court has said that the controversy between the employers, Technaloy, Ltd., and the trade union in this case was an "issue" and not a "dispute" within the meaning of the order, the "issue" being whether the employers should observe the terms and conditions of the agreement of Nov. 29, 1951. These terms and conditions, it is said, come within art. 2 (a) of the order, and the Minister presumably was satisfied that the conditions of art. 2 (c) were fulfilled. Then follows art. 9 (2) of the order which I will not trouble to read at length.

It was submitted on behalf of the employers that the Divisional Court's decision was right inasmuch as the matters in controversy were an "issue" and not a "dispute" within the meaning of the order, and it was said: (a) The reporting of a "dispute" may be made by a trade union on behalf of workers who are parties to the dispute whereas the reporting of an "issue" may be made by a trade union. The report of Sept. 11, 1952, used the words: "... a dispute exists as between this union and the above firm", although the Minister, in referring the question to the tribunal, had used the words: "the dispute arises out of a claim made by the said workers"; and "the dispute as reported to the Minister on Nov. 20, 1952, by the Amalgamated Union of Foundry Workers of Great Britain and Ireland on behalf of the workers." (b) All the twelve men employed by the employers on June 29, 1953, had signed a document stating that there was no dispute with the employers and they were all satisfied with the terms and conditions of their employment.

I am of opinion that neither of these two points is of any assistance in deciding the question in this appeal. Apart from the fact that the affidavit of Mr. Cornwell, the divisional organiser of the union, asserts that he was acting on behalf of the men at their direct request, and that of the twelve men who signed the document on June 29, 1953, nine are not involved in the controversy, I think it is plain that the report was made by the union on behalf of the workers and that the question in this appeal is not to be decided by an expression of views by workers who happened to be employed by the employers at a particular date. The real point to be decided is whether the facts in the case show the controversy to be an "issue" or a "dispute" within the meaning of the order.

The agreement of Nov. 29, 1951, was concerned with two matters only—the 11s. increase and the question of holidays. In asking the employers to fulfil the terms of this agreement the union was asking for the increase in wages and for the additional holidays, and in refusing to fulfil the terms of this agreement, the employers were saying: "We will not pay the increase, nor will we make any alteration in the holidays we grant." I am of opinion that art. 2 of the order and art. 9 (2) of the order do not apply to the facts of the present case, so as to make this an "issue" within the meaning of the order. The definition of "dispute" in art. 12 (1) of the order covers the controversy in this case which was concerned with the terms of the employment or with the conditions of labour. The "issue" defined in art. 2 of the order is something much wider, in my opinion. That article is concerned with what I may call the general case covering the whole of the particular industry. Where in any industry in any district terms and conditions of employment have been established by negotiation or arbitration

between organisations of employers and trade unions and these organisations may fairly claim to be representative of a substantial proportion of the employers and workers, then these terms and conditions may be called "recognised terms and conditions" and may also, I think, be described as a working code for the industry. The question whether any employer in that district should be bound by that code is properly to be termed an "issue". An organisation of employers or a trade union may report that "issue" to the Minister and the Minister may refer it to the tribunal to be dealt with under the provisions of art. 9 (2). The tribunal must then decide: (a) whether recognised terms and conditions applicable to the case exist; (b) whether the employer is observing them; (c) whether the employer, whilst not observing them, is yet observing terms and conditions not less favourable than the recognised terms and conditions, and may make its award to compel the employer to observe what I have called "the code" or such terms and conditions not less favourable than "the code". It is clear in the present case that no such "issue" arose. There was no attempt to make the employers observe "recognised terms and conditions" other than the two matters in the agreement of Nov. 29, 1951. It is true that these two matters had been settled by negotiation between the federation and the confederation and were thus "recognised terms and conditions", and the union was complaining of a failure to implement that agreement, but, nevertheless, in my view, that was a "dispute" within the definition in art. 12 (1) of the order rather than an "issue" within art. 2 of the order.

The additional evidence which we heard gave particulars of the awards and agreements dealing with almost every aspect of industrial relations which had been made from time to time in past years. The Handbook of National Agreements is a small volume in itself, and justifies the use of the words "general code" covering the whole of the particular industry, which I have used in an earlier part of this judgment. The agreement of Nov. 29, 1951, is a part of the code, and is to be interpreted in the light of some former agreements. Nevertheless, I am of opinion that the matter in question was properly referred to the tribunal as a "dispute" and not an "issue", and comes within art. 12 (1) and not art. 2 or art. 9 of the order. The questions in dispute were really two isolated matters, and in no sense is an "issue" raised as I have defined it.

LORD GODDARD, C.J., appears to have been influenced by what happened before the tribunal when they decided the "dispute" which had been referred to them. He said ([1953] 2 All E.R. 1341):

"It appears from the affidavit of the managing director of the employers that when they were before the tribunal in January of this year the tribunal refused to go into the question as to the amount of wages paid by the company, stating that the only question to be determined was whether or not the company should be bound by the agreement. If that was the question, it was an issue, and it ought to be determined according to the provisions of art. 9 of this order."

In the award made by the tribunal on Jan. 8, 1953, the contentions of the employers and the union are fully set out. The decision of the tribunal was, as stated in para. 6,

"that the company should apply to the workers concerned the provisions of the agreement of Nov. 29, 1951."

This looks on the face of it as though the tribunal had had a "dispute" referred to them and they had treated it as though it had been an "issue". But whether it was a "dispute" or an "issue", they could not decide it without examining the wages paid by the employers and the facts relating to holidays, and the statement of the Lord Chief Justice and the statements in the award seem to be in conflict.

We were assured by the learned counsel for the Minister that, whether the matter referred to the tribunal was a dispute or an issue, the employers would be

be entitled to show, if they could, that the terms and conditions of the employment of their workers were not less favourable than the terms and conditions in the agreement of Nov. 29, 1951. In my opinion, this is necessary if the employers are to be treated justly. If, for example, the submission of the union as set out in para. 4 of the award were to be accepted

" that the 11s. per week increase should apply to all adult male workers irrespective of earnings or of rates actually paid,"

it would be depriving the employers of the rights expressly given to them by the order. I would like to say in conclusion that the terms of the order are not easy to construe and that I differ from the Divisional Court with some hesitation, but for the reasons given I think the matters of difference in this case are properly to be described as a " dispute " and not an " issue " and I would allow the appeal.

ROMER, L.J.: It is, in my opinion, a matter of some difficulty to fix with exactitude the precise line of demarcation between what is a " dispute " under the Industrial Disputes Order, 1951, and what is an " issue ". I am fully in agreement with my brethren in thinking that the conception of an " issue " in the order is primarily related to the question whether or not a general code of terms and conditions of employment which exist in any particular district should be enforced as a whole on some employer in the district who is not already bound by them. For myself, however, I feel some difficulty in accepting the view that an " issue " is rigidly confined to the question of enforcing a code in its entirety and that any difference between employers and employees which is in any degree narrower in its scope than that cannot constitute an " issue ", but must be dealt with on the footing that it is a " dispute ". That which may be reported to the Minister by a trade union as an " issue " under art. 2 of the order is whether an employer should observe the recognised terms and conditions, which postulates that the employer concerned is not already observing them. Not the least important of such terms and conditions, presumably, are those which regulate the pay of the workmen, and I think it would be difficult to deny that an employer who disregarded the terms and conditions as to pay but faithfully conformed to the others was not observing the recognised terms and conditions. If so, he could, as it seems to me, be the subject of a report under art. 2 and of an award under art. 9. It is further to be observed that the tribunal has jurisdiction to act under art. 9 if it is " of opinion that there are recognised terms and conditions applicable to the case ", which is narrower language than that used in art. 2 and would seem to visualise the imposition by award of something less than the district code in its entirety. In addition to these considerations, it was suggested in argument before us, with, possibly, some force, that whereas an award on a " dispute " only operates in favour of the particular workmen whom it concerns, an award on an " issue " is, as it were, an award in rem and enures to the benefit of all subsequent employees. If this be so, it would be strange if the hypothetical employer to whom I have previously referred could avoid the imposition of a permanent obligation by showing that he was conforming to all the recognised terms and conditions with the exception of those relating to pay. I, accordingly, think on the whole that the refusal of an employer to observe an important part, but only a part, of a general code may be reported as an issue under art. 2 and dealt with by the tribunal as such.

If so, can a limited " issue " of this description be treated as a " dispute " as well? It is not outside the definition of " dispute " in art. 12 of the order. That definition includes all disputes between an employer and his workmen other than a dispute as to the employment or non-employment of any person or as to whether any person should or should not be a member of any trade union. It seems to me, therefore, that such an " issue ", being within the definition, can also be dealt with on the footing that it is a " dispute " unless there is some good

A reason, procedural or otherwise, for regarding all "issues" and "disputes" as being mutually exclusive. So far as procedure is concerned, I can see no such reason. An "issue" has to be reported either by an organisation of employers or a trade union whereas a "dispute" can be reported by an organisation of employers, on behalf of employers who are parties to the dispute, or by an employer, where the dispute is between that employer and his workmen, or by a trade union, on behalf of workers who are parties to the dispute. This distinction certainly supports the view which my brethren take, and which I myself accept, that an "issue" primarily involves a question whether a particular employer should be bound to accept a general code, for the machinery in relation to it can only be started by a representative body and not by an individual. I think this difference in the manner of reporting the two types of disagreement does tend to show, therefore, that a "dispute" is regarded as being rather more of a parochial affair than an "issue". Nevertheless, it does not, in my opinion, prevent in itself the partial non-observance of recognised terms and conditions from constituting an "issue". Another difference in procedure is that, under art. 8 (1), the reference of a "dispute" must be within fourteen days of it being reported to the Minister (although the Minister may extend it), whereas there does not appear to be any similar requirement with regard to an "issue"; I do not think, however, that much significance attaches to this. There is, however, a further difference between the treatment of a "dispute" and that of an "issue" which is of some importance. The tribunal, in determining a "dispute", can and should take into consideration every circumstance, including, for example, an alleged increase in the cost of living, that has a bearing on the claim; and amongst such relevant circumstances there would, of course, be included any terms and conditions of employment that are generally observed in the district. On the other hand, when an "issue" has to be determined the only circumstances with which the tribunal are concerned are the recognised terms and conditions applicable to the case and those which in fact exist as between the employer and workmen concerned; and such matters as an increase in the cost of living would seem to be irrelevant to the tribunal's decision. This difference in approach furnishes some reason for not treating a "dispute" as an "issue", but seems to me to afford no legitimate reason for not treating a partial disregard of recognised terms and conditions as a "dispute". I can see no other reason, apart from those which I have mentioned, arising from procedural requirements or otherwise, which would prevent an issue of a limited character such as I have mentioned from being referred to the tribunal as a "dispute".

F I am, accordingly, of opinion on the whole that the failure or refusal of an employer to observe some part only of a generally accepted code may constitute an "issue" and be referred to the tribunal as such, but it may nevertheless also be a "dispute" within the definition in the order and be reported and dealt with on that footing. It seems to me, indeed, that too rigid a distinction between the two kinds of difference envisaged by the order, involving as it does the view that "disputes" and "issues" are mutually exclusive, might well lead to trouble in the working of the order—as it has, in fact, led to trouble in the present case. In my judgment, there may, in some cases, although not, perhaps, in many, be an overlap between the two. In my opinion, the present is such a case. It is quite clear that the Amalgamated Union of Foundry Workers approached the employers' alleged disregard of the agreement of Nov. 29, 1951, on the footing that it gave rise to an "issue". The question which they submitted to the regional industrial relations officer in their letter of Sept. 15, 1952, was stated to be one as between the union and the employers and was not (on the face of it) reported by the union on behalf of the workers. Further, the "failure to agree" which they reported in this letter was the failure of the employers

H "to implement the agreement as between the Engineering and Allied

Employers' National Federation and the Confederation of Shipbuilding and Engineering Unions dated Nov. 29, 1951, relative to national wages increase and the provision of sixteen days' holiday per annum.

This report was sent on Sept. 11, 1952, and on Sept. 15 Mr. Murad, the employer-managing director, wrote to the regional industrial relations officer a letter in which he said:

"These people, namely the union, are under a complete misapprehension because we are not members of the Employers' Federation and are therefore not bound by an agreement existing between them and the union. In any case we are quite satisfied that our employees work under conditions which are far more generous than any covered by the agreement."

A copy of this letter (which was strongly reminiscent of art. 9 of the 1951 order) was sent to the union and in a letter to the employers from Mr. Gardner, the union general secretary, dated Oct. 2, he wrote:

"We would like to point out that on the very rare occasions when we have gone to arbitration with matters of this kind the decision has always been given in favour of this union, especially where firms are not adhering to the recognised rates and conditions of employment obtaining in that particular district."

Finally, in their official demand for arbitration on Nov. 19, the union reported to the Ministry

"the position of 'Failure to agree' between Messrs. Technaloy, Ltd., and this organisation"

and that the terms of reference were "Failure to agree to implement the agreement" of Nov. 29, 1951. Accordingly, it seems to me that the parties themselves regarded the question which the union raised as being of the nature of an "issue". Nor, in my opinion, were the parties altogether wrong in so regarding it. Since the first hearing of this appeal before us further evidence has been filed giving details as to the large number of national agreements and awards of the tribunal governing industrial relations, working conditions, wages, and other terms and conditions of employment in the bounding industry which together constitute the general code. Although the agreement of Nov. 29, 1951, which the union is seeking to enforce on the employers, is only a unit in this code, it is not a self-contained unit for, as Mr. Murad points out in his affidavit of Mar. 25, 1954, the agreement cannot very well be implemented without at the same time implementing pre-existing agreements and awards relating to rates of pay, working hours, and so on; and these are matters which are of the very core of the "recognised terms and conditions". In these circumstances, it does appear to me, as it appeared to the parties themselves, that the magnitude and scope of the difference in question elevates it to the status of an "issue". On the other hand, the union are not in form, nor, I think, in substance, asking the tribunal to make an award enforcing on the employers the code in its entirety. It is, therefore, in my opinion, a case which the Minister could have referred to the tribunal as an "issue", but was entitled to refer as a "dispute" and which the tribunal can properly hear and determine as such. I am, accordingly, in agreement with my brethren, though for somewhat different reasons, in thinking that this appeal should be allowed.

Appeal allowed.

Solicitors: W. H. Thompson (for the union); Hardman, Phillips & Mason (for the employer); Solicitors, Ministry of Labour & National Service (for the Ministry of Labour).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

CHURCH OF ENGLAND BUILDING SOCIETY v. PISKOR AND OTHERS.

COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.),
March 22, 23, 24, 26, 1954.]

Mortgage—Power of leasing—Tenancy by estoppel—Tenancy granted by mortgagor before completion of purchase of mortgaged property—Legal charge granted to facilitate purchase—Recital that property vested in mortgagor.

In September, 1946, the mortgagors contracted to purchase leasehold property (which was subject to the Rent Restrictions Acts) from B., and at the end of October, 1946, B., on receiving payment of part of the purchase money, permitted the mortgagors to enter into possession. The mortgagors immediately purported to sub-let various parts of the premises to H. and others. On Nov. 25, 1946, the lease was assigned to the mortgagors who, by a legal charge of the same date, charged their interest to secure repayment to the mortgagees of a sum advanced to them. In the legal charge the property was described as "now vested in the mortgagors free of incumbrances for the unexpired residue of the term". In January, 1947, H. sub-let a room to X. on a weekly tenancy. The mortgagors claimed possession of the premises including the room occupied by X. and it was agreed that X. was in the same position vis-à-vis the mortgagees as H.

HELD: there was a period of time during which the mortgagors were the owners of the leasehold property before they granted the legal charge, and, therefore, it followed that the estoppel created by the grant of a sub-tenancy by the mortgagors was fed by the legal interest vested in the mortgagors, and the mortgagees did not obtain a title paramount so as to enable them to obtain an order for possession against X.

Principle stated by **HARMAN, J.**, in *Coventry Permanent Economic Building Society v. Jones* ([1951] 1 All E.R. 903), dissented from.

Dictum of **DANCKWERTS, J.**, in *Woolwich Equitable Building Society v. Marshall* ([1951] 2 All E.R. 774), approved.

Re Connolly Bros., Ltd. (No. 2) ([1912] 2 Ch. 25), distinguished.

AS TO MORTGAGEE'S RIGHT TO POSSESSION, see **HALSBURY**, Halsbury Edn., Vol. 23, pp. 358-361, paras. 535-539; and FOR CASES, see **DIGEST**, Vol. 35, pp. 394-398, Nos. 1370-1404.

Cases referred to:

- (1) *Coventry Permanent Economic Building Society v. Jones*, [1951] 1 All E.R. 901; 2nd Digest Supp.
- (2) *Woolwich Equitable Building Society v. Marshall*, [1951] 2 All E.R. 769; [1952] Ch. 1; 2nd Digest Supp.
- (3) *Universal Permanent Building Society v. Cooke*, [1951] 2 All E.R. 893; [1952] Ch. 95; 2nd Digest Supp.
- (4) *Marrington Permanent Building Society v. Kenway*, [1953] 1 All E.R. 951; [1953] Ch. 382.
- (5) *Re Connolly Bros., Ltd.* (No. 2), [1912] 2 Ch. 25; 81 L.J.Ch. 517; 106 L.T. 738; 10 Digest 770, 4821.
- (6) *Meux v. Smith, Seager v. Smith*, (1841), 11 Sim. 410; 10 L.J.Ch. 225; 59 E.R. 931; *subsequent proceedings*, (1843), 12 L.J.Ch. 209; 17 Digest 54, 596.

APPEAL by the plaintiffs from an order of **VAISEY, J.**, dated Dec. 8, 1953.

The plaintiffs sued as legal chargees of a leasehold property known as No. 32, Harold Road, Croydon, held for the residue of a term of ninety-nine years. Before completing their purchase of the property, which was within the Rent Restrictions Acts, the mortgagors purported to sub-let parts of the premises. The assignment of the residue of the term and the legal charge were both executed

on Nov. 25, 1946, and the property was described in the legal charge as "now vested in the mortgagors". The plaintiffs claimed possession from [inter alia] a person holding as sub-tenant of a sub-tenant of the mortgagors. VAISEY, J., held that sub-tenancies by estoppel were created in favour of the sub-tenants of the mortgagors which were prior in time to the legal charge. It was conceded that the sub-tenant of a sub-tenant was, for this purpose, in the same position as a sub-tenant of the mortgagors, and VAISEY, J., dismissed the claim for possession. VAISEY, J., also held that, as against the mortgagors and a sub-tenant of the mortgagors whose sub-tenancy was granted after the date of the legal charge, the plaintiffs were entitled to an order for possession, and there was no appeal from that part of the order.

Harold Lightman for the plaintiffs, the mortgagees.

F. B. Alcock for the remaining defendant, the sub-tenant of a sub-tenant.

SIR RAYMOND EVERSHED, M.R.: This case belongs to a series relating to building society mortgages, of which the *Coventry Permanent Economic Building Society v. Jones* (1), decided by HARMAN, J., may be said to be the first, and which also includes *Woolwich Equitable Building Society v. Marshall* (2), decided by DANCKWERTS, J., and the case in this court of *Universal Permanent Building Society v. Cooke* (3). The action is a mortgagees' action for possession. The plaintiffs sue as legal chargees of a leasehold property, No. 32, Harold Road, Croydon, held for a term of ninety-nine years from Christmas, 1889. The legal charge is dated Nov. 25, 1946, that being the same date as is borne by the assignment to the mortgagors or chargors. The mortgagors were two persons of the name of Piskor and one named Sala, the sum secured being £1,600. The property charged was described in the schedule to the legal charge, and that schedule contains the words, after defining the property, "now vested in the mortgagors free from incumbrances for the unexpired residue of the term", which I have mentioned. The property is in what is called a compulsory registration area, but I am satisfied that nothing turns on that fact. The purchase by the mortgagors and the legal charge were in fact the first dealings with the property since the area had been made a compulsory registration area. Counsel for the defendant suggested an argument by way of analogy based on the Land Registration Act, 1925, and the rules made thereunder, but, in my judgment, the solution of the question with which we are concerned is not materially assisted by that analogy.

The chargers, General and Mrs. Piskor, of whom General Piskor has since died, and Mr. Sala, contracted to buy this property for the sum of £2,800 from the previous owners, a Mr. and Mrs. Bunbury, in September, 1946. I gather that the purchasers were partners. The interests which they acquired were as joint tenants. At the end of October, 1946, Mr. and Mrs. Bunbury moved out of the premises and an arrangement was made whereby on £800, part of the purchase money, being paid by the purchasers to the vendors, as was done, the purchasers were to go into possession of part of the premises, 32, Harold Road, Croydon. The purchasers appear to have taken possession of the whole of the premises. They proceeded to move themselves into one portion and then granted tenancies of other parts, e.g., to a Mrs. Gibbons and to a Captain Hamilton. Both Mrs. Gibbons and Captain Hamilton went into possession of the parts purported to be let to them early in November, or at any rate before Nov. 25, 1946. Captain Hamilton further sublet one room out of the part let to him to the defendant, Miss Hunnex, who herself went into occupation of that room on a later date, viz., January, 1947. Captain Hamilton himself at some stage moved out of the premises altogether.

When the action was started Mrs. Gibbons, a Miss Krum, and nothing material for the present purposes turns on her occupation—and Miss Hunnex were in occupation of various parts of the premises, and these three persons, together with Mrs. Piskor and Mr. Sala, the survivors of the mortgagors, were

joined as defendants. The learned judge made an order for possession against Mrs. Piskor and Mr. Sala as mortgagors and against Miss Krum, but he refused such an order against Mrs. Gibbons or Miss Hunnex. Mrs. Gibbons has retired altogether from the field of battle, leaving only Miss Hunnex in occupation of her single room. The plaintiffs have appealed against the refusal of the judge to make an order for possession against Miss Hunnex.

A For the purposes of this appeal it has been conceded by counsel for the plaintiffs that Miss Hunnex must be treated as being in the same position as Captain Hamilton would have been; Captain Hamilton, as will be remembered, had a contractual tenancy under which he had taken possession prior to the date of the mortgage. The plaintiffs, apparently, made no inquiry as to the state of the premises at the time they advanced their money, and the question is (and I am now able to state it) whether the mortgage or legal charge which they took is B subject to the rights that Miss Hunnex must be taken to have acquired in the shoes, so to speak, of Captain Hamilton. I may add that apart from the impact of the rent restriction legislation, there would be nothing of substance in the point. Whatever the terms of the tenancy may be, it is admittedly, so far as I understand it, only a weekly tenancy, and if Miss Hunnex or Captain Hamilton C had had any interest in possession (that is, a tenancy) when the mortgage took effect, the mortgagees could, in the ordinary course, have given notice to determine that tenancy by a notice to quit. But as things are, Miss Hunnex, if she has such an interest as I have described, is also admittedly entitled to the protection of the Rent Restrictions Acts, and, therefore, can only be removed by the appropriate proceedings in compliance with the provisions of those Acts. I have already stated the question to be determined, and I will re-state it in D another form—that is, whether the plaintiffs, as they now say, can eject Miss Hunnex on the ground that they have a legal title paramount to her interest.

From what I have said it is clear that, as between the mortgagors and Captain Hamilton (and I will henceforth speak of Captain Hamilton, treating him and Miss Hunnex as equivalent) there was created a tenancy by estoppel. So much is not contested, although, as I have said, the facts as to the creation of that E tenancy are somewhat vague. If, then, the mortgagors acquired a legal estate before the legal charge took effect, for however short a time, then the estoppel would, as it is said, be fed and the plaintiffs' claim must necessarily be defeated. This much was decided by this court in the *Universal Building Society* case (3), which I have already mentioned, where, on the facts, there was an interval of one day between the date of the conveyance to the mortgagors and the date of the F mortgage and there was no evidence to suggest that those deeds did not take effect according to their terms or on their apparent dates. Here, however, the date of the deed and the date of the legal charge and the assignment is the same; on the other hand, there is the recital in the legal charge which I have already read from the schedule to the legal charge. Thus, following in this respect the G decision of DANCKWERTS, J., in the *Woolwich* case (2), the mortgagees may well be said to be unable to complain of the truth of the recital which they, no doubt, caused to be inserted in their own mortgage. In other words, on the facts of this case it is said that the result must be the same as in the *Woolwich* case (2), assuming that case to have been rightly decided.

H Those last words raise the larger question, viz., whether, notwithstanding the recitals in the mortgage, the transaction—and I use deliberately the word chosen by counsel for the plaintiffs—consisting of the sale to the mortgagors and the mortgage is in truth all one transaction, with the result, as it is said, that there is no *scintilla temporis* during which the mortgagors had any legal estate prior to the legal estate of the mortgagees. This was the conclusion which HARMAN, J., reached in the *Corentry* case (1), and the question has been argued in this case whether HARMAN, J.'s view was correct. Counsel for the plaintiffs very properly reminded us that I myself, in the later case in this court, the

Imperial case (3) although expressing no opinion, because it was unnecessary to do so, on the validity of the judgment of HARMAN, J.—did use the phrase that it had obviously an appeal to common sense.

I first draw attention to certain special circumstances in the *Coventry case* (1) without taking up time with a long recital of the facts, because they are sufficiently set out in the headnote. It is to be observed that the mortgagors there, in granting the relevant tenancy, quite deliberately broke their word with the proposing lenders. The learned judge used the words: "The lenders or mortgagors had been defrauded". It is far from clear to me, on reading the facts, that the tenants themselves were not also particeps criminis and did not know perfectly well what promises had been given to the lenders. Thirdly, according to the reported facts of the case, there was no recital in the legal charge or mortgage corresponding to that which appeared in HAYES-WATTS, J.'s case (the *Woolwich case* (2)) and to that which appears in the present case.

Counsel for the plaintiffs referred us to certain passages from the affidavits, which are numerous, in the present case, and I think I ought to make one brief reference to what was said by the assistant secretary of the plaintiffs, a Mr. Groves, in his affidavit which was filed on June 22, 1953:

"The legal charge dated Nov. 25, 1946 . . . was completed at the same time as and was in substance part of the one transaction whereby the original defendants [the mortgagors] secured an assignment of the leasehold land and premises known as 32, Harold Road, Upper Norwood . . . from the vendors [Mr. and Mrs. Bunbury], but for the moneys advanced to the plaintiffs on the security of the said legal charge the vendors would not have delivered any assignment of the said property. The sum of £1,600 advanced by way of mortgage was paid to the vendors".

Then there is a reference to the registration. Later in the affidavit he says:

"The solicitors who acted for the mortgagors also acted for the vendors of the leasehold interest (Mr. and Mrs. Bunbury). In answer to question 1 in the requisitions on title it was represented by the vendors that the property was not let and that it was not thought that there was any standard rent, as the property had been in the possession of the then owners since 1928. I should, however, point out that the application for an advance on mortgage was dated Aug. 12, 1946 [i.e., before the contract] and the answers to the requisitions on title were dated Sept. 24, 1946".

And I add, recalling what I have already said, that the arrangement whereby the purchasers went into possession and were granted the various tenancies took place later still, in October and November. There was on the evidence no case for saying that there was any defrauding by the purchasers so far as I can see, and certainly no evidence to suggest that Captain Hamilton or Miss Holmes were other than entirely innocent of any deception.

I think the facts which I have stated in any event distinguish the present case from the *Coventry case* (1) which was decided by HARMAN, J. In the course of his judgment, HARMAN, J., said ([1951] 1 All E.R. 903):

"The question is whether I must assume the *scintilla temporis* and assume that because of the obligations of the landlord she must be held to have defrauded her mortgagee by creating a tenancy which is good against the society although it was not willing to lend the money except on the footing that she had no such right. I do not see why I need postulate this. The whole transaction was one transaction. The vendor would not sell without receiving his purchase money, and the mortgagee would not provide the purchase money without receiving the term of years. The money, in fact, went straight—as is the universal practice—from the mortgagee to the vendor, and not until it was in the vendor's hands would a legal state be created either in favour of the landlord or of the mortgagee. It seems to me

that the whole thing is one transaction in substance, and I am not constrained to introduce an artificiality so as to affect the rights of the building society”.

On the facts of that case, I think that the conclusion of HARMAN, J., might well be in any circumstances justified, since, if I am right in my inferences, all the parties including the tenants were well aware of the representation which was made. The tenant's occupation being (as the judge said) in fraud of the lenders, it may well be that the tenant could not be heard to plead his own fraud—

- A that is, the fact essential to his tenancy. But since the broader point has been also argued, I will express my opinion on it, which is briefly that, at any rate in a case such as the present, the transaction, although it may fairly be said to be one in substance, still cannot be said in the eyes of the law to be one and indivisible. The claim of the mortgagees to a title paramount rests essentially on their having obtained a legal estate, and this they can only have done by
- B virtue of the legal charge on which they sue: and if for some moment of time the legal estate was vested in the mortgagors and was, therefore, capable of being subjected by them to the charge on which the mortgagees rely—if that is right, then it seems inevitable that the estoppel which was involved in the tenancy created in favour of Captain Hamilton necessarily is fed by the legal estate in the hands of the mortgagors. In other words, I am not satisfied, with all respect to
- C HARMAN, J., that, if the language which I have read was meant to lay down a general proposition covering all cases of this kind, it was correct. It is, no doubt, true to say that in one sense the transaction was one transaction; but it is equally true to say that it consists necessarily of certain defined steps which must take place in a certain defined order if the result intended is eventually to be achieved. That seems to me not an artificiality, but a necessary result of the law and of the conveyancing practice which was involved. I would add also that I do not
- D think HARMAN, J., was right (and no authority has been cited to support his view) that no legal estate would be created in favour of the mortgagor or mortgagee until the purchase money had in fact reached the vendor's hands.

- E I, therefore, agree with, and adopt, the language which DANCKWERTS, J., used in the *Woolwich* case (2), in a short paragraph, both limbs of which, I think, are applicable in the present case. DANCKWERTS, J., says [1951] 2 All E.R. 774; [1952] Ch. 9):

- “It seems to me that a mortgagee who has inserted in the deed under which he acquires title a statement that the mortgagor is the estate owner in respect of the property which is being mortgaged or charged to the mortgagee cannot object if that statement is taken to be true. Therefore,
- F it seems to me that the irresistible inference is that I must assume that to be the position, even if the transfer by the vendors to the purchaser bore the same date as the charge. In fact, the transfer must have been executed at a time earlier than the charge to the building society, so that there was a time at which it would be correct to say that the mortgagor had become the
- G estate owner i.e., the legal owner of the fee simple of the property which was subsequently by him charged to the building society to secure the amount of his loan”.

- Counsel for the plaintiffs drew our attention to an earlier decision of this court in 1912, which was not cited when the *Corentry* case (1) came before HARMAN, J. Its apparent relevance was first noted by VAISEY, J., in another later case, *Mornington Permanent Building Society v. Kenney* (4). The case to which I
- H allude is *Re Connolly Bros., Ltd.* (No. 2) (5). In my judgment that case does not justify the general conclusion of HARMAN, J., which I have already read. Briefly, the facts in that case were that Connolly Bros., Ltd., had issued debentures charging the whole of their property by way of floating charge in the ordinary course. By the material date that charge had not crystallised. The company then proceeded to negotiate for the purchase of certain property and were only in a position to acquire the property if the bulk of the purchase price

was provided by a certain third party. The same solicitors acted for all parties, the vendor, the lender (a Mrs. O'Reilly) and the company; the recitals of fact in the LAW REPORTS are, I think, of importance and ought to be read (1912) 2 Ch. 27):

"They [the company] accordingly applied to one Mrs. O'Reilly to advance the sum of £1,000 for the purpose of enabling them to purchase the property and agreed to give her a charge upon the property so purchased to secure the sum to be advanced by her, and she consented to make the advance on those terms. The company thereupon entered into a contract for the purchase of the property for the sum of £1,100 and paid a deposit of £150, leaving £950 of the purchase-money unpaid. The contract was to be completed on Mar. 31, 1904, and on that day Mrs. O'Reilly was present at the completion and drew a cheque for £1,000 in favour of the company, into whose banking account it was paid. The company then drew a cheque for £950, which was cashed, and on the completion of the purchase that cash was handed over to the vendor. Upon this transaction Mr. Mereer, the vendor's solicitor, acted both for the company and for Mrs. O'Reilly. He knew of the arrangement between her and the company, and on the conveyance being executed he retained the deeds on her behalf".

The question between Mrs. O'Reilly and the debenture holders was a question of equitable priorities. There is no question that the company acquired the legal estate; the question was whether they acquired it and held it for some time free of any charge in favour of Mrs. O'Reilly, so that the equitable charge of the debenture holders would take priority over Mrs. O'Reilly's equity. It was held, particularly in the light of the specific agreement which I have read, that Mrs. O'Reilly's equity had priority, and, although the company took the legal estate, they took it subject to Mrs. O'Reilly's equity, which sprang into existence eo instanti as soon as the legal estate passed to the company; and, therefore, on the facts stated the company never acquired any estate free from the equitable right of Mrs. O'Reilly, so that the charge of the debenture holders only took effect on what the company themselves took; i.e., it was subject to Mrs. O'Reilly's prior charge which took priority over that of the debenture holders. It is true that SIR HERBERT COZENS-HARDY, M.R., in his judgment says *ibid.*, 31d:

"In my opinion we should be shutting our eyes to the real transaction if we were to hold that the unincumbered fee simple in the property was ever in the company so that it became subject to the charge of the debenture holders",

but I do not think that that language, appropriate to a case of competing equities, can be used to justify the view that there is one transaction—one that is, not only in substance, but in law one and indivisible—in a case such as the present.

Re Connolly Bros., Ltd. (5), followed (and the judges were referred to) an earlier case, *Mear v. Smith, Scager v. Smith* (6), which was of the same kind, i.e., involving a conflict of equities. I shall not, therefore, take up further time discussing that earlier case.

One other point was taken by counsel for the plaintiffs. That was this. Of the total purchase price of £2,800, £800 was paid in October, £1,600 was advanced by the building society, and the remainder, £400, was allowed to remain on second mortgage by the vendors, the vendors taking a second charge. It was said by counsel for the plaintiffs that by taking a second charge the vendors gave up their vendors' lien (as they in fact did); but, further, that the building society in some way was subrogated to the vendors' lien, so as to give to the building society via Mr. and Mrs. Bunbury the benefit of the vendors' lien and thereby a title paramount, effective against Miss Humes or Captain Hamilton. I cannot accept that argument—I do not know that I have in all respects followed it. The fact is that the vendors did take a second mortgage, but that fact does not seem to me to be material to the present question.

For the reasons I have stated at a little length because of the careful consideration which it has been necessary to give to the view of HARMAN, J., in the *Corentry* case (1), I think this appeal fails, and that VAISEY, J., rightly refused to make an order for possession against Miss Hummex. I should add that BIRKETT, L.J., has authorised me to say that he agrees with the judgment I have just delivered.

A ROMER, L.J.: I agree. The theory that a purchase, which is completed by payment of money that has been provided in part by a third party, and a mortgage by the purchaser of the property sold to secure the repayment of that money to the lender, constitutes only one transaction if the instruments are executed at more or less the same time is a conception which has a prima facie appeal, but it does not, on analysis, in my opinion, truly reflect the legal effect of what takes place. The mortgage of the purchased property cannot have any operation in law (whatever rights it may give rise to in equity or by estoppel) unless and until the purchaser is in a position to vest a legal term in the property, as security, in the mortgagee, and he is not and cannot be in a position to do this until he himself has acquired from the vendor the legal estate out of which the mortgage term is capable of being created. From this it follows that the execution and delivery of the conveyance (if the property is freehold) or of the assignment (in the case of a leasehold) by the vendor to the purchaser must of necessity constitute an essential preliminary to the vesting in the mortgagee of a subsidiary interest in the property. Counsel for the plaintiffs pressed on us the necessity of looking at the substance rather than the form of the transaction which took place in the present case and referred us to such cases as *Meux v. Smith* (6) in support of that proposition. I am very willing to do so, but the substance of the transaction was that the purchasers were to purchase property with money lent in part by the building society and give the society a mortgage on the property for the loan. All this has in fact been done and the society has got its security but, look at it how one will, the fact remains that the purchasers could not have given the society the legal charge which the society required unless, at the time when the charge was executed, the purchasers were the owners of the legal interest in the property charged. That this was recognised by the society itself is sufficiently shown by the fact that there appears in the schedule to the charge the statement that the premises were then (that is to say, at the moment of the delivery of the charge) vested in the mortgagors—a circumstance of evidence on which DANCKWERTS, J., relied in *Woolwich Equitable Building Society v. Marshall* (2). I agree with DANCKWERTS, J., that the mortgagees, having inserted that statement in the charge, cannot very well complain if the statement is regarded as true. Even without this element, however, I should still regard the legal interest in the purchased premises as having become vested in the purchasers prior to the execution of the charge for, as I say, unless this sequence of interests is observed the charge would have been wholly ineffective in law to achieve its immediate purpose. I agree with the submission of counsel for the defendant that a composite transaction cannot be regarded as being one transaction, unless it is not only one, but one and indivisible, and that two transactions, each possessing a legal individuality of its own, do not coalesce into one merely because they are dependent on each other.

H The whole object of the plaintiffs in trying to displace the view which is both logical and in conformity with conveyancing practice, viz., that the completion of the purchase preceded by however short a time the execution and delivery of the mortgage, is to defeat the claim of the sitting tenants. But for the Rent Restrictions Acts the point would have had no importance and would, I suppose, never have been taken at all, for the society could have determined the tenancies by the service of notices to quit. I find myself unable to treat as one what were, in law, two palpably distinct transactions merely for the purpose of enabling the society to evict persons who were already in occupation but whose existence or rights the society had never troubled to inquire about.

To the extent, then, that the view which HARMAN, J., acted on in the *Coventry Building Society* case, (1) was founded on the principle that in cases such as the present the conveyance and the mortgage are to be regarded as one transaction, I do not, for myself, now that the matter has been so fully argued before us, feel able to accept it.

I rather gathered from counsel for the plaintiffs that if we were against him on this question he would feel a difficulty in further pursuing the appeal. He did, however, suggest that the decision of this court in *Re Connolly Bros., Ltd.* (5), previously to the sale, entered into an immediately binding agreement to give the society a charge on the property, when assigned, to secure the money which they were proposing to advance. As to this, it seems to me, as at present advised, that, if such an agreement had been made after the tenancies had been granted, the legal estate which passed to the purchasers, subject to the equity in favour of the society arising from the agreement, would have sufficed to feed the estoppel in favour of the tenants. As, however, there is no evidence of such an agreement having been entered into, whether before or after the tenancies were granted, the point does not arise, and I express no concluded opinion on it.

For the above reasons and those given by the Master of the Rolls, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Dennis & Co.* (for the plaintiffs); *Peacock & Goddard* (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ALMA SHIPPING CO. S.A. v. V.M. SALGAONCAR E. IRMAOS LTDA.

[QUEEN'S BENCH DIVISION (Devlin, J.), March 22, 1954.]

Shipping—Demurrage—Dispatch money—“Charterers to have the right to average the days allowed for loading and discharging”—Time allowed for loading exceeded—Time saved on discharge—Method of “averaging”.

By a charterparty dated Dec. 17, 1952, shipowners chartered the S.S. Alma to charterers to load a cargo of iron ore at Mormugao and to discharge it at Rotterdam. Clause 9 of the charter provided: “Charterers to have the right to average the days allowed for loading and discharging”, and it was further provided that demurrage was payable at the rate of £250 per day and dispatch money at £125 per day. The loading time exceeded that permitted by four days, five hours, and twelve minutes, but the time occupied by the discharge of the cargo was five days, nineteen hours, and fifty nine minutes less than the permitted period. On a claim by the shipowners for demurrage

HELD: under cl. 9 the charterers were entitled to set against the time lost in loading the time gained in discharge, and, as the balance in their favour was one day, fourteen hours, and forty-seven minutes, to recover dispatch money from the shipowners.

Watson Brothers v. Mysore Manganese Co., Ltd. (1910) (102 L.T. 169), applied.

AS TO AVERAGING OF DAYS ALLOWED FOR LOADING AND DISCHARGING, see HALSEBURY, *Halsbury's Edn.* Vol. 50, p. 347, para. 576; and see *CARLISLE DIGEST*, Vol. 41, pp. 575, 576, Nos. 3992-3998.

Cases referred to:

(1) *Molière S.S. Co., Ltd. v. Naylor, Benzon & Co.*, (1897), 2 Com. Cas. 92; 13 T.L.R. 187; 41 Digest 576, 3993.

(2) *Watson Brothers v. Mysore Manganese Co., Ltd.*, (1910), 102 L.T. 169; 15 Com. Cas. 159; 41 Digest 572, 3966.

(3) *Rederiakt, Transatlantic v. Compagnie Francaise des Phosphates de l'Océanie*, (1926), 136 L.T. 619; 32 Com. Cas. 126; 41 Digest 576, 3996.

CLAIM for demurrage and CROSS-CLAIM for dispatch money.

By a charterparty dated Dec. 17, 1952, the plaintiffs (owners) chartered the s.s. Alma to the defendants (charterers) to load a full and complete cargo of iron ore, 7,000 tons, ten per cent. more or less at the captain's option, at Mormugao and to deliver the same at Rotterdam. The quantity of cargo loaded at Mormugao was 7,475 tons, and, in accordance with cl. 5 of the charter, the times allowable for the separate operations of loading and discharging were: (a) for loading 7,475 tons at 500 tons per day, fourteen days twenty-two hours, forty-eight minutes, and (b) for discharging 7,475 tons at 1,500 tons per day, four days twenty-three hours, thirty-six minutes. Under the charter demurrage was payable at £250 per day and dispatch money at £125 per day, and pro rata for portions of a day. Clause 9 of the charter read:

"Charterers to have the right to average the days allowed for loading and discharging".

The charterers having occupied more than the stipulated time in loading, but less in discharging, the cargo, a dispute arose whether, on a proper calculation under cl. 9 of the time for loading and discharging, demurrage was payable to the shipowners or dispatch money to the charterers.

T. G. Roche for the owners.

B. S. Eckersley for the charterers.

DEVLIN, J.: This case turns entirely on the construction of cl. 9 in a charterparty, which provides:

"Charterers to have the right to average the days allowed for loading and discharging".

"The days allowed", of course, refers to the lay days for loading and discharging. There is no difficulty about computing the lay days in this case because the computation is agreed. Computed according to the method which is described in the charterparty (that is, by rates of loading per day) they are agreed at almost fifteen days for loading and almost five days for discharging—I will call them, for the sake of simplicity, fifteen and five. The reason why they are different is because the charterers are expected under the lay days clause to discharge three times as fast as they are expected to load, it may be, because of better facilities at the discharge port, Rotterdam, as compared with the loading port, Mormugao. The differences that have arisen between the parties as to whether demurrage is payable, and, if so, what amount, or whether dispatch money is payable, relate, therefore, not to the calculation of lay days, but to the way in which the time used is to be related to the lay days, and what has given rise to divergence is the clause which I have read. It is clear, of course, that unless there is some clause of this sort the operations of loading and discharging have to be considered separately. The lay days for each have to be calculated separately, and the time used has to be considered against each separately and demurrage and dispatch money arrived at accordingly. The object of a clause of this kind is to prevent the two from being considered separately and to allow the charterer to avail himself, if he wants to, of days saved in loading so as to advantage himself in the discharging, or vice versa. These clauses, the authorities show, adopt various forms. The use of the word "average" is very common, the use of the word "reversible" is also common, and sometimes there is a clause which simply provides for the addition of the two lots of lay days together.

Three methods of operating the clause have been advanced in this case. The simplest of them is the one that is advanced by the charterers and is called method "B". That simply means that you add the two lots of lay days together, making approximately twenty days, and the difference between that and the

total days used for both operations produces the result. That is not, in any strict sense of the term, "averaging"; it is aggregating, or pooling, the two periods. You can get at the same result by averaging if, say, instead of taking twenty days for the whole you take twenty days and divide that by two: the average for loading and discharging would be ten so that you will have ten days at each place. At first sight, one would think it could not matter which way you set about it, but in fact it does matter. The reason why it matters, and the reason why these calculations produce different results, is because the time used does not flow smoothly and uninterruptedly. It is interrupted by Sundays, half-holidays, and other non-working days, and it is the interjection of these into the period which is actually used that causes different results to be produced by these two different methods of calculation. What might be regarded as the stricter method of calculation, namely, by averaging (that is, dividing the aggregate by two) is not relied upon by either side in this case.

The principal method on which the owners rely is method "A". On that basis you take the period by which the time used exceeded the lay days at the port of loading and deduct that excess from the lay days fixed at the port of discharge. On the facts of this case there was an excess of something over four days. The result of that is to diminish the lay days for discharging, and you then put the time actually used in discharging against that diminished amount of lay days. If, on the other hand, time is saved on loading, you add that to the lay days allowed for discharging.

The third method (which has been called method "C") is advanced in the alternative by the owners and accepted, though with considerable reluctance, by the charterers as an alternative if their method "B" is not allowed. By method "C" you keep the two calculations entirely separate until you get to the very end and then you strike a balance. If you have saved time on discharge you set it against the excess time of loading, or vice versa, and in that way you arrive at the net result.

The matter is not free from authority, because, as I say, clauses of this type are not uncommon. The first case to which I have been referred in which a clause providing for "averaging" was considered is *Molère S.S. Co., Ltd. v. Naylor, Benson & Co.* (1). The material words in the charterparty were (2 Com. Cas.):

"Charterers to be at liberty to average the days for loading and discharging in order to avoid demurrage".

It is, I think, sufficient to say that that case supports the charterers' method "B" if the position is rightly summarised in the headnote which reads (*ibid.*, 92):

"Where a charterparty gives liberty to the charterers 'to average the days for loading and discharging in order to avoid demurrage', the charterers may add together at the port of loading the days allowed for the two operations of loading and discharging, and the ship does not come on demurrage till the days so added together are exhausted".

But when one examines the judgment, it is plain that KENNEDY, J., was influenced by considerations other than the mere construction of the words. The report says that evidence was called in respect of the defendants' system of calculation, and KENNEDY, J. (*ibid.*, 99), says this:

"From the evidence called on behalf of the defendants it appears that during a period of ten years the clause has been in common use, and that during that time it has had an accepted meaning, on the basis of which settlements have been made without objection—that meaning being the one now put forward by the defendants. It seems to me that I ought to act upon that evidence. Apart from that understood meaning, the words 'to average the days' appear to me to be not very apt and to be open to argument. I do not say that without the evidence called by the defendants their

construction of the words would be an impossible one, but it would certainly be doubtful whether it was correct ”.

A So what the learned judge is saying there is that he doubted whether the construction which he put on the words was the correct one if he had been looking simply at the words themselves, but he felt it better in that case, because he thought the clause was ambiguous, to be guided by the evidence which he had heard. In those circumstances the headnote, I feel, is a little misleading because it might give the impression that the learned judge had arrived at his conclusion as a matter of construction, which is not the case.

B The next authority is a decision of HAMILTON, J., in *Watson Brothers v. Mysore Manganese Co., Ltd.* (2). There the wording was a little different. It was a charterparty which, apparently, provided for a number of voyages though, in fact, only one voyage took place under it, and the words used in cl. 5 of the charterparty were these (102 L.T. 170):

“ Days to be averaged over all voyages performed under and during the entire currency of this charter to avoid demurrage ”.

C The decision of KENNEDY, J., to which I have just referred was not, so far as appears from the report, discussed in the argument or in the judgment. HAMILTON, J., said this (*ibid.*):

D “ The defendants then contend that they are entitled to take ten days for the loading and add to that ten days for discharging, and interpret them as twenty clear working days of twenty-four hours as they would be interpreted according to the circumstances of the port of Marmagoa, and they say this is the meaning of the provision ‘ days to be averaged over all voyages performed under and during the entire currency of this charter to avoid demurrage ’ [method “ B ” in the present case]. There are other provisions with regard to demurrage in this charterparty which throw a little light upon it, but I think the real question turns on what is meant by the word ‘ average ’ ”.

E He considers other provisions of the charterparty, and continues (*ibid.*, 171):

F “ All these provisions show that the business men who entered into this charterparty contemplated that at the time the vessel was loaded at Marmagoa it would be possible then to know whether she was on demurrage or not, so that they would be able to exercise a lien for that demurrage or pay the commissions mentioned. It is, perhaps, technically a sufficient answer to say that some application might be given to those words in the event of the vessel being more than twenty days on demurrage at the port of loading, so that in no possible event, and in no kind of averaging, could there fail to be demurrage due and payable; but still it does show that the shipper is trying to get a good deal out of the words ‘ days to be averaged over all voyages ’, when he claims that he is entitled to say his ship is not on demurrage at Marmagoa until more than twenty of the charterparty days have expired and yet she is not loaded. I think the words ‘ days to be averaged over all voyages ’ will not bear this interpretation. Parties often stipulate, and the parties could have stipulated, that so many days are to be allowed for loading and discharging. The other form of averaging days over the voyage or voyages to avoid demurrage carries a different meaning. In my opinion the meaning of the average clause is that a number of days for shipment having been stipulated, and then a number of like days for discharge having been stipulated, the vessel’s right to demurrage must be determined upon the events which happen at the port of loading and according to the number of days allowed for loading there, though subsequent events at the port of discharge may entitle the charterers to abate the amount of demurrage incurred at the port of loading by taking credit for the number of days saved, if any, at the port of discharge. The

plaintiffs admit that two days were saved at the port of discharge, and the defendants claim these; but my view is that, as a matter of construction, at the end of ten charterparty days for loading at Marmagoa, the vessel was on demurrage".

There he adopts method "C".

Counsel for the charterers put forward the view that, on the terms of the charterparty, the issue in their case is determinable from that which I have to decide today. I do not think it is. I observe that HAMILTON, J., puts the real question which he has to determine as turning on what is meant by the word "average". I do not think that the slightly different wording in the clause affects his reasoning at all. It is plain that he has chosen between method "B", which the defendants there were advancing, and the method which he pronounces in favour of, which is method "C". He says (*ibid.*) particularly in referring to method "B":

"I think the words . . . will not bear this interpretation",

and then he adopts method "C". Once one has ascertained the number of days for shipment and the number of like days for discharge they become just as if they were days stipulated in the charterparty, so his reasoning exactly applies.

There was one other authority which was cited to me, and that is *Rederiakt. Transatlantisk v. Charpagnat, Compagnie des Messageries de l'Océan* (14), a case in the Court of Appeal. There the clause which the court had to construe was a straightforward one providing in terms (136 L.T. 619):

"At charterers' option any days or parts of days not consumed in loading may be added to the time for discharging and any extra time consumed in loading may be deducted from the time for discharging".

I do not think that the judgment of SCRUTTON, L.J., which was referred to by counsel for the charterers—although it has some helpful observations about the general way in which these clauses should be approached—touches the clause in this case and the meaning of the word "average" which I have to determine.

Counsel for the charterers drew my attention to, and adopted as part of his argument, the references to this point in two of the leading text-books, SCRUTTON and CARVER. In SCRUTTON ON CHARTERPARTIES, 15th ed., p. 344, the learned editors sum up what they conceive to be the effect of the decisions in these words:

"The clause 'to average the days for loading and discharging in order to avoid demurrage' allows the charterer to add together the days agreed for both operations, not being liable for demurrage till the total days are exhausted . . ."

In CARVER'S CARRIAGE OF GOODS BY SEA, 9th ed., p. 896, the author said:

"Charterers sometimes stipulate for 'liberty to average the days for loading and discharging'. This was held, in *Molière S.S. Co. v. Naylor* (1), to entitle them to add together the time allowed for loading and the time allowed for discharging, and to exhaust the whole before demurrage would begin to run".

It is, therefore, fair to say, I think, that in those works no distinction is drawn between the different forms of clause. No particular weight is put on the use of the word "average", and they are all considered as having the effect which the charterers in this case urge that they should be given. But in neither of those books is the decision of HAMILTON, J., referred to and in both of them the decision of HAMILTON, J., in the *Molière* case (1) is treated as if it were an authority on construction. I accept the submission of counsel for the owners that it cannot be so regarded.

In these circumstances I am left with the one authority which I think is clearly applicable (that is, the decision of HAMILTON, J.) and I can only decide

A in favour of the charterers by adopting their method "B" if I disagree with that decision. I am bound to say that, if the matter were *res integra*, I think a lot might be said for treating all these types of clause as intended to achieve the same thing, whether the words used were "averaging", "adding" or "reversible". But in the face of that decision, which clearly distinguishes between clauses which use the word "average" and clauses which use the word "adding" or have a similar effect to that produced by using the word "adding", I do not conceive that I can do so. If it were a decision given by a judge speaking with no greater authority than my own, I should still think it right to follow it, because nothing can be more unfortunate than that different shades of meaning in clauses of this type should be introduced by different judges, thus leading to a multiplicity of authorities. Coming as it does from HAMILTON, J., it acquires such added weight that, in my judgment, it would be wrong for me to disregard it.

B In those circumstances, therefore, I reject method "B", and must decide between method "A" and method "C". There is, as I have said, no authority in favour of method "A". There is nothing to show that it was actually considered by HAMILTON, J., but there is no doubt that he pronounced in favour of method "C" or that that was the one which he adopted. Counsel for the

C owners has argued that his observations can be distinguished having regard to the words in the clause in the present case, "days allowed". He submits that method "A" gives effect to those words, whereas method "C" is really only an accounting operation at the end of the whole transaction—that it does not operate on the days allowed either at one place or the other, but merely balances the results of the two calculations at the end. I do not think that

D distinction ought to operate on my mind. If it were possible to give one common meaning to all these clauses I feel there would be a great deal of advantage in so doing. For the reasons I have given I cannot go so far as that, but I do not think that I ought to allow slight differences of wording to give rise to somewhat subtle reasonings so as to produce different results according to only slightly different formations of words. I, therefore, adopt HAMILTON, J.'s, judgment in *Watson*

E *Brothers v. Mysore Manganese Co., Ltd.* (2) in its entirety as governing the present case, and, accordingly, I adopt method "C" as being the method that is produced by the right construction of this clause. The consequence of that is agreed between the parties. There is a balance of credit owed by the charterers to the owners which exceeds the dispatch money payable by the owners to the charterers by £114 10s. 6d., and I give judgment for the owners for that amount.

F *Judgment for owners.*

Solicitors: *Stokes & Mitcalfe* (for the owners); *Sinclair, Roche & Temperley* (for the charterers).

[Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.]

Re WRIGHT (*deceased*). BLIZARD AND ANOTHER v
LOCKHART AND OTHERS.

[COURT OF APPEAL (Denning and Romer, L.J.J.), March 26, April 13, 1954.]

Res Judicata—Implication—Bequest of residue on trust to take effect after death of tenant for life—Death of testatrix in 1933 and of tenant for life in 1942—Summons, on death of tenant for life, to determine whether bequest a good and charitable gift and for inquiry into practicability of trust—Order made in 1948 for inquiry as to practicability “now or at any future time”—Rest of summons ordered to stand over—Amended summons before court—Right to argue that date of testatrix’s death material date for estimating practicability. Charity—Charitable bequest—Bequest of residue on trust to found and maintain convalescent home—Trust to take effect after death of tenant for life—Date of ascertainment of practicability.

By her will, dated Dec. 2, 1932, the testatrix, who died on Mar. 15, 1933, directed her trustees to stand possessed of her residuary estate on trust thereout to found and maintain a convalescent home for impecunious gentlemen. In October, 1933, the terms of settlement of a probate action concerning the will were approved by the court, one of the terms being that W., a legatee under the will, was to have a life interest in the residue. On Feb. 15, 1942, W. died, and in 1943 the trustees of the will took out an originating summons to determine, *inter alia*, whether, on the true construction of the will and in the events which had happened, the gift of residue to found and maintain the convalescent home constituted a good and effective charitable gift. By an order, dated Feb. 2, 1944, the summons was stood over until Feb. 3, 1947. By an order, dated Jan. 27, 1948, the court, without argument on the point, ordered two inquiries to be made which were asked for by the summons, viz. “(i) An inquiry whether it is now or will at any future time be possible to carry into execution the trusts” for the establishment of the convalescent home, and (ii) an inquiry as to next of kin. By the same order the court directed: “The rest of the said originating summons is to stand over”. On July 4, 1952, the master filed his certificate saying that: “It is not now possible to carry into execution the trusts”, that he was unable to certify whether it would be possible to do so at any future time, and that the question was left for the consideration of the court. Pursuant to leave given on Sept. 4, 1953, the summons was amended to ask, alternatively to the original questions, whether, on the true construction of the will, the testatrix had shown therein a general charitable intention and the subject-matter of the gift ought to be applied *ex-parte*. When the amended summons came before the court, counsel for the Attorney-General sought to contend that the material date at which the practicability of the trust should be estimated was the date of the death of the testatrix. Counsel for the next of kin contended that that point was *res judicata* by implication, as the inquiry ordered by the court on Jan. 27, 1948, must have been directed on the footing that the material date was not the date of the testatrix’s death.

Held: (i) the order of Jan. 27, 1948, directing the inquiry was intended only to be an approach towards the main question asked by the summons, viz., whether the gift of residue to found and maintain the convalescent home constituted a good and effective charitable gift, and was not intended to be a final answer to that question, which was directed to stand over with a view to being disposed of at a later date, and, therefore, the doctrine of *res judicata* by implication did not apply so as to preclude argument on the question which was the material date to determine the practicability of the trust.

Defined of SOMERVILLE, L.J., in *Re Keenleyside* ([1949] 1 All E.R. 809), applied.

(ii) once money was effectually dedicated by a will to charity, whether in pursuance of a general or a particular charitable intent, the testator's next of kin or residuary legatees were forever excluded and no question of subsequent lapse, or of anything analogous to lapse, between the date of the testator's death and the time when the money became available for actual application to the testator's purpose could affect the matter so far as they were concerned; it made no difference whether the money was to be paid over to other persons or bodies to be applied by them to the designated charitable purpose or whether the trustees of the will were so to apply it; and, therefore, the proper date for ascertaining whether the establishment of the convalescent home was practicable or whether the gift failed for impracticability was the date of the testatrix's death.

Re Slevin ([1891] 2 Ch. 236), applied.

Re Moon's Will Trusts ([1948] 1 All E.R. 300), approved.

Decision of ROXBURGH, J. ([1954] 1 All E.R. 864), affirmed.

AS TO RES JUDICATA, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-414, paras. 465-469; and FOR CASES, see DIGEST, Vol. 21, pp. 156-158, Nos. 191-209.

Cases referred to:

(1) *Re Koenigsberg*, [1949] 1 All E.R. 804; [1949] Ch. 348; [1949] L.J.R. 1098; 2nd Digest Supp.

(2) *Hoystead v. Taxation Comr.*, [1926] A.C. 155; 95 L.J.P.C. 79; 134 L.T. 354; Digest Supp.

(3) *Re Moon's Will Trusts*, [1948] 1 All E.R. 300; [1948] L.J.R. 778; 2nd Digest Supp.

(4) *Re Slevin*, [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 8 Digest 346, 1404.

(5) *Re Soley*, (1900), 17 T.L.R. 118; 8 Digest 346, 1402.

(6) *Re Geikie*, (1911), 27 T.L.R. 484; 8 Digest 347, 1405.

INTERLOCUTORY APPEAL by the first and second defendants, the personal representatives of a deceased cousin of the testatrix, Alice Marion Wright, deceased, from an order of ROXBURGH, J., dated Feb. 19, 1954, and reported [1954] 1 All E.R. 864.

The facts appear in the judgment of ROMER, L.J.

G. B. H. Dillon for the first and second defendants (interested on intestacy).

H. A. Rose for the plaintiffs, the trustees.

Denys B. Buckley for the Attorney-General.

Cur. adv. vult.

Apr. 13. ROMER, L.J., read the following judgment. This is an appeal from an order of ROXBURGH, J., dated Feb. 19, 1954, under which the learned judge made two declarations and gave further directions which were consequential thereon. By the first declaration he declared that the defendant, the Attorney-General, was not estopped by the doctrine of res judicata by implication from contending that the date of the death of the testatrix, Alice Marion Wright, was the proper date at which to ascertain the practicability of a certain charitable trust which she sought to establish by her will. By the second declaration he declared that the date of the testatrix's death was, in fact, the proper date at which to ascertain the practicability of the said trust. The defendants to these proceedings who represent the testatrix's next of kin appeal against both of these declarations.

By her will, dated Dec. 2, 1932, the testatrix, after appointing executors and trustees and giving certain legacies, devised and bequeathed her residuary real and personal estate on the usual trusts for sale and conversion and for investment of the proceeds and (by cl. 7) directed that her trustees should stand possessed of the residuary trust fund

"upon trust therewith to found and maintain a convalescent home to be called 'the Alice Marion Wright Convalescent Home'."

for the purposes and in the manner which she thereupon prescribed, with a wealth of detail, to prescribe. It is unnecessary to set forth these purposes with any particularity. It is sufficient to say that her general object was to provide a place in which impecunious gentlemen who are recovering from illness should be permitted to stay free of expense to them during convalescence in order to recuperate their health. After the testatrix's death, which occurred on May, 15, 1933, a probate action was commenced, but was settled on certain terms, of which the only material one, for present purposes, was that a Mrs. Webb was to take a life interest in the testatrix's residuary estate. These terms were duly filed and made a rule of court. The net estate of the testatrix was sworn for purposes of probate at about £37,750.

Mrs. Webb died on Feb. 15, 1942, and the testatrix's residuary trust fund, accordingly, fell to be dealt with in accordance with cl. 7 of her will. It was, however, insufficient, in the view of the trustees, to enable them to carry out the wishes of the testatrix in the manner which she had expressed, and so, being uncertain what they ought to do with regard to the charitable trust, they issued an originating summons in the Chancery Division on June 23, 1943, asking for the directions of the court. The questions which the trustees asked by this summons were as follows:

- "(i) Whether on the true construction of the said will and in the events which have happened the gift therein contained of the proceeds of sale of the testatrix's residuary real and personal estate upon trust thereout to found and maintain a convalescent home to be called 'the Alice Marion Wright Convalescent Home' for the purposes and in manner therein particularly mentioned constitutes a good and effective charitable gift. (ii) If the answer to question (i) shall be in the affirmative, that a scheme may be directed for the purpose of carrying the said trust into effect or that otherwise directions may be given as to how the plaintiffs, as the present trustees of the said will, ought to apply or deal with the subject-matter of the said gift. (iii) If the answer to question (i) shall be in the negative, whether on the true construction of the said will and in the events which have happened the testatrix has died intestate in respect of the subject-matter of the said gift. (iv) If necessary an inquiry whether it is now or will at any future time be possible to carry into execution the trusts declared by the said will for the establishment in the manner thereby directed of a convalescent home to be called 'the Alice Marion Wright Convalescent Home'".

Then para. (v) asks for an inquiry as to next of kin, para. (vi) for a representation order, para. (vii) for administration, and para. (viii) for provision as to costs.

This summons first came before Vaisey, J., on Feb. 2, 1944, and, having regard to the difficulties of war time, he directed it to stand over for three years, namely, to Feb. 3, 1947, and ordered that the plaintiffs (the trustees) should restore the application to the list for hearing, with liberty to the parties to apply to restore it in the meantime if they should be so advised. The summons was restored for hearing and came on before Wyse-Parry, J., who, by order dated Jan. 27, 1948, directed an inquiry in the form indicated by para. (iv) of the summons, namely,

- "An inquiry whether it is now or will at any future time be possible to carry into execution the trusts declared by the will . . . for the establishment in the manner thereby directed of a convalescent home to be called 'the Alice Marion Wright Convalescent Home'".

The order also directed an inquiry as to next of kin and further directed that the rest of the originating summons should stand over. The Attorney-General was represented by counsel on the adjourned hearing before Wyse-Parry, J., but also were the other parties and it was, of course, open to him to contend that the inquiry as to the practicality of the convalescent home was proceeding

on a wrong basis and that the real question to which an inquiry should be directed was whether it was possible at the death of the testatrix to carry her charitable intentions into effect. He did not, however, so contend, but was content to accept the inquiry in the form directed by the order.

This inquiry was, accordingly, taken in chambers, and on July 4, 1952, the master certified as follows:

A "It is not now possible to carry into execution the trusts declared by the will of the above named testatrix Alice Marion Wright for the establishment in the manner thereby directed of a convalescent home to be called 'the Alice Marion Wright Convalescent Home'. From the evidence adduced I am unable to certify whether it will at any future time be possible to carry into execution the said trusts and the question is left for the consideration of the court."

B The master further stated in his certificate that it appeared from an affidavit of Sir Henry Tidy (the chairman of the convalescent homes committee of the King Edward's Hospital Fund for London) that in his opinion the residuary trust fund was insufficient and that the smallest sum which would be sufficient would be approximately £25,000 with an additional sum of £5,000 per annum for maintenance. No application was made to discharge or vary the master's certificate.

C On Sept. 11, 1953, the plaintiffs, pursuant to leave given by the master, amended the originating summons by introducing, between questions (ii) and (iii) of the summons, as originally framed, the following further question:

D "Alternatively, whether on the true construction of the said will the testatrix has shown therein a general charitable intention and the subject-matter of the said gift ought to be applied cy-près."

E The summons, as so amended, came on for further hearing before ROXBURGH, J., and he made the order of Feb. 19, 1954, from which this appeal has been brought. Counsel who was now appearing on behalf of the Attorney-General sought to argue before the learned judge that the relevant date for inquiring whether the testatrix's charitable intentions were capable of being carried into effect was not the date of the order made by WYNN-PARRY, J., or at any time thereafter, but was the date on which the testatrix died. Counsel for the next of kin submitted that, having regard to the previous orders and proceedings, it was not now open to the Attorney-General so to contend; he argued that the Attorney-General was estopped by res judicata by implication from raising this point.

F ROXBURGH, J., with some hesitation, decided in favour of the Attorney-General on this question. He said ([1954] 1 All E.R. 866) that the principles of law applicable had been concisely stated in *Re Koenigsberg* (1) and cited the following passage from the judgment of SOMERVELL, L.J., in that case ([1949] 1 All E.R. 809):

G "If an order made by the court necessarily involves a finding (whether there was argument or not) on the point which is later sought to be litigated, the authorities lay down that that point cannot be raised . . . I agree that the word 'traversable' [the word used by LORD SHAW ([1926] A.C. 166) in delivering the judgment of the Privy Council in *Hogstead v. Taxation Commr.* (2)] contemplates pleadings rather than an originating summons, but when a party takes out an originating summons he can make quite clear to those whom he has to bring before the court what point or points he wants decided, and it is for the defendants to raise matters and file evidence which deal with the points which in the originating summons are put before the court for decision."

H ROXBURGH, J., then expressed his views on the point as follows ([1954] 1 All E.R. 867):

" . . . counsel for the Attorney-General has convinced me, though by

a very narrow margin, that an order for an inquiry ought not to be regarded as a decision in a case where the very question to which the inquiry relates is, by the very order directing the inquiry, directed to stand over. It is not merely that an order for an inquiry is somewhat different from other kinds of orders, nor is it merely that there is a direction that the question is to stand over, but it is, in my judgment, a combination of both. Undoubtedly, there are cases in which there may be res judicata by implication although the litigation from which the res judicata springs is still in process of further litigation, but when, as in the present case, the question whether on the true construction of the will the gift is a good and effective charitable gift is expressly directed by the order to stand over and an inquiry is directed as to facts which are thought to be relevant to the answer to that question, it is, in my opinion, carrying this doctrine unwarrantably far to suggest that, because a certain hypothesis of law certainly did underlie the direction for an inquiry, that assumption of law is to be used as a conclusive argument against the further investigation of the question of law which is by the order expressly reserved. It is clear that the doctrine of res judicata by implication has never yet been extended to a case like the present, and, if it is to be so extended, I think that it may lead to a considerable increase in the costs of litigation. On the whole, however, I think that the doctrine is not to be extended to such cases."

I have quoted this language of the learned judge in full because it appears to me, if I may respectfully say so, to state the answer to the contention of counsel for the next of kin in the clearest possible way. It is true that counsel for the Attorney-General could, if he had wished to do so, have objected to the form of inquiry which was ordered by WYNN-PARRY, J., on the ground that it was not directed to the relevant question and that the inquiry should have been directed to the question whether it was possible at the time of the testatrix's death to establish the convalescent home. I cannot, however, appreciate why his omission to do so, or the fact that the inquiry which WYNN-PARRY, J., directed was taken, can operate now as an estoppel in the manner suggested. The inquiry was, in fact, a preliminary step on the road to answering question (ii) of the originating summons and that question itself was directed to stand over with a view to being disposed of at a later date. If the inquiry had been answered affirmatively, it would probably follow that an affirmative answer would, at a later stage, also be given to question (i) of the summons. It does not further follow, however, that a negative or uncertain certificate on the inquiry would involve of necessity a negative answer to question (i), for, as I have already indicated, the order directing the inquiry was intended only to be an approach towards the final answer to the question and not to be a final answer in itself. I am, accordingly, of the opinion that the principle of res judicata by implication has no application to the present case and that the appeal on this point fails. I would add that the law on the subject, so far as applicable, sufficiently appears from the judgment of SOMERVILLE, L.J., in *Re Kewingsbury* (1), and no authority of additional value was cited to us in argument.

The next question to be considered, then, is whether the learned judge was right in holding that the proper date for ascertaining whether the establishment of the convalescent home was practicable was the date of the testatrix's death. The argument of counsel for the testatrix's next of kin was to the effect that the gift in the will was for a special charitable purpose, namely, for the establishment and maintenance of the convalescent home which the testatrix had in mind and which she described with such particularity; and that the gift was dependent and conditional on it being practicable to carry the purpose, as so described, into effect when the death of the life tenant, Mrs. Webb, made the fund available for the home. It is not so much a question of lapse, he said, as a condition of practicability being attached to the gift, so that, if the condition could not be

satisfied, the bequest would fail. Counsel for the Attorney-General, on the other hand, contended that no such condition or contingency as suggested attached to the bequest. He argued that in the case of any charitable gift by will, whether immediate or future, no question of impracticability supervening after the testator's death is of any materiality, provided that the object or purpose to which the gift is to be applied is practicable when the testator died. That is the time, he argued, when the rights of the parties—charity, on the one hand, and the next of kin or other persons taking in default, on the other—are to be ascertained and they are to be ascertained at that time once and for all.

In the present case ROXBURGH, J., followed, on the point now under consideration, his earlier decision in *Re Moon's Will Trusts* (3). In that case a testator directed that after the death of his wife his trustees should pay a legacy of

“£3,000 to the trustees of the Gloucester Street Wesleyan Methodist Church at Devonport on trust to invest the same in some government security and to apply the income thereof to mission work in the district served by the said Gloucester Street Wesleyan Methodist Church including particularly John Street and Moon Street.”

By the time when the testator's widow died it had become impracticable to carry out the mission work which the testator envisaged. ROXBURGH, J., held that the gift was charitable, and held further that, although the legacy was a future legacy, the question whether or not the charitable purpose lapsed for impracticability had to be ascertained at the moment when the charity trustees became absolutely entitled to the legacy, i.e., at the moment of the testator's death and not at the moment when it became payable. The learned judge was guided to this conclusion by the reasoning of the judgment of this court in *Re Slevin* (4), which was delivered by KAY, L.J. The testator in that case bequeathed, amongst other “charitable legacies”, a legacy to an orphanage which was in existence at the time of his death, but was discontinued before his assets had been administered, and, therefore, before the legacy was or properly could be paid. The question was whether, in those circumstances, the legacy failed and fell into residue. In the course of the argument KAY, L.J., rhetorically asked ([1891] 2 Ch. 237):

“... where the charity, the legatee, is in existence at the death of the testator, and has received, or might have received the legacy, does not the legacy by that very fact become impressed with charity which the residuary legatee cannot get rid of?”

The judgment of the court gave an affirmative answer to that question. The following passages from that judgment (*ibid.*, 239-241) were relevant to *Re Moon* (3) and are, I think, equally relevant to the present case.

“Properly speaking, a lapse can only occur by failure of the object in the lifetime of the testator; but it is possible that a will might be so framed as that a subsequent failure of the object of the charitable gift might occasion a resulting trust for the benefit of the testator's estate. We have not been referred to any such case, nor have we found any... If it [the legacy] had been received, the whole might have been expended at once; and, even if not received, the amount might have been anticipated by borrowing from a banker, or otherwise, and charging this legacy with the amount so borrowed... The orphanage did come to an end before the legacy was paid over. In the case of a legacy to an individual, if he survived the testator it could not be argued that the legacy would fall into the residue. Even if the legatee died intestate and without next of kin, still the money was his, and the residuary legatee would have no right whatever against the Crown. So, if the legatee were a corporation which was dissolved after the testator's death, the residuary legatee would have no claim. Obviously it can make no difference that the legatee ceased to exist immediately after the death

of the testator. The same law must be applicable whether it was a day, or month, or year, or, as might well happen, ten years after: the legacy not having been paid either from delay occasioned by the administration of the estate or owing to part of the estate not having been got in. The legacy became the property of the legatee upon the death of the testator, though he might not, for some reason, obtain the receipt of it till long after. When once it became the absolute property of the legatee, that is equivalent to saying that it must be provided for: and the residue is only what remains after making such provision. It does not for all purposes cease to be part of the testator's estate until the executors admit assets and appropriate and pay it over; but that is merely for their convenience and that of the estate. The rights as between the particular legatee and the residue are fixed at the testator's death."

As counsel for the Attorney-General pointed out, if the argument of counsel for the next of kin on the present appeal be right, the decision in *Re Slevin* (4) would have been that the gift had failed by reason of the fact that, by the time the executors were administratively able to pay the legacy, the orphanage to which the testator had given it had been discontinued and, therefore, the purpose of the gift had become impracticable. The court did not, however, take that view, but held that, as the orphanage existed and was capable of taking when the testator died, the gift took effect just as it would have done if the legatee had been an individual who survived the testator but died before payment. The reasoning in *Re Slevin* (4) appears to me to have been almost conclusive of the question in *Re Moon* (3), and, in my opinion, the decision of ROXBURGH, J., in that case was perfectly right. It, accordingly, follows that, unless there is any distinction in principle between *Re Moon* (3) and the present case, the appeal must necessarily fail. Counsel for the next of kin contended that a future gift, as here, to a particular charitable purpose is in a different position from a gift to a particular charitable institution, and that, although a condition of survival, as it were, may not attach to the latter, it does attach to the former. Counsel for the Attorney-General, on the other hand, says that a particular charitable purpose is, in effect, an entity just as charity generally is regarded as being, and that it could only be defeated by the next of kin in the present case if they could sufficiently show (and the onus would lie on them) that the purpose which the testatrix had in mind was doomed to inevitable failure from the moment when the testatrix died, and that they could not have discharged this onus, for the life tenant under the compromise might have died at any time, and, in particular, might have died while the purpose which the testatrix desired to achieve was still capable of fulfilment.

In my opinion, the distinction which counsel for the next of kin sought to draw between a particular charitable purpose, on the one hand, and an individual or an existing and specified charity, on the other hand, is not a sound distinction. Once money is effectually dedicated to charity, whether in pursuance of a general or a particular charitable intent, the testator's next of kin or residuary legatee are for ever excluded and no question of subsequent lapse, or of anything analogous to lapse, between the date of the testator's death and the time when the money becomes available for actual application to the testator's purpose can affect the matter so far as they are concerned. This conclusion necessarily follows, I think, on the reasoning in *Re Slevin* (4). In *Re Soley* (5) a testator bequeathed money on trust to pay the income thereof to a person for life and after his death the fund was given to the Drapers' Company to be applied by them for the benefit of their college at Tottenham and for promoting a scholarship, and scholarships for the encouragement of the scholars in various branches of learning, or in such other manner as the masters, wardens and court of assistants in their absolute discretion should think most suited to promote the interests of the college. The gift, accordingly, was for the promotion of a particular charitable

purpose. After the testator's death, but during the lifetime of the tenant, the college ceased to exist. BYRNE, J., following *Re Slavin* (4), held that there had been no lapse of the bequest and directed that it should be applied for charitable purposes *cy-près*. A similar decision was that of NEVILLE, J., in *Re Geikie* (6), and, indeed, the decision of ROXBURGH, J., in *Re Moon* (3) itself proceeded on the same footing. It is true that in all these cases the funds which were in question were to be paid over to other persons or bodies to be applied by them to the designated charitable purposes whereas in the present case it is the trustees themselves who were so to apply the residuary trust fund, but, in my opinion, no difference of principle arises from this. The testatrix's trustees hold the fund impressed with a charitable trust just as did the third parties to whom the gifts were directed to be paid in the other cases. I am, accordingly, of opinion that no legitimate distinction exists, either on principle or on authority, between the present case and *Re Moon* (3) and that the learned judge's decision on this question was right and should be affirmed. I would only add that, although the question before us is not one of construction, nevertheless a contrary conclusion in the present case would, in fact, quite clearly defeat the intention of the testatrix. The life interest in residue of Mrs. Webb, which deferred for years the fulfilment of the testatrix's wishes as expressed in her will, arose from the settlement of the probate proceedings and not from any bounty of the testatrix herself. She wanted the charity to be founded immediately on her death, and, but for the change in her testamentary dispositions effected by the compromise, her next of kin could have had no possible claim to the fund. It is, therefore, without reluctance that I have reached the conclusion that the appeal should be dismissed.

D DENNING, L.J.: I agree. The result, therefore, is that the appeal will be dismissed. *Appeal dismissed.*

Solicitors: *Beale & Co.* (for the first and second defendants); *Frank Taylor, Nightingale & Baker* (for the plaintiffs); *Treasury Solicitor*.

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

F COTTON v. COTTON AND ANOTHER.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), April 8, 9, 1954.]

Legitimacy—Presumption of legitimacy—Rebuttal—Birth in lawful wedlock—Burden of proof of non-access.

On May 16, 1951, the wife left the husband. On June 2, 1951, she returned, but left him again on June 5, 1951, and went to live with the co-respondent. On Dec. 22, 1951, a child was born to the wife. On May 5, 1952, the husband obtained a dissolution of the marriage on the ground of the wife's adultery with the co-respondent. The husband disputed the paternity of the child and at the trial of this issue he alleged that, although he had slept in the same bed as the wife, he had had no intercourse with her since January, 1951.

HELD: where the legitimacy of a child born in lawful wedlock was in dispute, the husband alleging that he had had no intercourse with the wife at the material time, the evidence to that effect must be such as to exclude any reasonable doubt, and in the circumstances that proof was not forthcoming.

Dictum of LUXMOORE, J., in *Re Bromage* ([1935] Ch. 616), applied.

AS TO THE REBUTTAL OF THE PRESUMPTION OF LEGITIMACY, see HALSBURY, *Sinmonds Edn.*, Vol. 3, pp. 89-92, paras. 141-145: and FOR CASES, see DIGEST, Vol. 3, pp. 360-364, Nos. 24-53.

Cases referred to:

(1) *W. v. W.*, [1953] 2 All E.R. 1013; [1954] P. 48.

(2) *Re Bromage*, [1935] Ch. 605; 104 L.J.Ch. 299; 153 L.T. 313; Digest Supp.

- (3) *Barbours Peckage Case*, (1811), 1 Sim. & St. 153; 57 E.R. 62; 3 Digest 358, 2.
- (4) *Morris v. Davies*, (1837), 5 Cl. & Fin. 163; 7 E.R. 365; 3 Digest 359, 17.

APPEAL by the husband against an order of His Honour JUDGE WHITMER, sitting as special commissioner in divorce at Ipswich, dated Jan. 7, 1954.

The parties were married in 1941. On May 16, 1951, the wife left the husband and went to stay in a house occupied by a Mrs. S. On June 2, 1951, she returned to the husband. On June 5, 1951, she again left him and went to stay in a house occupied by one Joffre Howard. On Dec. 11, 1951, the husband presented a petition for dissolution of the marriage on the ground of the wife's adultery with Howard (who was cited as co-respondent) on and after June 5, 1951, and claimed the custody of the three children of the marriage born respectively in 1941, 1944 and 1947. On Dec. 22, 1951, a fourth child was born to the wife who named the child Joffena Carol. The petition was heard on May 5, 1952, when a decree nisi was granted to the husband who denied the paternity of the child Joffena Carol. On Jan. 7, 1954, an issue as to the paternity of the child was tried by the commissioner. The husband stated that he had not had sexual intercourse with the wife after Jan. 29, 1951, but he admitted that he had continued to sleep in the same bed with her until she left finally on June 5, 1951. The commissioner was not satisfied that the husband had discharged the heavy burden of proof resting on him, and decided the issue against the husband, namely, that the child was a child of the marriage.

R. M. O. Havers for the husband.

F. P. Keysell for the wife.

J. T. Turner for the Official Solicitor as guardian ad litem of the child.

SINGLETON, L.J., stated the facts and continued: Before the commissioner the husband claimed that the child was not his. He alleged that there had been an adulterous association between the wife and the co-respondent for some months before the wife left him. The commissioner, having said that the wife was an unreliable witness and that he could not rely on her evidence, said:

"But if one takes the matter by stages and attempts an analysis of it, one ought not merely to jump to the opposite conclusion that the husband's evidence must be wholly reliable. It simply means that one puts the wife's evidence out as not being reliable, almost as if she had not given it."

The husband's evidence was that he had not had sexual intercourse with his wife since Jan. 29, 1951, and that he could not be the father of this child born on Dec. 22, 1951. The wife disputed that. She said that sexual intercourse took place between them regularly until they parted. The commissioner was of opinion that she thought that the co-respondent was the father of the child whose paternity was in question, but he pointed out that she might be wrong. The commissioner asked himself:

"What evidence is there the other way round? There is only this evidence of the husband as to when intercourse ceased. Counsel for the husband says: 'What other evidence can you give?' The answer in the circumstances, I suppose, may well be that there is none. The answer may be that it is unfortunate if he was sharing the same bed, because then he cannot establish his case in accordance with the very high standard of proof required. Counsel for the husband attempts to answer that by saying that one ought to look for corroboration of the husband's story. The wife clearly, counsel says, thought the co-respondent was the father because she knew she had been misconducting herself at the time the child was conceived, and was not having intercourse with the husband . . ."

The husband said:

"My wife and I slept in the same bed until we parted. There was nowhere else for us to sleep. There were two beds in the house. Three children slept in one, and my wife and I slept in the other, but for months before the parting we had not had sexual intercourse."

The question for the commissioner was: Was that established to his satisfaction? Counsel for the husband complained of this sentence in the judgment:

"The answer may be that it is unfortunate if he was sharing the same bed, because then he cannot establish his case in accordance with the very high standard of proof required."

That, counsel submitted, shows that the commissioner was really adopting the view expressed in HALSBURY'S LAWS OF ENGLAND, 3rd ed., vol. 3, p. 90, para. 142*:

"When husband and wife are shown to be sleeping together, there being no natural impediment, the evidence is irresistible that the intercourse took place."

I do not think that that passage can be regarded as an accurate statement of the law today. For some years now it has been possible for husband and wife to give evidence on a matter of this kind, and the Matrimonial Causes Act, 1950, s. 32 (1) provides:

"Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period."

Thus, it was open to the husband to give evidence that he had not had intercourse with his wife at any material time. That evidence he gave, and it was for the commissioner to determine whether or not he could accept it as conforming to the measure of proof required in a case of this kind. Later in his judgment the commissioner said:

"I have no doubt that, as a matter of law, that can be taken as corroboration and it is some corroboration. On the other hand, ought I to accept the husband's evidence, corroborated to the extent it is in the way I have just indicated, that, though sleeping with his wife, he was not having intercourse with her at the material time?"

It seems to me that in that passage the commissioner put to himself the real question in the case. He then referred to *W. v. W.* (1), and read this passage ([1953] 2 All E.R. 1016) from the judgment of BARNARD, J.:

"If I had to decide this issue merely on a balance of probability I would decide in the husband's favour, but the presumption of law—which means that he must satisfy me beyond all reasonable doubt—has not been displaced, and, therefore, I decide the issue in favour of the wife."

The commissioner continued:

"I can only repeat those words. If this were a civil case, unhesitatingly I would decide in the husband's favour. I am more than suspicious that this child is the child of the co-respondent. I think it probably is. But that does not seem to me to carry the matter far enough. The husband has to prove the matter beyond all reasonable doubt. I have to look at the present case as best I can with the mind of a jury. Not without hesitation, I have come to the conclusion that the probability is that a jury would not be willing to go all the way in deciding this issue in the husband's favour if they were properly directed, and in those circumstances, I must admit with reluctance because I am inclined to think the truth is the other way, I must decide this issue against the husband."

* Quoting, in effect, per LORD COTTENHAM, L.C., in *Morris v. Davies* (1837), 5 Cl. & Fin. 163, 243.

Consider that last passage. The commissioner was impressed by the fact that when the wife was pregnant she went to the house of the co-respondent and lived there. He found it difficult to think that that would have happened if the child she was carrying was not the child of the co-respondent. I find it difficult myself. He thought, too, it was unlikely that the wife would have given the child the name Joffena unless the co-respondent, Joffre Howard, was the father. So do I. But, notwithstanding that, the commissioner did not find himself able to be satisfied that there had not been sexual intercourse between husband and wife at the material time. He said that, if there was one act of intercourse about the time of the conception of the child, the child might still be the child of the husband, and it would be wrong, in those circumstances, to declare the child illegitimate, for that virtually would be the result of such a finding. He did not feel able to say that the husband had proved that he had not had sexual intercourse with his wife at the material time.

The law on the subject is summarised in *Re Braggage* (2) where LUXMOORE, J., cited ([1935] Ch. 610) these words from the *Banbury Peerage Case* (3):

“ ‘Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child, and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when by such intercourse, the husband could by the laws of nature, be the father of such child ’.”

LUXMOORE, J., continued:

“ The evidence must, as the Lord Chancellor (LORD COTTESHAM) said in *Morris v. Davies* (4) (5 Cl. & Fin. 215), ‘ be such as to exclude all doubt, that is, of course, all reasonable doubt in the minds of the court or jury, to whom that question is submitted.’ The question cannot be decided upon a mere balance of probabilities. To quote LORD LYNDHURST’S words (*ibid.*, 265: ‘ . . . that presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive.’ ”

It seems to me that the test applied by the commissioner was the test stated in those passages which I have read. I cannot see that there was any error of law on his part. Counsel for the husband said that, perhaps, he might have taken more authorities to put before the commissioner. I do not think that would have carried the case any further. It was a question of fact which had to be decided according to that which has been said over the centuries, that the measure of proof in a matter of this kind is, indeed, strict. The commissioner thought that that measure of proof was not attained. It would not help anyone if I, or any other member of this court, expressed a view as to the conclusion which we might have reached if we had seen the witnesses and had heard what they had to say. It was a question for the judge of first instance. The husband did not satisfy him as he thought he ought to be satisfied before he could decide in the way the husband asked him to decide. In those circumstances, it appears to me that the only course which this court can take is to dismiss the appeal.

JENKINS, L.J.: I agree.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Gotelee & Goldsmith*, Ipswich (for the husband); *Lyus, Burne & Lyus*, Diss (for the wife); *Official Solicitor*, agent for *Turner, Martin & Symes*, Ipswich (for the infant child).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re GREAVES (*deceased*). GREAVES v. GREAVES AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), March 23, April 8, 14, 1954.]

Family Provision—Extension of time for application—Form of application for extension—“Circumstances affecting administration or distribution of estate”—Inheritance (Family Provision) Act, 1938 (c. 45), s. 2 (1A) (added by Intestates’ Estates Act, 1952 (c. 64), s. 7, sched. III).

A An application for an extension of time, under s. 2 (1A) of the Inheritance (Family Provision) Act, 1938 (added by the Intestates’ Estates Act, 1952, s. 7 and sched. III), should be made by way of a separate item (being the first item) in the originating summons asking for the main relief which is sought under the Act. Where the summons asking for the main relief has already been issued before the plaintiff becomes aware that the application is not within the time prescribed by s. 2 (1) of the Act, he should apply for leave to amend the summons so as to include this further relief as the first item in the summons. The question of relief under s. 2 (1A) should be adjourned into court as a separate matter and before the hearing of the main part of the summons, but it is not a procedure summons and should not be so listed.

B
C *Family Provision—Extension of time for application—“Circumstances affecting the administration or distribution of the estate”—Inheritance (Family Provision) Act, 1938 (c. 45), s. 2 (1A) (c) (added by Intestates’ Estates Act, 1952 (c. 64), s. 7, sched. III).*

D The deceased died on Mar. 2, 1953, and his will was proved on Apr. 14, 1953. On Dec. 21, 1953, the widow took out an originating summons asking for reasonable provision to be made for her maintenance out of the estate of the deceased, under the Inheritance (Family Provision) Act, 1938, s. 1 (1). As the application was not made within six months from the date of the grant of probate, the period prescribed by s. 2 (1) of the Act, she was granted leave to amend the summons so as to ask for an extension of the period under s. 2 (1A) (added by the Intestates’ Estates Act, 1952, s. 7, sched. III). It was submitted on her behalf that the limitation to the period prescribed by s. 2 (1) would operate unfairly in consequence of circumstances affecting the administration or distribution of the estate, viz., (i) that she was without information in regard to the true value of the estate; (ii) that during August and September, 1953, she was negotiating with the executors and beneficiaries with the object of effecting a compromise, and that the negotiations were not ended but merely suspended; and (iii) that the estate had not been distributed.

E
F HELD: although the facts set out by the widow constituted circumstances affecting the administration or distribution of the estate, within s. 2 (1A) (c) of the Act she had failed to show that any unfairness flowed from any of them, and, therefore, she was not entitled under s. 2 (1A) to an extension of the period prescribed by s. 2 (1).

G FOR THE INHERITANCE (FAMILY PROVISION) ACT, 1938, s. 2 (1A), as amended by the Intestates’ Estates Act, 1952, s. 7 and sched. III, see HALSBURY’S STATUTES, Second Edn., Vol. 32, p. 142.

SUMMONS.

H By an originating summons issued on Dec. 21, 1953, the plaintiff, Beatrice Annie Greaves, the widow of Edwin Horace Greaves, deceased, applied under the Inheritance (Family Provision) Act, 1938, s. 1 (1), for reasonable provision to be made for her maintenance out of the estate of the deceased. When the summons came before the master, he pointed out that, as the deceased’s will was proved on Apr. 14, 1953, the application was not made within the period prescribed by s. 2 (1) of the Act. The plaintiff then applied for the period to be extended under s. 2 (1A) of the Act (added by the Intestates’ Estates Act, 1952, s. 7 and sched. III).

R. J. S. Thompson for the plaintiff, the widow.

Grants for the defendants, the executors of the will of the deceased and family members under the will.

Mar. 23. **ROXBURGH, J.**, gave the following ruling. I have spoken to the chief master, and, as a result of my conversation with him, in my view the proper practice, if the plaintiff wants relief under s. 2 (1A) of the Inheritance (Family Provision) Act, 1938 (added by the Intestates' Estates Act, 1952, s. 7 and sched. III), is to ask for that relief as a separate item by originating summons, proceeding also to ask for the main relief as a separate item. If the plaintiff becomes aware of the deficiency of his summons after he has issued it, then his duty is to ask for leave to amend the summons by asking for relief under s. 2 (1A) as a separate item. It would then be proper and, indeed, desirable for the question of relief under s. 2 (1A) to be adjourned into court as a separate matter and before the hearing of the main part of the summons. But it is not a procedure summons and should not be so listed. It is the ordinary case of an originating summons adjourned into court on one point and not on the other point.

[On an application by counsel for the plaintiff, HIS LORDSHIP gave leave to amend the summons.]

ADJOURNED SUMMONS.

By the amended summons the plaintiff asked, *inter alia*, (i) that the period of six months prescribed by s. 2 (1) of the Act of 1938 might be extended, pursuant to s. 2 (1A), until Dec. 21, 1953; and (ii) that reasonable provision should be made for her maintenance out of the estate of the deceased.

In support of her application under s. 2 (1A) the plaintiff sought to show that the limitation to the period of six months would operate unfairly in consequence of circumstances affecting the administration or distribution of the estate, within s. 2 (1A) (c).

Curr. adv. vult.

Apr. 14. **ROXBURGH, J.**, read the following judgment. The Inheritance (Family Provision) Act, 1938, s. 2, as amended by the Intestates' Estates Act, 1952, s. 7 and sched. III, provides as follows:

"(1) Except as provided by the following provisions of this section or s. 4 of this Act, an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the deceased's estate is first taken out. (1A) If it is shown to the satisfaction of the court that the limitation to the said period of six months would operate unfairly,—(a) in consequence of the discovery of a will or codicil involving a substantial change in the disposition of the deceased's estate (whether or not involving a further grant of representation) or (b) in consequence of a question whether a person had an interest in the estate, or as to the nature of an interest in the estate, not having been determined at the time when representation was first taken out, or (c) in consequence of some other circumstances affecting the administration or distribution of the estate, the court may extend that period. (1B) The provisions of this Act shall not render the personal representatives of the deceased liable for having distributed any part of the estate of the deceased after the expiration of the said period of six months on the ground that they ought to have taken into account the possibility that the court might exercise its power to extend that period, but this sub-section shall be without prejudice to any power to recover any part of the estate so distributed arising by virtue of the making of an order under this Act".

Edwin Horace Greaves died on Mar. 2, 1953. His will was proved on Apr. 11, 1953, and this application under the Act of 1938 was made on Dec. 21, 1953. When it came before the master he pointed out that it was out of time. Hence

this preliminary application for an extension of time. Well within the prescribed time the plaintiff (who is the testator's widow) instructed solicitors and they negotiated with the solicitors for the defendants, who were both executors and beneficiaries. On Aug. 7, 1953, the solicitors for the widow wrote (in a letter headed "without prejudice"):

A "It has occurred to us that if the suggested arrangement can be carried into effect it would save any further controversy and possible litigation, and would, we think, satisfy all parties concerned".

On Sept. 9, 1953, the solicitors for the defendants replied (in a letter, also headed "without prejudice"):

B "Our clients are considering your letter, but we have today before us certain communications from the Revenue affecting values for estate duty purposes. To use our clients' own words, they cannot say whether there will be anything to be generous with, and until we can conclude matters with the Revenue we do not think our clients can give us any definite instructions".

At this point the negotiations were suspended. On Oct. 14, 1953, the prescribed period expired. There is, in my judgment, no doubt that the reason why no proceedings began in due time was that the plaintiff's solicitors were ignorant of the time limit. But it has been submitted by counsel that the limitation to the period of six months would operate unfairly because (i) the plaintiff was without information as to the true value of the estate; (ii) the negotiations for a compromise had been suspended but not ended; (iii) the estate had not been distributed; and that these were circumstances affecting the administration or distribution of the estate. I think that they were. But, in my judgment, no D unfairness flows from any of them. As to the first point, the plaintiff's solicitors never asked for any information regarding the true value of the estate, and, indeed, the true value of any estate is seldom known within six months from the date of a grant. As regards the second, the plaintiff had ample time within the prescribed period and after the negotiations had been suspended to issue a summons, and this step would, undoubtedly, have been taken by anybody aware E of the time limit. As to point (iii), I certainly cannot lay down a rule that it would be unfair not to extend the time in every case in which no distribution has yet been made. This is so in the great majority of cases, and is not, in my view, a circumstance which makes it unfair to require a plaintiff to proceed within the prescribed period. In my judgment, if, in the present case, it is unfair to hold the plaintiff to the prescribed time, it is so in consequence of the mistake of her F solicitors and for no other reason, and that is not a circumstance affecting the administration or distribution of the estate. Therefore, the summons is dismissed.

Order accordingly.

Solicitors: *Doyle, Devonshire & Co.*, agents for *Abberley & Walker*, Burslem (for the plaintiff); *Holt, Beever & Kinsey*, agents for *Brown & Corbishley*, Newcastle-under-Lyme (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

CHANCERY DIVISION.

PRACTICE NOTE.

Family Provision—Practice—Application for reasonable provision—Conflicting interests—Adding of one applicant as defendant.

The following Practice Note is published by direction of Vaisey, J.

THE INHERITANCE (FAMILY PROVISION) ACT, 1938.
APPLICANTS WITH ADVERSE INTERESTS.

Where two or more persons are joined as plaintiff in an application under the above mentioned Act it will generally be the case that their respective interests are, or may be, in conflict, and difficulties will then arise as to the presentation of their claims, since two or more plaintiffs cannot be separately represented by counsel at the hearing.

The Act requires that the application shall be "by or on behalf of" the dependant, and it is, therefore, not possible for one claimant to initiate the proceedings, making the other claimant a defendant.

In a recent case, in which a widow and her infant daughter were joint plaintiffs and this difficulty arose, an order was made upon summons by the plaintiffs in the proceedings) in the following form:—

AND IT APPEARING that the interests of the infant plaintiff are or may be adverse to those of the plaintiff . . . and that it is desirable that the infant plaintiff should be enabled to be separately represented for the purpose of prosecuting her claim in this action under the above mentioned Act

IT IS ORDERED that the infant plaintiff . . . be struck out as a plaintiff and added as a defendant

The recital was inserted to make it plain that the infant, having complied with s. 1 (4) of the Act by originally joining in the application as a plaintiff, remains a claimant although transferred to the other side of the record.

3rd May, 1954.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

PRACTICE NOTE.

Administration of Estates—Grant—Jurisdiction of registrar.

The President has authorised the registrars of the Principal Probate Registry to make orders for grants of administration under s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, or for leave to admit to probate, in estates not exceeding £3,000 gross value. The previous limits, as notified in the Practice Notes of Feb. 6, 1951, and Nov. 6, 1942, were £2,000 in the first case and £1,000 in the second.

Re STIRLING (*deceased*). UNION BANK OF SCOTLAND, LTD.
v. STIRLING AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), April 13, 1954.]

Will—Gift to bank “with the request that it will dispose of it in accordance with any memorandum signed by me”—No communication of wishes to bank during testator’s lifetime—Whether bank beneficially entitled.

By his will, a testator appointed a bank to be his executor and trustee and provided by cl. 2 that, if his wife should survive him for one month, then, but not otherwise, he gave and devised all his real and personal estate to her absolutely and beneficially. He further provided that, if his wife should not survive him for that period, the subsequent clauses of his will should take effect. By cl. 4 the testator provided: “I bequeath the following pecuniary legacies:—(a) To the bank the sum of £1,000 free of duty . . . with the request that it will dispose of it in accordance with any memorandum signed by me and I direct that any such memorandum is not to form part of this my will or to have any testamentary character and I request the bank that if the said legacy of £1,000 is not wholly disposed of in complying with such memorandum the balance not so disposed of shall fall into and form part of my residuary estate and I declare that the foregoing expression of my wish in connection with the said sum of £1,000 shall not create any trust or legal obligation even if the same shall be communicated to the bank in my lifetime”. By cl. 5 the testator constituted his residuary estate and bequeathed it “as to . . . one third share thereof to the bank with the request that it will dispose of it in accordance with any memorandum signed by me and I direct that any such memorandum is not to form part of this my will or to have any testamentary character and I declare that the foregoing expression of my wish in connection with the said one third share shall not create any trust or legal obligation even if the same shall be communicated to the bank in my lifetime”. On Nov. 24, 1952, the testator died, and on Dec. 2, 1952, the testator’s wife died. No wishes were communicated to the bank during the testator’s lifetime regarding the legacy or the one third share of residue bequeathed to it, but a memorandum was found amongst the testator’s papers after his death indicating his wishes. It was not contended that the memorandum had any legal effect. On the question as to the beneficial entitlement to the legacy of £1,000 and the share of the residuary estate bequeathed to the bank,

HELD: on the true construction of the will, the bank was absolutely and beneficially entitled both to the legacy and to the share of residue.

Re Falkiner ([1924] 1 Ch. 88), applied.

Re Rees ([1949] 2 All E.R. 1003), *Re Hawksley’s Settlements* ([1934] Ch. 384) and *Re Boyes* (1884) (26 Ch.D. 531), distinguished.

AS TO GIFT TO EXECUTOR WITH NON-BINDING REQUEST, see HALSBURY, Hailsham Edn., Vol. 33, p. 106, para. 180; and FOR CASE, see DIGEST, Vol. 43, p. 599, No. 470.

Cases referred to:

- (1) *Re Falkiner*, [1924] 1 Ch. 88; 93 L.J.Ch. 76; 130 L.T. 405; 43 Digest 599, 470.
- (2) *Re Schar*, [1950] 2 All E.R. 1069; [1951] Ch. 280; 2nd Digest Supp.
- (3) *Re Rees*, [1949] 2 All E.R. 1003; [1950] Ch. 204; 2nd Digest Supp.
- (4) *Re Hawksley’s Settlements*, [1934] Ch. 384; 103 L.J.Ch. 259; 151 L.T. 299; Digest Supp.
- (5) *Re Boyes*, (1884), 26 Ch.D. 531; 53 L.J.Ch. 654; 50 L.T. 581; 43 Digest 601, 487.

ADJOURNED SUMMONS to determine whether, on the proper construction of the will of the testator and on the events which happened, (a) a legacy of £1,000

bequeathed to the plaintiff and (b) the one third share of residue bequeathed to the plaintiff (d) might be retained by the plaintiff and disposed of as it thought fit without any trust or obligation; (n) were subject to a trust for the benefit of those entitled to the residue of the estate of the testator and for the next of kin respectively; or (m) were subject to some and if so what trusts in favour of persons mentioned in memoranda left by the testator.

By his will dated Sept. 28, 1949, Robert Stirling appointed the plaintiff bank to be his executor and trustee and by cl. 2 provided that, if his wife should survive him for the space of one month (which event did not happen), then, but not otherwise, he gave all his real and personal estate to her absolutely and beneficially without any sort of trust or obligation. By cl. 3 he provided:

"If my said wife shall not survive me for the period aforesaid then I direct and declare that the subsequent clauses of this my will shall take effect".

By cl. 4:

"I bequeath the following pecuniary legacies:—(a) To the bank the sum of £1,000 free of duty to be paid in priority to all other legacies bequeathed by this my will with the request that it will dispose of it in accordance with any memorandum signed by me and I direct that any such memorandum is not to form part of this my will or to have any testamentary character and I request the bank that if the said legacy of £1,000 is not wholly disposed of in complying with such memorandum the balance not so disposed of shall fall into and form part of my residuary estate and I declare that the foregoing expression of my wish in connection with the said sum of £1,000 shall not create any trust or legal obligation even if the same shall be communicated to the bank in my lifetime".

Then followed a number of pecuniary legacies to various relations. By cl. 5 the testator constituted his residuary estate and bequeathed it

"... as to one third share thereof to my brother the said James Fairlie Stirling absolutely as to another one third share thereof to my brother the said David Edward Stirling absolutely and as to the remaining one third share thereof to the bank with the request that it will dispose of it in accordance with any memorandum signed by me and I direct that any such memorandum is not to form part of this my will or to have any testamentary character and I declare that the foregoing expression of my wish in connection with the said one third share shall not create any trust or legal obligation even if the same shall be communicated to the bank in my lifetime."

Josefina Stirling, the wife of the testator, made a will also dated Sept. 28, 1949, which was in all material respects similar in form to that of the testator.

On Nov. 24, 1952, the testator died, and his wife died, within one month, on Dec. 2, 1952. Neither made any communication to the bank during his and her lifetime as to their wishes in respect of the legacies of £1,000 and one third of their respective residues, but certain memoranda were found among their papers at their deaths. It was not contended, in the circumstances, that any of those memoranda could have any legal effect, and the question arose (in the case of each will) whether the legacy of £1,000 and the one third share of residue bequeathed to the bank could be retained and disposed of by the bank as it thought fit. The bank desired to dispose of the property bequeathed to it in accordance with the memoranda.

F. E. Skone James for the plaintiff, the Union Bank of Scotland, Ltd.

Raffety for those interested in residue.

D. H. M. Davies for the next of kin.

WYNN-PARRY, J.: The two wills in this case are, for all material purposes, in the same form, and I can deal with the whole summaries conveniently by

reference to the will of the testator, Robert Stirling. [His LORDSHIP stated the facts and continued:] The sole question in the circumstances which I have to consider is whether, on the true construction of the will, both the legacy and the one third share of residue bequeathed to the plaintiff may be retained by the plaintiff and disposed of by it as it thinks fit without any trust or obligation or are subject to a trust for the benefit of the persons entitled to the residue of each estate and for his or her next of kin respectively.

A I propose first to construe the will unaided or unembarrassed by any authority. It is pointed out by counsel for the next of kin that in the very first clause of the will the bank is stamped with a fiduciary character, being described as and appointed as "executor and trustee". It is further pointed out by counsel that in the second clause in the conditional gift to his wife the testator uses the words "absolutely and beneficially", but it is, on the other hand, to be observed that B he adds the words "without any sort of trust or obligation", which words may be considered strictly to be otiose, following as they do the words "absolutely and beneficially". Those are points to be taken into consideration.

I then proceed to the first of the two vital clauses, cl. 4 (a). It opens with the words:

C "To the bank the sum of £1,000 free of duty to be paid in priority to all other legacies bequeathed by this my will . . .",

and, if the clause stopped there, there would be nothing whatsoever to indicate from the language used that the bank were to take that £1,000 otherwise than D absolutely and beneficially, for I should find that there was insufficient in the points to which I have already referred, in view of that language, to cut down what would be a plain and unqualified gift. The clause goes on with the request that the bank will dispose of the £1,000 in accordance with any memorandum signed by the testator, and there is the direction that the memorandum is not to form part of the will. That is a direction, and is, therefore, intended to be operative. It is followed by a request as regards any balance, and in contrast E to the verb "direct" there is the verb "request". There follows a declaration, which, again, is the introduction to a phrase intended clearly to be operative, viz.,

"that the foregoing expression of my wish in connection with the said sum of £1,000 shall not create any trust or legal obligation even if the same shall be communicated to the bank in my lifetime".

Turning to cl. 5, where the last third of the residuary estate is given to the bank, F there is exactly the same direction and the same declaration, the only difference in the construction of the residuary clause being the necessary omission of the request relating to any part of the £1,000 not wholly disposed of which the testator desired to fall into residue.

Regarding the matter as purely one of construction, it appears to me to be a necessary conclusion from the scheme of the will that the testator intended that G the bank, at any rate as regards the other residuary legatees so far as the bequest of the £1,000 is concerned and as regards the next of kin so far as the residuary clause is concerned, should take the £1,000 legacy and the share of residue absolutely and beneficially. The question then arises: Is there any authority, or line of authority, which will operate to prevent me giving effect to the construction which I have placed on these two wills?

H The nearest case is *Re Falkiner* (1). The headnote of that case reads as follows ([1924] 1 Ch. 88):

"By her will, dated Apr. 22, 1922, a testatrix devised and bequeathed her real and personal estate to two persons upon trust for sale and conversion and investment of the net proceeds as therein mentioned. She then bequeathed to the two persons by name 'absolutely as joint tenants one half of the residuary trust moneys, with the request that they will dispose of the same in accordance with any memorandum or paper signed by me and

deposited with this my will or left amongst my papers at my death'. There was a similar gift of the other half of the residuary trust moneys subject to a life interest. She then declared that any such memorandum or paper should not have any testamentary character, 'and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation, even if the same shall be communicated to my trustees in my lifetime'."

Pausing there, it will be seen that the relevant provisions in that will are very similar to the relevant provisions in these two wills.

"The two persons were the partners in the firm of solicitors which prepared her will, and an earlier will dated Aug. 9, 1921, which contained the same bequests and declaration. Before the date of the first will the testatrix sent to one of the partners a list containing the names of those she wished to benefit, and in preparing her first will he did his utmost to induce her to allow the names of beneficiaries to be inserted in the ordinary way, but she refused. On Oct. 18, 1921, the testatrix sent him revised lists of the persons and institutions she wished to benefit, and requested him to destroy the earlier list, and he replied next day, 'I have your letter of the 18th inst., with the enclosures, and quite understand your instructions'. Subsequently she wrote letters making slight alterations in the lists, which he similarly acknowledged:—Held, that the true inference was, seeing that the partners had full knowledge of the contents of the testatrix's will, that they only agreed to give effect to the testatrix's wishes in accordance with the scheme of the will, including the provision that there was to be no trust or legal obligation, and accordingly that they took the property bequeathed to them absolutely for their own benefit".

In the course of his judgment, TOMLIN, J., said (*ibid.*, 94):

"The first question is whether they are absolute owners of what is expressed to be given them by the will. If not, then the further question will arise whether they are trustees for the persons and institutions set out in the lists of Oct. 12, 1921, or whether they are trustees of a fund of which the beneficial interest is undisposed of, so that the persons beneficially entitled are the testatrix's next of kin. I think the question whether, if there is not a trust created outside the will in favour of the persons named in the lists, the Messrs. Mead are trustees for the next of kin must depend on the construction of the will itself; because if there was no bargain outside the will imposing a fiduciary relationship [and that is the case here] then that relationship can only exist by virtue of the terms of the will itself. Looking at the will, I do not think that any fiduciary relationship is created. By the fifth clause of the will the testatrix bequeathed to them absolutely as joint tenants a moiety of the residuary trust moneys, with the request that they would dispose of the same in accordance with any memorandum or paper signed by her and deposited with her will or among her papers; and the position is similar with regard to the remaining moiety subject to a life interest given to Dr. O'Sullivan. Then by cl. 8 the testatrix provides: 'Any such memorandum or paper referred to in cl. 5 and cl. 7 hereof shall not be deemed to form part of my will or to have any testamentary character and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation even if the same shall be communicated to my trustees in my lifetime'. I think on the true construction of the will the Messrs. Mead take these interests absolutely, and that, assuming there are no trusts created outside the will, they cannot be said to be trustees for the next of kin".

It will be observed that TOMLIN, J., placed great weight on the language of cl. 8 of the will, which in effect corresponds to the declaration found at the end of

cl. 4 (a) in this case and at the end of the provision in cl. 5 dealing with the one third share of the residuary estate bequeathed to the bank, and in so far as, on a question of construction, one case can be said to govern another, it appears to me that this case is covered by the reasoning of TOMLIN, J., in *Re Falkiner* (1).

In the later case of *Re Schar* (2) it appears that in the matter of the estate of that deceased at an earlier stage COHEN, J., had to consider the true construction of the will and codicil of the deceased in regard to this point. The testator had made a will in 1931 directing that his residuary estate be divided among beneficiaries, all or some of whom lived in Germany. In 1940 he made a codicil providing that if, at his death, or before his trustees had wound-up his estate, there should be legislation in force in this country depriving the beneficiaries of the right to receive those benefits

“ . . . then I give such benefits to my trustees absolutely with the request but without creating any trust that they will carry out the wishes contained in my said will or any codicil thereto when legislation permits them to do so ”.

On the matter coming before COHEN, J., in March, 1945, he declared, on the true construction of the will and codicil, that

“ . . . legacies and shares of residue thereby given to persons who survived the testator and were at his death enemies within the meaning of the Trading with the Enemy Act, 1939, and any orders made thereunder were payable to the bank and to the first two defendants beneficially ”.

Unfortunately, there is no report of the judgment of COHEN, J., but it is clear from that reference to his order that he had approached the case, as TOMLIN, J., did in *Re Falkiner* (1), as one purely of construction. Those two cases, and particularly *Re Falkiner* (1), therefore, appear to me to support the contention that I ought to answer the question raised in the sense of declaring that the legacy and the share of residue passed to the bank absolutely. Indeed, as I have already indicated, I think on this point *Re Falkiner* (1) is decisive.

I was referred to one or two other cases. The first was *Re Rees* (3), a decision of the Court of Appeal. In that case SIR RAYMOND EVERSHED, M.R., pointed out ([1949] 2 All E.R. 1007 that):

“ These courts, moreover, have been very insistent on the importance of the principle that those who assume the office of trustees should not, so far as they can prevent it, allow themselves to be in a position in which their interests and their duties conflict ”,

but I find nothing in that case which could cut down the effect of the judgment of TOMLIN, J., in *Re Falkiner* (1), and it would appear to me that *Re Rees* (3) is distinguishable from the present case because the devise and bequest there was to the trustees “ they well knowing my wishes concerning the same ”, that is, concerning the whole of his property.

In *Re Hawksley's Settlements* (4) the relevant provision was that the testatrix appointed three persons to be her executors and residuary legatees

“ to carry out instructions that I may leave in writing or verbally which I have not yet fully completed ”,

but there was not in that case anything which corresponded to cl. 8 of the will of the testatrix in *Re Falkiner* (1) or to the declaration at the end of cl. 4 (a) and cl. 5 in the wills in this case; and it appears to me that the older case of *Re Boyes* (5) is distinguishable on the same basis.

In those circumstances and for those reasons, treating it purely as one of construction, I propose to make a declaration in the sense which I have indicated.

Order accordingly.

Solicitors: *S. F. Miller, Mathews & Co.* (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Ex parte FRY.

QUEEN'S BENCH DIVISION (Lord Goddard, C.J., and Hallett, J.), April 2, 1954.
COURT OF APPEAL (Singleton, Hodson and Morris, L.J.J.), April 5, 1954.

Certiorari. Fire brigade. Exercise of disciplinary power. Refusal of applicant to clean uniform of officer. Fireman cautioned by chief officer. Fire Services (Discipline) Regulations, 1948 (S.I., 1948, No. 545), reg. 5 (1).

The court will not interfere by an order of certiorari with the exercise of a disciplinary power in a service such as a fire brigade.

Observations of LORD GODDARD, C.J., in *R. v. Metropolitan Police Comr. Ex p. Parker* ([1953] 2 All E.R. 721), applied.

FOR THE FIRE SERVICES ACT, 1947, s. 4, see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 12.

FOR THE ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) ACT, 1938, s. 7 (2), see *ibid.*, Vol. 6, p. 102.

FOR THE FIRE SERVICES (DISCIPLINE) REGULATIONS, 1948, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 9, p. 14.

Cases referred to:

(1) *R. v. Metropolitan Police Comr. Ex p. Parker*, [1953] 2 All E.R. 717; 117 J.P. 440.

(2) *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; Digest Supp.

APPLICATION, *ex parte*, by Ronald Alexander Fry, a fireman in the county of Glamorgan fire brigade, for leave to move for an order of certiorari to remove into the Queen's Bench Division to be quashed a decision made by one Bates, chief fire officer of the said brigade, under the Fire Services (Discipline) Regulations, 1948.

In an affidavit in support of his application, the applicant said, *inter alia*:

"On Mar. 5, 1954, I was ordered by Leading Fireman Parker to clean the uniform of Assistant Divisional Officer Evans. I considered that this order was not a lawful order, because the orders issued to the said fire brigade preclude an officer from giving such an order to a fireman, and I, therefore, declined to comply with it. 3. Later the same day I was notified that I had been suspended from duty on half pay because of my action, and I was escorted off the fire station. 4. On Mar. 9, 1954, I was charged under the Fire Services (Discipline) Regulations, 1948, reg. 1 (1) with disobedience to orders in that I on Mar. 5, 1954, failed to carry out a lawful order given to me to clean the fire uniform of an officer attached to Station C.I. Pontypridd. I denied the said charge and nominated Leading Fireman Gunter (hereinafter called 'Gunter') as my accused's friend. 5. I appeared with Gunter at the hearing of the case before D. W. Bates, the chief officer of the said fire brigade (hereinafter called 'the chief officer'), on Mar. 19, 1954. The hearing was conducted by the chief officer in such a way that I was denied a fair trial. 6. Divisional Officer Hogg, the complainant, acted as prosecuting officer and made a speech opening his case. Before any witnesses were called Gunter said that the proceedings were out of order because I had not been supplied with copies of any report, complaint or other written allegation on which the charge was founded as required by reg. 2 (2) of the said regulations. The chief officer swept this aside without considering it. Gunter next said that he submitted that there was no case to answer on the grounds that the said order was unlawful because it was an order to do something which was outside the scope of a fireman's duties and because it contravened National Fire Service Instruction No. 46/1942, which instruction held good in the said fire brigade. A copy of the said instruction, which prohibits firemen being employed as personal servants of officers and prohibits any

officer from having his uniform looked after by a fireman, except as a purely private arrangement in certain circumstances, is now produced and shown to me marked 'R.A.F.I.' 7. Gunter was about to develop this argument when the chief officer interrupted him and said that he had no doubt that the order was lawful."

A The applicant was found guilty of disobedience of orders and the chief officer administered a caution.

Apr. 2. The applicant applied to the Divisional Court of the Queen's Bench Division for leave to move for an order of certiorari.

Lloyd-Jones, Q.C., and Pain for the applicant.

B LORD GODDARD, C.J.: The affidavit of the applicant sets out that the chief officer did not act in a judicial manner, and, therefore, it is sought to quash his order administering a caution. Apparently, during the time the applicant was suspended he did not receive his pay, and I suppose it is also desired to challenge in this court whether he was properly suspended. In my opinion, although the chief officer is the chief officer of a body set up by the Fire Services Act, 1947, and hears the case under the Fire Services (Discipline) Regulations, 1948, reg. C 5 (1), he cannot in any sense be said to constitute a court. The Act of 1947, by s. 17 (1) (c) and (d), gave the Secretary of State power to make disciplinary regulations, which he made. In them he has laid down terms under which fire officers are to administer discipline in the body of which they are chief officers and has provided (reg. 13) certain penalties and the conditions (regs. 7 and 8) under which they may be inflicted. He has also given a right of appeal to the fire authority in certain cases (reg. 9) and the Secretary of State in other cases (reg. 14), but there is no appeal where the only punishment awarded, if it can be dignified by the name of punishment, is a caution.

D Leave is sought to move the court for an order of certiorari to bring up the order of the chief officer who administered the caution in the present case, and it is said that this court can review his decision. In *R. v. Metropolitan Police Comr. Ex p. Parker* (1), which is not entirely on all fours with the present case, since E it was under the London Cab Order, 1934, and dealt with different matters, I said ([1953] 2 All E.R. 721):

F "... where a person, whether he is a military officer, a police officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has".

It seems to me impossible to say, where a chief officer of a force which is governed by discipline, as is a fire brigade, is exercising disciplinary authority over a member of the force, that he is acting either judicially or quasi-judicially. G It seems to me that he is no more acting judicially or quasi-judicially than a schoolmaster who is exercising disciplinary powers over his pupils. It is true that there is an Act of Parliament,—the Fire Services Act, 1947—but so is there an Army Act, with Queen's Regulations thereunder. Under the Army Act, a court-martial can be set up (s. 48) to deal with certain offences, but a commanding officer has power (s. 46 (1)) to deal with certain disciplinary offences. He deals H with those in the orderly room, and there he is sitting, not as a court, but as an officer administering discipline. I have never heard it suggested that in those circumstances this court can issue certiorari to bring up his order. Nor do I know of any case with regard to police officers—who are dealt with under the Police (Discipline) Regulations, 1952, regarding matters of discipline—in which this court has purported to exercise control by the issue of certiorari. Certiorari goes to a court or something which can fairly be said to be a court. In the cases beginning with *R. v. Electricity Comrs. Ex p. London Electricity Joint*

Committee Co. (1920), Ltd. (2), considerable expansion has been given to the word "court" because government departments are given powers which may be called semi- or quasi-judicial powers in dealing with various matters, and, accordingly, this court has exercised control over them by certiorari. I think that is entirely different from saying that this court can interfere with the discipline of police forces, fire brigades, or similar bodies which, in their nature, are disciplined services, where the chief officer is simply acting as an officer in the matter of discipline. In such cases this court ought not, in my opinion, to exercise control by means of an order of certiorari. There is no ground for giving leave to move in this case, and the application is refused.

HALLETT, J.: I agree, and I am reinforced in my opinion by observing what is alleged in the affidavit filed on behalf of the applicant. Counsel for the applicant sought to convince us that this court is being asked to exercise its jurisdiction of supervising the proceedings of inferior courts. In his affidavit the applicant first complains of an order to do something which he says he ought not to have been ordered to do. There is there no question of any proceeding of any court. This court so far is being asked to review whether or not an order given to one member of an organised body by a senior member of the body was proper. Then he says in his affidavit, that in fact the penalty he sustained was a loss of pay of £8 14s. 6d. "because I was suspended on half-pay for two weeks prior to the hearing". The propriety of his suspension on half-pay for two weeks prior to the hearing cannot be affected by anything wrong in the conduct of the hearing, and it is the conduct of the hearing which he suggests ought to be the subject of inquiry and action by this court. So, first, there is an order which is nothing to do with the hearing which we are asked to review, and, secondly, there is the suspension, which is obviously nothing to do with the hearing which we are asked to review. Then we are asked by a side-wind to review the propriety of the order and the subsequent suspension by inquiring whether or not the hearing was conducted in what is alleged to have been a non-judicial manner. I only add those two facts because they seem to me to illustrate the distinction LORD GODDARD, C.J., has drawn in the present case, as he did in *R. v. Metropolitan Police Comr. Ex p. Parker* (1), between a purely disciplinary proceeding which is not the proper subject of review by this court and a judicial proceeding which is. I agree that this application ought to be refused.

Leave refused.

Apr. 5. The applicant appealed.

Lloyd-Jones, Q.C., and Pain for the applicant.

SINGLETON, L.J., stated the facts and continued: By the Fire Services Act, 1947, s. 4:

"... the council of every county and county borough shall, subject to the provisions of this Act, be the fire authority for the area of the council ...",

and power was given by the Act (s. 12) under which the county council can delegate certain of its powers. The Fire Services (Discipline) Regulations, 1948, provide:

"1. A member of a fire brigade commits an offence against discipline (hereafter in these regulations referred to as an 'offence') if he commits one or more of the offences set out in the schedule hereto. 2. (1) The chief officer, if he decides that a member of the fire brigade shall be charged with an offence, shall as soon as possible cause him to be informed in writing of the charge together with such particulars as will leave the accused under no misapprehension as to the precise nature of the allegations on which the charge is based. (2) The accused shall also be given as soon as possible copies of any report, complaint, or other written allegation on which the charge may be founded and any reports thereon, notwithstanding that they may be confidential ... 5. (1) The fire authority may direct that any class

or description of case shall be heard by them, but subject to any such direction the chief officer may decide either to hear the case himself or order the case to be heard by a tribunal consisting of one or more officers not being below the rank of Divisional Officer, Grade III. (2) If the chief officer decides to hear the case himself, he may order an officer or officers of the fire brigade to assist him to hear the case as assessors. (3) The chief officer or the officer or officers ordered by him to hear the case are hereafter in these regulations referred to as the disciplinary tribunal . . . 8. (5) The accused may, within three days of the notification to him of a decision of the disciplinary tribunal to impose a punishment other than a caution, appeal to the fire authority by giving notice in writing to that effect to the chief officer, and, where the decision is one which under para. (1) or (2) of this regulation would have required confirmation, it shall, subject to such appeal, have effect without confirmation . . . 13. An offence may be punished by—(a) dismissal; (b) being required to resign as an alternative to dismissal forthwith or at such later date as may be specified; (c) reduction in rank; (d) stoppage of pay; (e) reprimand; (f) caution”.

[HIS LORDSHIP read the affidavit of the applicant and continued:] There was no report, complaint, or other written allegation. The submission which was made by the friend of the applicant that the proceedings were out of order because he had not been supplied with copies of the report failed because of want of any proof that there was any written report. The accused did not ask, nor did his friend ask, if there was any such written report. The submission was not based on fact, and it is not surprising in those circumstances that the chief officer swept it aside. Further, the chief officer was well acquainted with the National Fire Service instruction referred to by the applicant and he knew the nature of the order which had been given. He formed the view that the order was lawful, and he so held. The applicant was given an order with which he refused to comply. He was found guilty of disobedience, and the punishment inflicted on him was the least of those set out in reg. 13. It was a caution. It meant that, as he had been suspended for some days, he lost half his pay during the time of his suspension. The order was that he should clean the uniform of Assistant Divisional Officer Evans. He, the applicant, disobeyed that order. He might have obeyed it and then have put forward to the fire authority, or, if necessary, to the Secretary of State, the question whether or not, in view of the instruction which had been issued, the order was lawful and one with which a fireman was bound to comply. He did not think it right to do that. He disobeyed the order, and so the case was made the subject-matter of a charge. I cannot help feeling it was extraordinarily foolish conduct. In these days it behoves everyone to act reasonably. If every fireman or every policeman is to take it on himself to disobey an order of this kind and to say: “I do not think it is lawful”, it will become impossible to carry on any public service. The Secretary of State has made not only the Fire Services (Discipline) Regulations, 1948, but also, in the same year, the Fire Services (Ranks and Conditions of Service) Regulations, 1948 (S.I., 1948, No. 546), which deal with the good government of the fire services, and with questions of discipline. It is always possible for a man to raise a question whether or not an order such as this is proper, and the sensible way is to carry out the order and raise the matter afterwards if he wishes to do so instead of disobeying it and asking for trouble.

The applicant says in his affidavit that the chief officer did not deal with his case in the way in which he ought to have done. The relief which he seeks arises under the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 7, which provides:

(1) The prerogative writs of mandamus, prohibition and certiorari shall no longer be issued by the High Court. (2) In any case where the High Court would, but for the provisions of the last foregoing sub-section, have had

jurisdiction to order the issue of a writ of . . . certiorari removing any proceedings or matter into the High Court . . . the court may make an order . . . removing the proceedings or matter, as the case may be."

Thus, the remedy is discretionary in the court. If it is seen that there is a danger of serious injustice being done by the decision of an inferior court through its assuming a jurisdiction it had not, or through something in the trial which is unlawful or contrary to the interests of justice, then the Divisional Court may grant the remedy which is sought in this case. In the Divisional Court LORD GODDARD, C.J., said (*ante* p. 119):

"In my opinion, although the chief officer is the chief officer of a body set up by the Fire Services Act, 1947, and hears the case under the Fire Services (Discipline) Regulations, 1948, reg. 5 (1), he cannot in any sense be said to constitute a court . . . It seems to me impossible to say, where a chief officer of a force which is governed by discipline, as is a fire brigade, is exercising disciplinary authority over a member of the force, that he is acting either judicially or quasi-judicially."

LORD GODDARD, C.J., was following a decision of the Divisional Court in *R. v. Metropolitan Police Comr. Ex p. Parker* (1), in which, having held that the Commissioner of Police, in the circumstances of that case, was not exercising any judicial or quasi-judicial function, but was merely acting as a disciplinary authority, he added ([1953] 2 All E.R. 721):

" . . . where a person, whether he is a military officer, a police officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has."

In *R. v. Metropolitan Police Comr. Ex p. Parker* (1) the judgment of LORD GODDARD, C.J., was based on two points: (i) that the Commissioner of Police was not sitting in a judicial or quasi-judicial capacity; and (ii) that the remedy which was sought was discretionary in the court. In the present case I prefer to base my decision on the second ground. The applicant is a member of a service which is of great public importance. For the good of that service and of those who are employed in the service, the Secretary of State has made regulations so that their position may be ascertained and there may be as few difficulties as possible. There is "a complete code". If a man feels that he is ordered to do something which he ought not to be ordered to do, he can raise the matter in the way that I have said, but if, instead of doing that, he deliberately sets out to disobey the order given to him by a superior officer, he is only making difficulties for himself and for the whole of the service, and that is something which he ought to realise. Again, in the ordinary case of discipline which is dealt with by the chief officer, there is an appeal under the Fire Services (Discipline) Regulations, 1948, reg. 9, to the fire authority. In the circumstances of the present case there was no appeal (reg. 8 (5)), because the punishment inflicted was only a caution, but there are ways and means of bringing to the notice of the fire authority in a proper case the conduct of one who has to preside over a disciplinary tribunal of this kind if it is thought right and proper that that should be done. In the circumstances I do not think that the Divisional Court ought to have granted the relief which the applicant sought, nor do I think that this court should do so. The application must be dismissed.

HODSON, L.J.: I agree.

MORRIS, L.J.: I also agree.

Appeal dismissed.

Solicitor: *W. H. Thompson* (for the applicant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

PEACOCK v. AMUSEMENT EQUIPMENT CO., LTD.

[QUEEN'S BENCH DIVISION (Parker, J.), April 6, 1954.]

Fatal Accident—Damages—Deductions from damages—Property left by deceased wife to two children—Voluntary payment of one third of estate to husband.

A The plaintiff was the husband of a woman who had died as a result of injuries sustained while a passenger on a miniature railway run by the defendants. By her will the wife left her property, chiefly a grocery business, to her two children by a previous marriage, and nothing to the plaintiff. The business was sold and the two children voluntarily paid over to the plaintiff the sum of £575 which was said to represent about one third of the estate. In an action under the Fatal Accidents Act, 1846, by the plaintiff against the proprietors of the railway,

B HELD: the payment made by the children must be taken into account in assessing the damages to which the plaintiff was entitled.

Baker v. Dalgleish S.S. Co., Ltd. ([1922] 1 K.B. 361), applied.

AS TO DEDUCTIONS FROM DAMAGES, see HALSBURY, Hailsham Edn., Vol. 23, p. 698, para. 986.

C Cases referred to:

(1) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest, Replacement, 223, 1191.

(2) *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2), [1942] 1 All E.R. 657; [1942] A.C. 601; 111 L.J.K.B. 418; 167 L.T. 74; 2nd Digest Supp.

D (3) *Redpath v. Belfast & County Down Ry.*, [1947] N.I. 167; 2nd Digest Supp.

ACTION under the Fatal Accidents Act, 1846.

E On Aug. 10, 1953, the plaintiff's wife, Mrs. Mabel Annie Peacock, while a passenger on a miniature railway conducted by the defendants, received injuries from which she died. The plaintiff had married the deceased in 1940. At that time she was a widow with two children by a previous marriage, a boy aged seven and a girl aged eleven. The deceased had bought a house in her own name and had paid a deposit, the house being subject to a mortgage. After their marriage the plaintiff and the deceased lived with the children in this house. The plaintiff was a tool supervisor and between 1940 and 1950 was earning approximately £9 10s. per week. Up to 1945 or 1946 he handed over to his wife virtually his whole wages, amounting after deductions to about £8 per week out of which she kept him, the children, and herself, and made the payments under the mortgage which was eventually paid off. In 1945 or 1946 the plaintiff, who had saved some money, bought a motor car, and from then on he gave his wife £6 per week, retaining the balance to run the car for himself and the family. By 1950 the deceased's son had gone into the army, the daughter had married, and the wife wanted something to occupy her time. Accordingly, the house was sold for £1,750, and with the proceeds a grocery business, with living accommodation over it, was purchased. From that time onwards the wife out of the profits of the shop (which amounted to about £6 10s. per week) paid for the upkeep of the home and the plaintiff no longer paid over any of his wages. By her will the wife left her whole estate, chiefly the grocery business, to her children and no part of it to the plaintiff. After the children had come into the property the business was sold, all the estate was distributed, and they paid to the plaintiff voluntarily the sum of £575 which was said to represent about one third of the estate. In an action by the plaintiff under the Fatal Accidents Act, 1846, the question arose whether this payment should be taken into account in assessing the damages to which he was entitled.

P. M. O'Connor for the plaintiff.

McGougan for the defendants.

PARKER, J., stated the facts and continued: Counsel for the defendants refers me to *Baker v. Dalgleish S.S. Co., Ltd.* (1) and also to *Dunne v. Parnell Duffryn Associated Collieries, Ltd.* (No. 2) (2), and contends that any benefit, received from whatever source, be it even a voluntary payment, falls to be taken into consideration. In *Baker v. Dalgleish S.S. Co., Ltd.* (1), SCRUTTON, L.J., says ([1922] 1 K.B. 372):

"Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death."

In effect, counsel for the defendants says that the probability of voluntary contribution is here being crystallised and has become a certainty by the payment. Counsel for the plaintiff, on the other hand, has referred me to a case in the courts of Northern Ireland which, though not binding on me, is, of course, very persuasive authority. It is *Redpath v. Belfast & County Down Ry.* (3), which came before the Lord Chief Justice of Northern Ireland on a motion to compel the plaintiff to answer certain interrogatories. What had happened there was that after the injury to the plaintiff and the death of others in a railway accident a fund came into existence, to which people subscribed from charitable motives, for the benefit of the relatives of the persons injured or their dependants, and interrogatories had been directed to ascertain the amount received by the plaintiff from that fund. The Lord Chief Justice held that the interrogatories were directed to a matter which was irrelevant to the issues in the action, and in an exhaustive judgment he came to the conclusion that receipts from a fund such as the one in question, which came into existence long after the death and was supported by voluntary subscriptions, was not to be taken into consideration. As he put it ([1947] N.I. 175):

"The possibility of such a fund being formed is a contingency altogether too remote to enter into the calculation and assessment of damage."

It seems to me that each case must depend on its own facts. It is clear that a payment must be taken into consideration even when it is made voluntarily and not as a matter of legal right. Equally, I would not venture to differ from the Lord Chief Justice of Northern Ireland in saying that receipts from a fund brought into existence after the death, subscribed to by complete strangers from charitable motives, are to be taken into consideration. In the present case, accepting that the plaintiff was unaware, as he says he was, that on his wife's death he would get anything from the family, it is clear that, as a result of her death, his two step children have paid him part of the deceased's estate. They have not collected subscriptions for him, nor have they used what was purely their earnings or savings. I cannot say that that payment is too remote to enter into the calculation of damages. It seems to me it is one of those things which has to be brought into account. Starting with the financial loss as a result of the death, applying what I consider to be the appropriate number of years' purchase, and taking into consideration the payment from the children, I would assess the damages at a sum of £1,250, and, accordingly, there will be judgment for the plaintiff for that sum.

Judgment for plaintiff.

Solicitors: *R. I. Lewis & Co.* (for the plaintiff); *Wm. Easton & Sons* (for the defendants).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

Re LUPKOVICS. *Ex parte* THE TRUSTEE *v.* FREVILLE.

[CHANCERY DIVISION (Upjohn, J.), January 18, February 1, 8, 1954.]

Bankruptcy—Attachment of debt—Restriction of rights of creditor under attachment—Attachment of debt on undertaking of creditor's solicitors to hold sum for six months against claim of trustee in bankruptcy—Completion of attachment—"Receipt of the debt"—Bankruptcy Act, 1914 (c. 59), s. 40 (1), (2)—Crown Proceedings Act, 1947 (c. 44), s. 27 (1).

Bankruptcy—Postponement of debt—Wife's claim—Money lent by wife for husband's business—Judgment obtained by wife—Postponement of judgment debt—Bankruptcy Act, 1914 (c. 59), s. 36 (2).

On July 16, 1952, a wife obtained judgment against her husband for £5,550 and costs in respect of loans made by her to the husband for the purposes of his business. Pursuant to the Crown Proceedings Act, 1947, s. 27 (1), the wife sought a direction of the court that £2,786 owing to her husband by the Ministry of Health should be paid to her. On Oct. 29, 1952, the master ordered that "on the [wife's] solicitors undertaking to hold the sum of £2,786 for six months from Oct. 31, 1952, and to indemnify the . . . Minister for that period against any claim by a trustee in bankruptcy of the [husband] in respect of the said sum" the husband be restrained from receiving from the Ministry the said sum, and it was further ordered that the "Ministry of Health (after deducting therefrom £7 7s. their assessed costs of this application) do on Nov. 1, 1952, pay to the [wife] . . . £2,786 the debt due from the said Ministry of Health to the [husband]". The costs were ordered to be taxed and added to the judgment debt and to "be retained out of the money recovered by the [wife] under this order and in priority to the amount of the judgment debt". The wife's solicitors received the amount specified in the order. On Jan. 20, 1953, a bankruptcy petition was presented against the husband, and on Mar. 4, 1953, a receiving order was made. The trustee in bankruptcy claimed the sum held by the wife's solicitors.

HELD: (i) the order of Oct. 29, 1952, and the payment to the solicitors in pursuance thereof did not constitute receipt of the debt by the wife within s. 40 (2) of the Bankruptcy Act, 1914, and, in consequence, she had not completed attachment of the money payable by the Ministry before the date of the receiving order, and, therefore, under s. 40 (1) of the Act she was not entitled to retain the benefit of that money against the trustee.

George v. Thompson's Trustee ([1949] 1 All E.R. 554), considered.

(ii) "attachment" was not a term of art and proceedings under the Crown Proceedings Act, 1947, s. 27 (1), were proceedings by way of attachment for the purposes of s. 40 (1) of the Act of 1914.

(iii) the judgment obtained by the wife in July, 1952, did not change the character of the debts owed to her from that of deferred debts under s. 36 (2) of the Act of 1914, being for money lent by her to her husband for the purposes of his business, so as to enable her to prove in competition with other creditors.

Re Slade ([1921] 1 Ch. 160), distinguished.

Dictum of SIR HERBERT COZENS-HARDY, M.R., in *Re Van Laun. Ex p. Chatterton* ([1907] 2 K.B. 30), applied.

AS TO COMPLETION OF ATTACHMENT, see HALSBURY, Simonds Edn., Vol. 2, p. 544, para. 1079; and FOR CASES, see DIGEST, Vol. 5, pp. 809-815, Nos. 6903-6933.

Cases referred to:

(1) *George v. Thompson's Trustee*, [1949] 1 All E.R. 554; [1949] Ch. 322; 2nd Digest Supp.

- 2 *Re Andrew, Official Receiver v. Standard Range & Foundry Co., Ltd.* (No. 7), [1936] 3 All E.R. 450; 155 L.T. 586; sub nom. *Re Andrew. Ex p. Official Receiver (Trustee)* (No. 2), [1937] Ch. 122; 106 L.J.Ch. 195; Digest Supp.
- (3) *Re Slade*, [1921] 1 Ch. 160; 89 L.J.Ch. 556; 124 L.T. 232; Digest Supp.
- (4) *Re Van Lann. Ex p. Chatterton*, [1907] 2 K.B. 23; 76 L.J.K.B. 644; 97 L.T. 69; 4 Digest 326, 3058.

MOTION by the trustee in bankruptcy of Nicholas Lupkovics.

The trustee claimed that certain moneys advanced by the wife of the bankrupt to the bankrupt were gifts and not loans, and, alternatively, that, having regard to the Bankruptcy Act, 1914, s. 40 (1), the wife was not entitled to retain against the trustee the benefit of an attachment of a debt due to the bankrupt from the Ministry of Health.

J. G. K. Sheldon for the applicant, the trustee in bankruptcy.

Diplock, Q.C., and *N. MacDermot* for the respondent, the wife.

Cur. adv. vult.

Feb. 8. **UPJOHN, J.**, read the following judgment. By this motion the applicant, the trustee of the estate of Nicholas Lupkovics, whom I will refer to as "the bankrupt", makes a number of claims against the respondent, Ruth Margaret Freville, who is the wife of the bankrupt although she has now changed her name by deed-poll. I will refer to her as "the wife".

The bankrupt and the wife married in Budapest in 1937 and they came to England shortly after the outbreak of war in 1939. The bankrupt is a doctor and practised for a time in Swindon, but in 1948 he went with the wife to Plymouth and set up there in partnership with a Doctor Bradlaw at the premises known as No. 73, Embankment Road, Plymouth. The bankrupt and the wife purchased and resided at a house known as Compton Lodge, Plymouth. In that year, and, admittedly, for the purposes of the bankrupt's medical practice, the wife advanced to her husband £4,500 and the first question that arises on the motion is whether that sum was advanced by way of loan or by way of gift. Later, in 1950, the wife advanced to her husband £800 for the purchase of a large Ford car which was also to be used for the purposes of his medical practice. A similar question arises as to the £800.

About the end of 1951, or, possibly, the beginning of 1952, the bankrupt was joined as co-respondent in a divorce suit brought by a Mr. Paterson against his wife in which Mr. Paterson claimed substantial damages against the bankrupt. Unfortunately, Mrs. Paterson was a patient of the bankrupt and this, not unnaturally, led Dr. Bradlaw to dissolve partnership with the bankrupt. The terms of the dissolution were contained in a written agreement dated May 17, 1952, whereby the partnership was dissolved with effect from Mar. 31, 1952, and by cl. 2 thereof it was provided that the bankrupt would take over No. 73, Embankment Road, Plymouth, and would assume sole liability for £2,038 1s. 10d., being the amount then due by the partnership to Lloyds Bank, Ltd., on Mar. 31, 1952, in connection with that property. The effect of that term of the agreement appears to have been misunderstood at the wife's private examination. The bankrupt continued to live with the wife at Compton Lodge, and on June 30, 1952, the wife issued a writ against her husband claiming two sums, one of £1,750 alleged to have been lent to the bankrupt on May 1, 1948, and £800 alleged to have been lent on Sept. 25, 1950. Those sums, admittedly, represent the sums of £4,500 and £800 that I have already mentioned, the claim for the additional £250 appearing in the writ being mistaken. No appearance was entered, and judgment was duly entered against the bankrupt for £5,550 and costs on July 16, 1952.

The bankrupt left the wife on Aug. 29, 1952. He put up a notice in the surgery at Embankment Road saying that patients should go to another doctor, and the

A trustee admits that, apart from the liability to Lloyds Bank in connection with that property, he left no debts in the locality. Thereafter, the evidence as to his movements is somewhat obscure. The wife, apparently, knew that he was living with Mrs. Paterson at an address in Cheveston Gardens, London, but she herself must have left Compton Lodge some time in September and gone to stay with an aunt in Worthing, and after that, apparently, she has been earning her living working at one or more jobs. Later on, probably in January, 1953, we know that the bankrupt was in Brixton Prison, for the wife visited him there, and that is really the sum total of the evidence before me as to the movements of the bankrupt after he left the wife in August, 1952.

To complete the history, at the instance of the wife garnishee orders absolute were made on Oct. 8 and Oct. 17, 1952, respectively directing the executive council for Plymouth to pay to the wife £144 14s. 1d. and £104 4s. 7d. due by them to the bankrupt, and those sums were duly paid to the wife. There was a further substantial sum of £2,786 which was due to the bankrupt from the Ministry of Health under the provisions of the National Health Service Act, 1946, and the regulations made thereunder on his retirement from practice, which took place at latest on Aug. 29. Pursuant to the Crown Proceedings Act, 1947, s. 27, the wife sought to obtain a direction that that sum should be paid to her. The matter came before a Queen's Bench master on Oct. 29, 1952, and a good deal of evidence was filed thereon. On that day an order was made directing payment of the said sum of £2,786 (omitting shillings and pence) less the Ministry's costs, seven guineas, but on the terms that the sum of £2,786 should be retained in the hands of the wife's solicitors for six months from Oct. 31, 1952, they undertaking to indemnify the Ministry for that period against any claim by a trustee in bankruptcy of the bankrupt in respect of that sum. I shall have to refer in detail to that order at a later stage. Pursuant to that order, £2,778 (i.e., £2,786 less £7 7s. costs) was paid into the joint names of two partners in Messrs. Field, Roscoe & Co., solicitors, and invested by them in gilt-edged securities which they hold pending the decision of this case. On Jan. 20, 1953, a bankruptcy petition was presented against the bankrupt, and on Mar. 4, 1953, a receiving order was made and the applicant trustee was duly appointed the trustee of the estate.

The first question that I have to determine is whether the £4,500 and £800 advanced to the bankrupt by the wife in 1948 and 1950 were gifts or loans. [His LORDSHIP considered the evidence, held that both sums were loans, and continued:] It follows, therefore, that the judgment obtained on July 16, 1952, was, at all events as to £4,500 and £800, a valid judgment, and the attachments in respect of the sums of £144 and £104, having been completed before the bankruptcy, cannot be re-opened.

Different considerations arise in regard to the sum of £2,786. Counsel for the trustee submitted that the wife is not entitled to retain the benefit of the payment made to her solicitors pursuant to the order of Oct. 29 on two grounds, both arising under the Bankruptcy Act, 1914, s. 40, which I will read:

"(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

I need not read sub-s. (3).

First, counsel says that at the date of the order the wife had notice of an available act of bankruptcy by the debtor. The available act of bankruptcy relied on is contained in s. 1 (1) (d) of the Act of 1914. That paragraph is in these terms:

"If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house ; "

It is said that on Oct. 29 the wife knew that the bankrupt was absenting himself with intent to defeat or delay his creditors. [His Lordship considered the facts and said that he could not draw the inference that the bankrupt left, and remained away from, Compton Lodge with a view to defeating or delaying his creditors. If, however, he did remain absent to defeat his creditors, there was no evidence that the wife knew that that was the reason. His Lordship continued:] In my judgment, on the facts of this case, the trustee fails on this point.

The second ground submitted by counsel for the trustee was that the attachment was not completed before the date of the receiving order because there had been no receipt of the debt within the meaning of s. 40 (2) for, by the terms of the order of Oct. 29, the sum of £2,786 or investments representing the sum remained in the hands of the wife's solicitors at that date. He referred me to *George v. Thompson's Trustee* (1), where WYNN-PARRY, J., reviewed the earlier authorities and held that where the judgment creditor had an absolute and indefeasible title to money in court, but had, through no fault of his own, not obtained actual payment out before the bankruptcy, the attachment was not complete.

I must now read the order of Oct. 29:

"Upon hearing the solicitors for the judgment creditor and counsel for the Minister of Health and upon reading the affidavits of Arthur James Francis Danielli and James Austin filed herein And on the judgment creditor's solicitors undertaking to hold the sum of £2,786 for six months from Oct. 31, 1952, and to indemnify the said Minister for that period against any claim by a trustee in bankruptcy of the judgment debtor in respect of the said sum It is ordered that the judgment debtor be restrained from receiving from the Ministry of Health the sum of £2,786 And it is further ordered that the said Ministry of Health (after deducting therefrom £7 7s. their assessed costs of this application) do on Nov. 1, 1952, pay to the said judgment creditor or if the judgment creditor is resident outside the scheduled territories as defined by the Exchange Control Act, 1947, or would receive payment of the said sum on behalf of a person so resident into court unless the Treasury's permission under the said Act has been given unconditionally or upon conditions which have been complied with £2,786 the debt due from the said Ministry of Health to the said judgment debtor And that the judgment creditor's costs of this application be taxed and added to the judgment debt and be retained out of the money recovered by the said judgment creditor under this order and in priority to the amount of the judgment debt . . . "

The first submission of counsel for the wife on that order was that there was an unconditional order to pay £2,778 to the wife preceded by a separate collateral arrangement between the solicitors of the wife and the Ministry to which the wife was no party whereby the wife's solicitors held, apparently, an entirely different sum of £2,786 on the terms of the order. I reject that argument. It is perfectly plain that the arrangement between the parties, that is, the wife, the Ministry, and her solicitors, was that she was to be paid £2,778, but that that sum was to remain in her solicitors' hands until Apr. 30, 1953, as security for any

claim that might be made against the Ministry by a possible trustee in bankruptcy of the bankrupt. The difference of seven guineas is a matter de minimis.

A Counsel for the wife has a further point. He says that the words "benefit of the execution" in s. 40 (1) refer, not to the fruits of the execution, but only to the charge remaining under the still subsisting execution for the balance of the debt: see *Re Andrew, Official Receiver v. Standard Range & Foundry Co., Ltd.* (No. 2) (2); and he says that the order has been complied with, there has been payment, the Ministry have been discharged of their indebtedness to the bankrupt, and there is nothing on which the "benefit of the execution" can operate, but, having regard to the words of sub-s. (2), he still has to say, and he does say, that the attachment has been completed by receipt of the debt and that is really the whole question which I have to determine. Did the order of Oct. 29 and payment to the solicitors in pursuance thereof constitute a receipt of the debt? B That must mean, in my judgment, receipt of the debt by the debtor or her duly authorised agents. In my judgment, there is no receipt of the debt until, at all events, as between the judgment creditor, the judgment debtor and the garnishee, there has been an unconditional payment to the judgment creditor or her duly authorised agents. In this case there has been a payment to the judgment creditor's duly authorised agents, but they are bound to hold the sum, not solely as her agents, but as stakeholders or trustees as security for the benefit of the Ministry of Health. If, instead of ordering payment to the wife's solicitors, payment into court for six months had been ordered, then *George v. Thompson's Trustee* (1) would have been directly in point. If, instead of payment to the wife's solicitors, payment had been made to third parties as stakeholders, I cannot see how the wife could have said there was receipt of the debt. It can make no difference that payment was made to her solicitors, they receiving the money, not solely as her agents, but as stakeholders or trustees holding the money in medio to meet a possible claim against the garnishee. In my judgment, there was no receipt of the debt while the money or investments representing the same remained in the solicitors' hands on the terms of the order, and, therefore, the attachment was not completed before the date of the receiving order. D

E The next point taken by counsel for the wife was this. He said that the proceedings between the wife and the Ministry of Health were not proceedings by way of attachment at all. The argument is a dangerous one, for, if the proceedings were not an attachment, it would seem that the trustee could claim the debt from the Ministry as being due to the bankrupt, and, although the bankrupt is restrained by injunction from receiving it, it would not necessarily preclude the trustee from doing so. However that may be, counsel said, and said rightly, these proceedings were taken under the Crown Proceedings Act, 1947, s. 27 (1). F The side-note to that section is: "Attachment of moneys payable by the Crown". The section provides:

G " (1) Where any money is payable by the Crown to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under rules of court to obtain an order for the attachment thereof as a debt due or accruing due, or an order for the appointment of a sequestrator or receiver to receive the money on his behalf, the High Court may, subject to the provisions of this Act and in accordance with rules of court, make an order restraining the first-mentioned H person from receiving that money and directing payment thereof to that other person, or to the sequestrator or receiver."

Apparently, before 1947 there was no means of attaching a debt due from the Crown: see ROBERTSON, CIVIL PROCEEDINGS BY AND AGAINST THE CROWN, at p. 611. In my judgment, however, proceedings under s. 27 (1) are proceedings by way of attachment for the purposes of s. 40. Attachment is nowhere defined in the Bankruptcy Act, 1914, but it is not, in my judgment, a term of art confined to

attachments arising strictly under R.S.C., Ord. 45. It is equally appropriate to include proceedings under s. 27 (1), a section clearly intended to put the judgment creditor in the same position vis-à-vis the Crown as any other debtor of the bankrupt, i.e., to prevent the judgment debtor obtaining payment of the debt and to secure payment to himself, the difference in the form of order obtained being due to the privileges and immunities of the Crown. This submission fails and, in my judgment, the wife must repay £2,778 to the trustee.

The last point taken by counsel for the wife was this. He admits that the sums in question were originally advanced by the wife to the bankrupt for the purposes of his business, and, therefore, prima facie under s. 36 (2) of the Bankruptcy Act, 1914, she is deferred to other creditors, but he submits that, having regard to the judgment that she obtained in July, 1952, she has improved her position and she is entitled to prove in competition with other creditors on that judgment, and he relied on *Re Slade* (3). That was a very different case. Originally a married woman had advanced £1,000 to her husband for his farming business. Some years later the husband and wife entered into an arrangement whereby, in consideration of the payment of the original sum, he entered into a bond to pay her £40 per annum for her life. Years afterwards the husband died and his estate was administered in bankruptcy, and SARGANT, J., held that the widow or her assignee could prove for the annuity in competition with the other creditors on the simple ground that the original loan had long since been put to an end and that at the time of the bankruptcy she was in the position of a person entitled to an annuity of £40 per annum from her husband and his estate. In this case there was no change whatever in the nature of the arrangement between husband and wife, and she merely became a judgment creditor in respect of the original debt. It is clearly settled in bankruptcy law that there is no merger of the original debt in a judgment debt, and the trustee in bankruptcy is entitled to go behind the judgment to investigate the nature and grounds of the debt. SIR HERBERT COZENS-HARDY, M.R., expressed the bankruptcy law on the point in a sentence in *Re Van Laun. Ex p. Chatterton* (4) ([1907] 2 K.B. 30):

"I cannot bring myself to believe that what I may call the judgment cases are anything more than illustrations of the principle that the court has a right and a duty to investigate the nature and the grounds of the debt."

Investigation in this case shows two things. First, that the debt was for £5,300 and not £5,550, and, secondly, that it was a debt created by way of loan for the purposes of the bankrupt's business. Accordingly, in my judgment, the balance of this debt is deferred to the claims of other creditors, after deducting the sums of £144 and £104.

Order accordingly.

Solicitors: *Wellake, Letts & Birds* (for the applicant); *Field, Rose & Co.* (for the respondent).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

ROE v. MINISTRY OF HEALTH AND OTHERS. WOOLLEY
v. SAME.

[COURT OF APPEAL (Somervell, Denning and Morris, L.J.J.), March 22, 23, 24, 25,
April 8, 1954.]

A *Hospital Negligence—Liability for negligence of members of staff—Specialist anaesthetist—Spinal anaesthetic administered to patients—Contamination of drug in ampoules—Molecular flaws in ampoules.*

On Oct. 13, 1947, each of the plaintiffs underwent a surgical operation at the Chesterfield and North Derbyshire Royal Hospital. Before the operation in each case a spinal anaesthetic consisting of Nupercaine, injected by means of a lumbar puncture, was administered to the patient by the second defendant, a specialist anaesthetist. The Nupercaine was contained in glass ampoules which were, prior to use, immersed in a phenol solution. After the operations the plaintiffs developed spastic paraplegia which resulted in permanent paralysis from the waist downwards. In an action for damages for personal injuries against the Ministry of Health, as successor in title to the trustees of the hospital, and the anaesthetist, the court found that the injuries to the plaintiffs were caused by the Nupercaine becoming contaminated by the phenol which had percolated into the Nupercaine through molecular flaws or invisible cracks in the ampoules, and that at the date of the operations the risk of percolation through molecular flaws in the glass was not appreciated by competent anaesthetists in general.

D HELD: having regard to the standard of knowledge to be imputed to competent anaesthetists in 1947, the anaesthetist could not be found to be guilty of negligence in failing to appreciate the risk of the phenol percolating through molecular flaws in the glass ampoules and, a fortiori, there was no evidence of negligence on the part of any member of the nursing staff.

E Per curiam: The anaesthetist was the servant or agent of the hospital authorities who were, therefore, responsible for his acts.

Gold v. Essex County Council ([1942] 2 All E.R. 237) and *Cassidy v. Ministry of Health* ([1951] 1 All E.R. 574), considered.

Since the plaintiffs had been unable to establish negligence on the part of any of the defendants they were precluded from recovering damages.

F AS TO LIABILITY OF HOSPITAL FOR NEGLIGENCE OF ITS SERVANTS OR AGENTS, see HALSBURY, *Hailsham Edn.*, Vol. 22, p. 320, para. 605; and FOR CASES, see DIGEST, Vol. 34, p. 550, Nos. 86, 87.

Cases referred to:

(1) *Gold v. Essex County Council*, [1942] 2 All E.R. 237; [1942] 2 K.B. 293; 112 L.J.K.B. 1; 167 L.T. 166; 106 J.P. 242; 2nd Digest Supp.

G (2) *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574; [1951] 2 K.B. 343; 2nd Digest Supp.

(3) *Mahon v. Osborne*, [1939] 1 All E.R. 535; [1939] 2 K.B. 14; 108 L.J.K.B. 567; 160 L.T. 329; Digest Supp.

(4) *Barkway v. South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392; [1950] A.C. 185; 114 J.P. 172; 2nd Digest Supp.

H (5) *Baker v. Market Harborough Industrial Co-operative Society*, (1953), 97 Sol. Jo. 861.

(6) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; sub nom. *Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest, Replacement, 38, 185.

(7) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 1942 S.C. (H.L.) 78; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

- (8) *Woods v. Duncann, Duncann v. Hambrook, Duncann v. Carrivell Ltd & Co., Ltd.*, [1946] 1 All E.R. 420 n.; [1946] A.C. 401; [1947] L.J.R. 120; 174 L.T. 286; 2nd Digest Supp.
- (9) *M. Alister (or Daphne) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (10) *Stansbie v. Troman*, [1948] 1 All E.R. 599; [1948] 2 K.B. 48; [1948] L.J.R. 1206; 2nd Digest Supp.
- (11) *Lewis v. Carmarthenshire County Council*, [1953] 2 All E.R. 1403; 118 J.P. 51.
- (12) *Thurogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 2nd Digest Supp.
- (13) *King v. Phillips*, [1953] 1 All E.R. 617; [1953] 1 Q.B. 429.
- (14) *Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663.
- (15) *Liesbosch, Product v. Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; sub nom. *The Edison*, 149 L.T. 49; Digest Supp.
- (16) *Jones v. Livox Quarries, Ltd.*, [1952] 2 Q.B. 608; 3rd Digest Supp.
- (17) *Bolton v. Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 859; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of Mc NAIR, J., dated Nov. 12, 1953.

The plaintiffs, Cecil Henry Roe and Albert Woolley, were patients in the Chesterfield and North Derbyshire Royal Hospital. On Oct. 13, 1947, surgical operations were performed on them, in each case a spinal anaesthetic consisting of Nupercaine being administered by injection by lumbar puncture. In each case the Nupercaine was aspirated from a glass ampoule. The glass ampoules containing the Nupercaine had been kept for twelve or more hours in a glass jar containing a one-in-forty solution of phenol, before which they had been immersed for about twenty minutes in a one-in-twenty phenol solution. The anaesthetic was administered by the second defendant, Dr. Graham. After the operations each plaintiff developed spastic paraplegia which resulted in permanent paralysis from the waist downwards.

In an action for damages for personal injuries, the plaintiffs alleged negligence on the part of the Ministry of Health (the successor in title of the trustees of the hospital), and/or Dr. Graham as the anaesthetist, and/or the manufacturers of the Nupercaine, Ciba Laboratories, Ltd. They contended that, as against the first two defendants, the maxim *res ipsa loquitur* applied inasmuch as paralysis did not ordinarily follow a spinal anaesthetic properly administered; alternatively that, as against the Ministry, on the basis that Dr. Graham was in law the servant or agent of the Ministry, the injuries were caused by the negligent injection of the contents of a glass ampoule of Nupercaine contaminated by phenol; that, on the basis that Dr. Graham was not in law the servant or agent of the Ministry, the contamination occurred through the negligent mishandling of the ampoules by the theatre staff, and, further, that the failure to detect the contamination was due to the failure to employ an effective system of differential colouring in the phenol solution. Further, as against Dr. Graham, it was contended that he negligently injected the contents of an ampoule of Nupercaine contaminated by phenol, that he failed to make any proper examination for cracks in the ampoules, and failed to adopt and maintain an effective system of differential colouring in the phenol solution. During the trial of the action the third defendants were dismissed therefrom on an admission by counsel for all parties that no liability was alleged against them. Mc NAIR, J., found that the Ministry had fulfilled its duty by supplying a competent anaesthetist and trained theatre staff, and that the plaintiffs' injuries were caused by the injection of Nupercaine contaminated with phenol which had percolated into the ampoules by means of invisible cracks or molecular flaws in the glass. On these facts he held that neither Dr. Graham, nor, a fortiori, the theatre staff could be guilty of negligence in failing to appreciate the risk of such percolation on the basis of medical

knowledge at the date of the operations; nor could Dr. Graham be guilty of negligence in failing to apply a differential colour test which might have disclosed a risk which, in common with many other anaesthetists, he did not appreciate as a possibility. He held further (i) that the Ministry was not responsible for the acts of Dr. Graham who, as a specialist, was in a position comparable with that of a visiting surgeon or physician for whose acts a hospital does not assume responsibility in law, and (ii) that where an operation was under the control of two persons not in law responsible for the acts of each other, the doctrine of *res ipsa loquitur* could not apply to either person since the *res*, if it spoke of negligence, did not speak of negligence against either person individually.

Elwes, Q.C., and John Hobson for the plaintiffs.

Berryman, Q.C., Marven Everett, Q.C., and J. S. L. Macaskie for the Ministry of Health, the first defendant.

Hyllton-Foster, Q.C., and Cumming-Bruce for the second defendant, Dr. Graham.

Faulks and Syrett for the third defendants, Ciba Laboratories, Ltd.

Cur. adv. vult.

Apr. 8. The following judgments were read.

SOMERVELL, L.J.: The two plaintiffs in these consolidated actions were both anaesthetised by a spinal anaesthetic for minor operations on Oct. 13, 1947, at the Chesterfield and North Derbyshire Royal Hospital, now represented by the first defendant, the Ministry of Health. The results were tragic in that both men were and have since remained paralysed from the waist downwards. Each claims in negligence. The second defendant is the anaesthetist, and one of the issues was whether the principle *respondet superior* was applicable as between the hospital and him. The spinal anaesthetic used was Nupercaine, manufactured and supplied by the third defendants, Ciba Laboratories. It was supplied in glass ampoules, one of which was used for each patient. The suggestion that the Nupercaine in the two ampoules in question must have been defective or contaminated before delivery to the hospital was, after investigation, abandoned at the trial. The third defendants were, therefore, not concerned in the substantive appeal. The learned judge found for the defendants and the plaintiffs appeal. He found that the damage had been caused by phenol which had percolated into the ampoules from a solution in which the two ampoules, with others, had been immersed. There was difference of opinion among the experts, but this finding was accepted by all counsel before us as the explanation, and the question, therefore, is whether this percolation was caused by the negligence of the defendants or either of them. The ampoules were about five inches high, one inch in diameter, narrowing towards the top to a neck about $\frac{1}{4}$ inch in diameter, and swelling out slightly above the neck and then tapering. The ampoule was opened by filing and then breaking at the neck. Each contained twenty c.c. of Nupercaine. As delivered by the makers the outside and label were not sterilised. They were to be treated, as a notice on the box stated, as "frankly septic". The needle of the syringe could be inserted through the neck when the ampoule had been opened without coming in contact with the outside of the ampoule. The ampoule would be held by the sister and the syringe by the anaesthetist and there was a possibility of accidental contact.

It is plain that this possibility exercised a good many anaesthetists round about 1946. There was at the hospital Dr. Pooler, the senior anaesthetist; the second defendant; and a resident anaesthetist who was clearly of a lesser status and who is not concerned in this case. In 1947 Dr. Pooler and Dr. Graham discussed the danger of sepsis as described above, and the importance of sterilising the ampoules. Dr. Pooler in fact started, for his cases, the method which was used by Dr. Graham at the date of the operations on the plaintiffs. That was to immerse the ampoules in a one-in-twenty solution of phenol for twenty minutes and then in a one-in-forty solution for twelve or more hours. On the learned judge's finding a quantity of this phenol solution, sufficient to cause the paralysis,

percolated through a crack in each ampoule, sufficient Nupercaine being left to anaesthetise each patient. There was no precise evidence as to the amount of phenol solution necessary to cause the injuries, but probably about one-fifth of the volume of the Nupercaine. Each plaintiff had an injection of 10 c.c. If about one-fifth was phenol solution one would expect anaesthesia and injury.

Dr. Graham appreciated the possibility of cracks and the great danger of phenol solution if injected into the spine. He examined each ampoule for cracks before taking its contents or part of them into the syringe. The learned judge accepted his evidence that he made such an examination carefully in these cases. "I did not believe for one moment that I could have missed a crack" he said. Was he negligent in so believing? The learned judge deals with this matter in the following paragraph:

"It is now clear that phenol can find its way into an ampoule of Nupercaine stored in a solution of phenol through cracks which are not detectable by the ordinary visual or tactile examination which takes place in an operating theatre—these cracks were referred to in the evidence as 'invisible cracks'—or through molecular flaws in the glass. The attention of the profession was first drawn to this risk in this country by the publication of Professor MACINTOSH's book on LUMBAR PUNCTURE AND SPINAL ANAESTHESIA in 1951. In 1947 the general run of competent anaesthetists would not appreciate this risk. (See the evidence of Dr. Macintosh, Day 3, 18, 19, 42-E; of Dr. Organe, Day 8, 61; and of Dr. Cope, Day 9, 25). Dr. Graham certainly did not appreciate this as a risk. I accordingly find that, by the standard of knowledge to be imputed to competent anaesthetists in 1947, Dr. Graham was not negligent in failing to appreciate this risk, and, a fortiori, the theatre staff were not negligent."

I accept this. Although leading counsel for the plaintiffs did not accept these findings, his main attack on Dr. Graham was based on a different matter. There was evidence that in some hospitals where the immersion system was used the disinfecting liquid, whether a phenol solution or surgical spirit, was stained a deep tint with methylene blue or some other dye. Professor MACINTOSH described the liquids he had seen as the colour of ink. This would make it easier, of course, to detect percolation. It was a method used by Ciba Laboratories and was known to analytical chemists. A certain amount of confusion arose from the fact that the two solutions of phenol in which the ampoules were immersed were coloured, though not deeply. This was not done as a precaution against percolation. The one-in-twenty phenol solution was coloured a light blue and the one-in-forty a light pink for general purposes of identification and not as a precaution against cracked ampoules. As a precaution for this latter purpose the colouring was, as Professor MACINTOSH said, quite inadequate. Dr. Graham gave certain answers which might have meant he was relying on colour to detect cracks. If so, it should have been deeper. I agree with the submission of leading counsel for Dr. Graham that, taking his evidence as a whole, he was not so relying. If, of course, he had seen that the liquid in an ampoule was pink, he would at once have realised there had been substantial percolation. He was, however, relying on his visual inspection. Leading counsel for the plaintiffs submitted that once the plaintiffs had shown that this precaution was taken in some other hospitals the onus passed to Dr. Graham or the hospital to explain why it was not adopted in the present case. If the onus did so pass, I think it was discharged. Leading counsel for Dr. Graham conceded in the course of the trial and before us that if there had been deep tinting it would probably have disclosed any dangerous percolation. The learned judge, who had many difficult matters to deal with, of which he has relieved us, did not, I think, fully appreciate this submission. However, the other reasons which he gives, in my opinion, justify his finding, with which I agree, that Dr. Graham was not negligent. Dr. Graham had never heard of deep tinting as a precaution. There had been

a reference in American publications to colouring, but the only paper traced on "immersion" in this country made no reference to deep tinting as an ingredient of the process. On one occasion Dr. Graham found an ampoule which had been cracked or broken at the top. I do not think this assists either side. Leading counsel for Dr. Graham submitted, I think with force, that, if anything, it confirmed Dr. Graham's view that cracks would be visible. The actual method of immersion without deep tinting was introduced and used in the first instance by his senior, Dr. Pooler. Dr. Graham was entitled to place some reliance on that. It would obviously be wrong to infer negligence from the fact only that it was used in some other hospitals. I felt at one time that as Dr. Pooler had started the system it would have been right that the hospital should have called him. They were, however, submitting that he was not their servant, and on that basis it was, I think, reasonable for them not to call him. If it had been obvious or accepted that he was their "servant" for this purpose, it might well have been a matter for comment if he had not been called.

It is well to consider the nature of the allegation here made with regard to Dr. Graham's interests as well as his duties. If a man driving a motor car is late for an urgent appointment he has, at any rate, a motive for taking a risk. What, however, is the suggested act of negligence here? It is a failure to instruct a sister to put dye into a solution of phenol. It imposes no burden on the doctor except the speaking of a sentence. He or Dr. Pooler would have every motive for putting this minor burden on the nursing staff if either had any idea that it might prevent injury to his patients. There is, in my opinion, on the evidence no justification for finding that Dr. Graham was negligent in this matter.

The learned judge found that the hospital was not liable in law for Dr. Graham's acts of negligence, if any. I will set out the passage in which the learned judge states the position of Dr. Pooler and Dr. Graham:

"In October, 1946, he was, with Dr. Pooler who had taken his diploma of anaesthesia some years earlier, appointed as a visiting anaesthetist to the hospital. He and Dr. Pooler between them were under obligation to provide a regular anaesthetic service for the hospital, it being left to them to decide how to divide up the work. In fact, apart from emergencies, they worked at the hospital on alternate days. The hospital set aside a sum of money out of their funds derived from investments, contributions and donations for division among the whole of the medical and surgical staff including visiting and consulting surgeons as the participants might decide. Dr. Graham participated in this fund but otherwise received no remuneration from the hospital. He was at all times allowed to continue his private anaesthetic practice."

The learned judge referred to *Gold v. Esser County Council* (1) and *Cassidy v. Ministry of Health* (2). He assimilated Dr. Pooler and Dr. Graham to the "consulting physicians or surgeons" referred to by LORD GREENE, M.R., in *Gold's* case (1) ([1942] 2 All E.R. 242). The line suggested in that case and in *Cassidy's* case (2), in the judgments of SINGLETON, L.J., and myself, may not be a very satisfactory one, but I would have regarded Dr. Pooler and Dr. Graham as part of the permanent staff and, therefore, in the same position as the orthopaedic surgeon in *Cassidy's* case (2). Like him they are, of course, qualified skilled men controlling as such their own methods. The positions of surgeons and others under the National Health Service Act will have to be decided when it arises. The position of hospitals under that Act may or may not be different from when they were voluntary or municipal hospitals. Having regard to my conclusion with regard to Dr. Graham, the matter is relevant only on the alleged application of *res ipsa loquitur*. The learned judge said that principle could not apply to a case where the operation is, as he held here, under the control of two persons not in law responsible for each other. Our attention was drawn to some observations in *Mahon v. Osborne* (3) which suggest this is too widely stated. As to the maxim itself, I agree, with respect, with what was said by

LORD RADCLIFFE in *Barclay v. South Wales Transport Co., Ltd.* (4) ([1950] 1 All E.R. 403):

"I find nothing more in that maxim than a rule of evidence, of which the essence is that an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence."

In medical cases the fact that something has gone wrong is very often not in itself any evidence of negligence. In surgical operations there are, inevitably, risks. On the other hand, of course, in a case like this, there are points where the onus may shift, where a judge or jury might infer negligence, particularly if available witnesses who could throw light on what happened were not called. Having come to the conclusion that the hospital was responsible for Dr. Graham, the judge's reason (which is applicable in certain cases) for excluding the maxim has not operated on my mind.

I will now turn to the second main submission by leading counsel for the plaintiffs. Invisible cracks are none the less cracks and would not have been there if the ampoules had been carefully handled by the nursing staff. Therefore, there must have been negligent handling. And, of course, if the submission is to succeed, that negligent handling must have caused the injury. A number of experiments were conducted to try to crack ampoules in the way in which they must have been cracked on the findings. It was, of course, possible to break them if handled sufficiently roughly. It was found very difficult to produce an invisible or not easily visible crack except by thermal methods. It would be a very speculative basis on which to find some unidentified nurse negligent. I think, however, making assumptions in the plaintiffs' favour, the submission fails on causation. I will assume that a nurse knocked two ampoules together as she was placing them in the basin and this "rough" handling caused the "invisible" cracks. It would obviously be inadvertent, and, I will assume, negligent. The duty as such not negligently to mishandle equipment would be a duty owed by the hospital. If an ampoule were dropped and broken there would clearly be no breach of any duty to a patient. In the case I am assuming, having knocked the ampoules, the natural inference is that the nurse would look to see if they were cracked. This is what every normal person who has dropped or knocked something does. Is it broken? As the learned judge has found there was no visible crack and the nursing staff had no reason to foresee invisible cracks, the nurse would reasonably assume no harm had been done and would let the ampoule go forward. The duty which the nursing staff owed to the plaintiffs was to take reasonable care to see that cracked or faulty ampoules did not reach the operating theatre. That duty would not, in my opinion, be broken in the circumstances and on the assumption as set out above. For these reasons I would dismiss the appeal.

DENNING, L.J.: No one can be unmoved by the disaster which has befallen these two unfortunate men. They were both working men before they went into the Chestfield Hospital in October, 1947. Both were insured contributors to the hospital, paying a small sum each week, in return for which they were entitled to be admitted for treatment when they were ill. Each of them was operated on in the hospital for a minor trouble, one for something wrong with a cartilage in his knee, the other for a hydrocele. The operations were both on the same day, Oct. 13, 1947. Each of them was given a spinal anaesthetic by a visiting anaesthetist, Dr. Graham. Each of them has in consequence been paralysed from the waist down.

The judge has said that those facts do not speak for themselves, but I think they do. They certainly call for an explanation. Each of these plaintiffs is entitled to say to the hospital: "While I was in your hands something has been done to me which has ruined my life. Please explain how it has come to pass."

The reason why the judge took a different view was because he thought that the hospital authorities could disclaim responsibility for the anaesthetist, Dr. Graham: and, as it might be his fault and not theirs, the hospital authorities were not called on to give an explanation. I think that reasoning is wrong. In the first place, I think that the hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole-time or part-time. The hospital authorities are responsible for all of them. The reason is because, even if they are not servants, they are the agents of the hospital to give the treatment. The only exception is the case of consultants or anaesthetists selected and employed by the patient himself. I went into the matter with some care in *Cassidy's case* (2) and I adhere to all I there said. In the second place, I do not think that the hospital authorities and Dr. Graham can both avoid giving an explanation by the simple expedient of each throwing responsibility on the other. If an injured person shows that one or other or both of two persons injured him, but cannot say which of them it was, then he is not defeated altogether. He can call on each of them for an explanation: see *Baker v. Market Harborough Industrial Co-operative Society* (5).

I approach this case, therefore, on the footing that the hospital authorities and Dr. Graham were called on to give an explanation of what has happened. But I think they have done so. They have spared no trouble or expense to seek out the cause of the disaster. The greatest specialists in the land were called to give evidence. [HIS LORDSHIP then stated the facts as found by the learned judge and continued:] That is the explanation of the disaster, and the question is: Were any of the staff negligent? I pause to say that once the accident is explained, no question of *res ipsa loquitur* arises. The only question is whether on the facts as now ascertained anyone was negligent. Leading counsel for the plaintiffs said that the staff were negligent in two respects: (i) in not colouring the phenol with a deep dye; (ii) in cracking the ampoules.

I will take them in order: (i) The deep tinting. If the anaesthetists had foreseen that the ampoules might get cracked with cracks that could not be detected on inspection they would, no doubt, have dyed the phenol a deep blue; and this would have exposed the contamination. But I do not think their failure to foresee this was negligence. It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way. Something goes wrong and shows up a weakness, and then it is put right. That is just what happened here. Dr. Graham sought to escape the danger of infection by disinfecting the ampoule. In escaping that known danger he, unfortunately, ran into another danger. He did not know that there could be undetectable cracks, but it was not negligent for him not to know it at that time. We must not look at the 1947 accident with 1954 spectacles. The judge acquitted Dr. Graham of negligence and we should uphold his decision. (ii) The cracks. In cracking the ampoules, there must, I fear, have been some carelessness by someone in the hospital. The ampoules were quite strong and the sisters said that they should not get cracked if proper care was used in handling them. They must have been jolted in some way by someone. This raises an interesting point of law. This carelessness was, in a sense, one of the causes of the disaster; but the person who jolted the ampoule cannot possibly have foreseen what dire consequences would follow. There were so many intervening opportunities of

inspection that she might reasonably think that, if the jolting caused a crack, it would be discovered long before any harm came of it. As SOMERVELL, L.J., has pointed out, she herself would probably examine the ampoule for a crack, and seeing none, would return it to the jar. The anaesthetist himself did, in fact, examine it for cracks, and, finding none, used it. The trouble was that nobody realised that there might be a crack which you could not detect on ordinary examination. What, then, is the legal position?

It may be said that, by reason of the decision of this court in *Re Polemis & Furness, Withy & Co.* (6), the hospital authorities are liable for all the consequences of the initial carelessness of the nurse, even though the consequences could not reasonably have been foreseen. But the decision in *Re Polemis* (6) is of very limited application. The reason is because there are two preliminary questions to be answered before it can come into play. The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct: see *Hay (or Bourhill) v. Young* (7) and *Woods v. Duncan* (8) ([1946] A.C. 426, per LORD RUSSELL OF KILLOWEN, and *ibid.*, 437 per LORD PORTER). The second question is whether the neglect of duty was a "cause" of the injury in the proper sense of that term; and causation, as well as duty, often depends on what you should foresee. The chain of causation is broken when there is an intervening action which you could not reasonably be expected to foresee: see *Woods v. Duncan* (8), *ibid.*, 421, per VISCOUNT SIMON; *ibid.*, 431, per LORD MACMILLAN; *ibid.*, 442, per LORD SIMONDS. It is even broken when there is an intervening omission which you could not reasonably expect. For instance, in cases based on *McAlister (or Donoghue) v. Stenerson* (9), a manufacturer is not liable if he might reasonably contemplate that an intermediate examination would probably be made. It is only when those two preliminary questions—duty and causation—are answered in favour of the plaintiff that the third question, remoteness of damage, comes into play. Even then your ability to foresee the consequences may be vital. It is decisive where there is intervening conduct by other persons: see *Stansbie v. Troman* (10); *Lewis v. Carpenters' & Joiners' County Council* (11). It is only disregarded when the negligence is the immediate or precipitating cause of the damage, as in *Re Polemis* (6) and *Thorogood v. Van Den Berghs & Jurgens, Ltd.* (12). In all these cases you will find that the three questions, duty, causation, and remoteness, run continually into one another. It seems to me that they are simply three different ways of looking at one and the same question which is this: Is the consequence fairly to be regarded as within the risk created by the negligence? If so, the negligent person is liable for it; but otherwise not. Even when the three questions are taken singly, they can only be determined by applying common sense to the facts of each particular case: see as to duty, *King v. Phillips* (13) ([1953] 1 All E.R. 620, 624); as to causation, *Stapley v. Gypsum Mines, Ltd.* (14), and as to remoteness, *Liesbosch, Dredger v. Edison S.S.* (15) ([1933] A.C. 460, per LORD WRIGHT). Instead of asking three questions, I should have thought in many cases it would be simpler and better to ask the one question: Is the consequence within the risk? and to answer it by applying ordinary plain common sense. That is the way in which SINGLETON and HODSON, L.J.J., approached a difficult problem in *James v. Lee & Quirk, Ltd.* (16) ([1952] 2 Q.B. 613, 618), and I should like to approach this problem in the same way.

Asking myself, therefore, what was the risk involved in careless handling of the ampoules, I answer by saying that there was such a probability of intervening examination as to limit the risk. The only consequence which could reasonably be anticipated was the loss of a quantity of Sypnalar, but not the paralysis of a patient. The hospital authorities are, therefore, not liable for it. When you stop to think of what happened in that case, you will realise that it was a most

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extraordinary chapter of accidents. In some way the ampoules must have received a jolt, perhaps while a nurse was putting them into the jar or while a trolley was being moved along. The jolt cannot have been very severe. It was not severe enough to break any of the ampoules or even to crack them so far as anyone could see. But it was just enough to produce an invisible crack. The crack was of a kind which no one in any experiment has been able to reproduce again. It was too fine to be seen, but it was enough to let in sufficient phenol to corrode the nerves, whilst still leaving enough Nupercaine to anaesthetise the patient. And this very exceptional crack occurred, not in one ampoule only, but in two ampoules used on the self-same day in two successive operations; and none of the other ampoules was damaged at all. This has taught the doctors to be on their guard against invisible cracks. Never again, it is to be hoped, will such a thing happen. After this accident a leading text-book, Professor MACINTOSH ON LUMBAR PUNCTURE AND SPINAL ANAESTHESIA, was published in 1951 which contains the significant warning:

“Never place ampoules of local anaesthetic solution in alcohol or spirit.

This common practice is probably responsible for some of the cases of permanent paralysis reported after spinal analgesia.”

If the hospitals were to continue the practice after this warning, they could not complain if they were found guilty of negligence. But the warning had not been given at the time of this accident. Indeed, it was the extraordinary accident to these two men which first disclosed the danger. Nowadays it would be negligence not to realise the danger, but it was not then.

One final word. These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure. I agree with my Lord that these appeals should be dismissed.

MORRIS, L.J., stated the facts and continued: The evidence adduced at the hearing showed that it was only in very rare cases that any untoward consequence followed on spinal anaesthetic injection. In the nature of things the plaintiffs could not know, nor be expected to know, exactly what took place in preparation for and during their operations. When they proved all that they were in a position to prove they then said: “*res ipsa loquitur*”. But this convenient and succinct formula possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying: “I submit that the facts and circumstances that I have proved establish a *prima facie* case of negligence against the defendant.” It must depend on all the individual facts and the circumstances of the particular case whether this is so. There are certain happenings that do not normally occur in the absence of negligence and on proof of these a court will probably hold that there is a case to answer. (For a valuable discussion of this topic see an article by Dr. ELLIS LEWIS: 1951, 11 CAMBRIDGE LAW JOURNAL, p. 74). Where there are two or more defendants it may be that the facts proved by a plaintiff are such as to establish a *prima facie* case against each defendant. Thus, in *Mahon v. Osborne* (3), MACKINNON, L.J., said ([1939] 1 All E.R. 553):

“Five persons were concerned in the operation on Mar. 4—Mr. Osborne, the surgeon, the anaesthetist, Nurse Ashburner, as chief or theatre nurse, Nurse Edmunds, and Nurse Callaghan. The plaintiff, having no means of

knowing what happened in the theatre, was in the position of being able to rely on the maxim *res ipsa loquitur* so as to say that some one or more of these five must have been negligent, since the swab was beyond question left in the abdomen of the deceased. In fact, she sued Mr. Osborne, the surgeon, and Miss Ashburner, the chief nurse. One or other of them, or perhaps both, must have been negligent, but it was for the plaintiff to establish her case against either or both."

Difficulties may arise, however, if a plaintiff only proves facts from which the inference is that there may have been negligence either in defendant A, or in defendant B. So, in the present case it was said that unless Dr. Graham was the servant or agent of the hospital the position at the close of the plaintiffs' cases was that if a *prima facie* case of negligence was established it was merely a case that pointed uncertainly against either Dr. Graham or the hospital. I do not think that it is necessary to consider whether, if Dr. Graham was not the servant or agent of the hospital and if no evidence at all had been called on behalf of the defendants, it could have been asserted that a *prima facie* case was made out both against Dr. Graham and against the hospital, for I have come to the conclusion that Dr. Graham was the servant or agent of the hospital.

In *Gold v. Essex County Council* (1) LORD GREENE, M.R., pointed out ([1942] 2 All E.R. 242) that in cases of this nature the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. He added (*ibid.*):

"Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf; and this is equally true whether or not the obligation involves the use of skill."

In the present cases the learned judge held that both plaintiffs were contributors for hospital and surgical treatment under a contributory scheme run by the hospital, so that they made some contributions which were received by the hospital for their treatment. The exact details of the scheme which the hospital had run were not before us and they might not have added materially to the facts proved. While the requisite standard of care does not vary according to whether treatment is gratuitous or on payment the existence of arrangements entitling the plaintiffs to expect certain treatment might be a relevant factor when considering the extent of the obligation assumed by the hospital. In his judgment in *Gold v. Essex County Council* (1) LORD GREENE, M.R., analysed the position of the various persons in the "organisation" of the hospital to which the plaintiff in that case resorted for free advice and treatment. He said (*ibid.*):

"The position of the nurses again . . . if the nature of their employment, both as to its terms and as to the work performed, is what it usually is in such institutions, I cannot myself see any sufficient ground for saying that the respondents do not undertake towards the patient the obligation of nursing him as distinct from the obligation of providing a skilful nurse."

This passage conveniently demonstrates a contrast. A hospital might assume the obligation of nursing; it might, on the other hand, merely assume the obligation of providing a skilful nurse. But the question as to what obligation a hospital has assumed becomes, as it seems to me, ultimately a question of fact to be decided having regard to the particular circumstances of each particular case: the ascertainment of the fact may require in some cases inference or deduction from proved or known facts. In the present case we are concerned only with the position of Dr. Graham in 1947 in this voluntary hospital.

The general position in regard to nurses would appear to be reasonably uniform and clear. In the case cited above LORD GREENE, M.R., said (*ibid.*, 243):

"Nursing, it appears to me, is just what the patient is entitled to expect

from the institution and the relationship of the nurses to the institution supports the inference that they are engaged to nurse the patients. In the case of a nursing home conducted for profit, a patient would be surprised to be told that the home does not undertake to nurse him. In the case of a voluntary hospital with the usual nursing staff his just expectation would surely be the same. The idea that in the case of a voluntary hospital the only obligation which the hospital undertakes to perform by its nursing staff is, not the essential work of nursing but only so-called administrative work appears to me, with all respect to those who have thought otherwise, not merely unworkable in practice but contrary to the plain sense of the position."

On the principles so clearly enunciated the court in that case held that the hospital had assumed the obligation of treating a patient who sought treatment by Grenz rays and of giving the treatment by the hand of a competent radiographer. That was the natural and reasonable inference to be drawn from the way in which those running the hospital conducted their affairs and from the nature of the engagement of the radiographer.

If a patient in 1947 entered a voluntary hospital for an operation it might be that if the operation was to be performed by a visiting surgeon the hospital would not undertake so far as concerned the actual surgery itself to do more than to make the necessary arrangements to secure the services of a skilled and competent surgeon. The facts and features of each particular case would require investigation. But a hospital might in any event have undertaken to provide all the necessary facilities and equipment for the operation and the

obligation of nursing and also the obligation of anaesthetising a patient for his operation. The question in the present case is whether the hospital undertook these obligations. In my judgment, they did. There can be no doubt that they undertook to nurse the plaintiffs and to provide the necessary facilities and equipment for the operations. I think they further undertook to anaesthetise the plaintiffs. The arrangements made between the hospital and Dr. Pooler

and Dr. Graham, together with the arrangements by which a resident anaesthetist was employed, had the result that the hospital provided a constantly available anaesthetic service to cover all types of cases. It is true that Dr. Pooler and Dr. Graham could arrange between themselves as to when they would respectively be on duty at the hospital, and each was free to do private work. But these facts do not negative the view, to which all the circumstances point, that the

hospital was assuming the obligation of anaesthetising the plaintiffs for their operations. I consider that the anaesthetists were members of the "organisation" of the hospital: they were members of the staff engaged by the hospital to do what the hospital itself was undertaking to do. The work which Dr. Graham was employed by the hospital to do was work of a highly skilled and specialised nature, but this fact does not avoid the application of the rule of

"respondeat superior". If Dr. Graham was negligent in doing his work I consider that the hospital would be just as responsible as were the defendants in *Gold v. Essex County Council* (1) for the negligence of the radiographer or as were the defendants in *Cassidy v. Ministry of Health* (2). I have approached the present case, therefore, on the basis that the defendants would be liable if the plaintiffs' injuries were caused by the negligence either of Dr. Graham or

by the negligence of someone on the staff who was concerned with the operation or the preparation for it. On this basis if negligence could be established against one or more of those for whom the hospital was responsible it would not matter if the plaintiffs could not point to the exact person or persons who had been negligent.

It was not suggested that Dr. Graham was negligent in using Supercaine, nor that there was anything faulty in the manner of his injection. But it was said that the evidence pointed to the fact that the quantity of phenol which must

have found its way into the Nupercaine had passed through cracks of dimensions which would not have eluded a careful examiner. This view depended in part on an estimate as to the percentage of phenol admixture which would be damaging and in part on evidence as to the results of experiments to ascertain the rate at which phenol might percolate through cracks. But it seems unlikely that Dr. Graham in two successive operations would fail to detect cracks which could be observed or felt. The learned judge, having seen and heard Dr. Graham, whose evidence he said was given "in a very careful and forthright manner", rejected the suggestion that Dr. Graham had failed to detect cracks which could have been seen. I do not think that this finding can be disturbed and, accordingly, the matter must be considered on the footing that phenol had found its way into the ampoules through cracks not ordinarily detectable. On this basis it is clear that if the phenol solution had been tinted with some vivid colouring any escape of the solution into the ampoules would have been readily apparent. This was at all times frankly conceded by leading counsel for Dr. Graham. The question arises whether Dr. Graham was negligent in not arranging for the deep-tinting of the phenol solution. The phenol solution as used in the hospital was in fact coloured although not vividly. This colouring was part of the routine adopted in the hospital to denote and to identify phenol. It was Dr. Pooler who first introduced in the hospital the system of immersing the ampoules in phenol solution. Dr. Graham considered the matter for some time before he followed the lead given him by his senior and more experienced colleague on whose opinion he greatly relied. When Dr. Graham adopted the new method he realised full well, as he unhesitatingly admitted, that if a glass ampoule became cracked there could be resultant percolation of phenol solution which would be a "terribly serious danger". It was for that reason that he felt it necessary after changing over to the new method to examine carefully for cracks. But Dr. Graham was most emphatic in his evidence that in 1947 he had no knowledge at all that there might be in an ampoule some kind of a crack which was not visible but which yet permitted percolation. He firmly believed that there was no danger provided that there was no crack that could be seen on proper inspection: he never conceived the idea of a crack that he could not see. I read his evidence when taken in its entirety as showing that he was not relying on seeing some discoloration as a warning that there had been percolation, but that he was convinced that danger could only arise if there was a crack that could be seen and that such danger could be fully averted by careful inspection. It is now known that there could be cracks not ordinarily detectable. But care has to be exercised to ensure that conduct in 1947 is only judged in the light of knowledge which then was or ought reasonably to have been possessed. In this connection the then-existing state of medical literature must be had in mind. The question arises whether Dr. Graham was negligent in not adopting some different technique. I cannot think that he was. I think that a consideration of the evidence in the case negatives the view that Dr. Graham was negligent and I see no reason to differ from the conclusions which were reached on this part of the case by the learned judge.

But it is further said that there must have been negligent mishandling of the ampoules on the part of some member or members of the staff of the hospital. On behalf of the plaintiffs it was urged that the ampoules must have arrived intact and in good order at the hospital and must have been carefully handled at a later stage when they were being made ready and available for operative use. There was much evidence which supported the contention that ampoules could only have been damaged if they were mishandled. Even so, it is problematical as to when and where and in what circumstances these two ampoules became damaged. But as the case now stands an acceptance of the finding of fact of the learned judge that Dr. Graham carefully examined the ampoules used and that there were no cracks which would by such examination have

been revealed involves that the offending cracks were not detectable ones. If the view is correct that an anaesthetist in 1947 was not negligent in not knowing of the risk of seepage through what have been called "invisible cracks" it follows, I think, that members of the theatre staff could not be expected to know of any such risk. In his speech in *Bolton v. Stone* (17) LORD PORTER said ([1951] 1 All E.R. 1081):

A "It is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence."

If some member of the staff had in fact mishandled the ampoules in question, then the position was either that the damage was not seen after an actual inspection or that an inspection would have been unavailing: since no detectable damage to them was caused there was no reason to foresee that there was any risk in leaving such ampoules amongst those from which an anaesthetist would select and no reason to contemplate that any injury would be likely to follow. Although there must be abiding sympathy with the two plaintiffs in their grievous and distressing misfortunes, I consider that the judgment of the learned judge was correct.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the plaintiffs); *Berrymans* (for the first defendant, the Ministry of Health); *Hempsons* (for the second defendant, Dr. Graham); *Sweepstones* (for the third defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

GALLOWAY v. GALLOWAY.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), March 8, 29, 30, April 13, 1954.]

E *Divorce—Custody—Child born before marriage—Not legitimated per subsequens matrimonium—Matrimonial Causes Act, 1950 (c. 25), s. 26 (1).*

Infant—Maintenance—Infant born before marriage—Not legitimated per subsequens matrimonium—Matrimonial Causes Act, 1950 (c. 25), s. 26 (1).

F Per JENKINS and HODSON, L.J.J., SINGLETON, L.J., dissentiente: The term "children" in s. 26 (1) of the Matrimonial Causes Act, 1950, does not include a child born out of wedlock in circumstances which prevent the child being legitimated by the subsequent marriage of the parents under the provisions of the Legitimacy Act, 1926, and, therefore, on the dissolution of the parents' marriage, no order for the custody or maintenance of the child can be made.

G *Harrison v. Harrison* ([1951] 2 All E.R. 346) and decision of MORRIS, L.J., in *Packer v. Packer* ([1953] 2 All E.R. 127), approved.

Decision of DENNING, L.J., in *Packer v. Packer* (ibid.), not approved.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 26 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 413.

Cases referred to:

- H (1) *Harrison v. Harrison*, [1951] 2 All E.R. 346; [1951] P. 476; 115 J.P. 428; 27 Digest, Replacement, 664, 6289.
 (2) *R. v. Tolley (Inhabitants)*, (1845), 7 Q.B. 596; 14 L.J.M.C. 138; 5 L.T.O.S. 196; 9 J.P. 583; 115 E.R. 614; 28 Digest 139, 3.
 (3) *Woolwich Union v. Fulham Union*, [1906] 2 K.B. 240; 75 L.J.K.B. 675; 95 L.T. 337; *affd.* H.L., sub nom. *Fulham Parish v. Woolwich Union*, [1907] A.C. 255; 76 L.J.K.B. 739; 97 L.T. 117; 71 J.P. 361; 37 Digest 255, 503.

- (4) *C. v. C.*, [1947] 2 All E.R. 50; 177 L.T. 399; 111 J.P. 442; sub nom. *Colquitt v. Colquitt*, [1948] P. 19; [1948] L.J.R. 897; 27 Digest, Replacement, 709, 6765.
- (5) *Langworthy v. Langworthy*, (1886), 11 P.D. 85; 55 L.J.P. 33; 54 L.T. 776; 27 Digest, Replacement, 689, 6597.
- (6) *Green v. Green*, [1929] P. 101; 98 L.J.P. 58; 140 L.T. 93; 27 Digest, Replacement, 664, 6286.
- (7) *Millard v. Millard & Addis*, [1945] 2 All E.R. 525; sub nom. *M. v. M.*, [1946] P. 31; 115 L.J.P. 29; 173 L.T. 305; 27 Digest, Replacement, 555, 5053. A
- (8) *Packer v. Packer*, [1953] 2 All E.R. 127; [1954] P. 15.
- (9) *Bednall v. Bednall & Shirussara*, [1927] P. 225; 96 L.J.P. 150; 137 L.T. 632; 27 Digest, Replacement, 664, 6285.
- (10) *Jackson (otherwise Macfarlane) v. Jackson*, [1909] P. 308; 77 L.J.P. 147; 27 Digest, Replacement, 577, 5352. B
- (11) *Jones v. Jones*, (1929), 98 L.J.P. 74; 140 L.T. 647; 27 Digest, Replacement, 664, 6287.
- (12) *Webb v. Webb*, [1952] 1 All E.R. 527; 116 J.P. 146; 3rd Digest Supp.
- (13) *Thomasset v. Thomasset*, [1894] P. 295; 63 L.J.P. 140; 71 L.T. 148; 27 Digest, Replacement, 664, 6283. C
- (14) *Evans v. Evans & Blyth*, [1904] P. 274; 73 L.J.P. 87; 91 L.T. 356; 27 Digest, Replacement, 662, 6264.

APPEAL by the wife against an order of His Honour Judge LAWSON CAMPBELL, sitting as special commissioner in divorce at Cambridge, dated Nov. 26, 1953.

On Aug. 14, 1953, the wife presented a petition for the dissolution of the marriage on the ground of the husband's desertion and adultery. The petition contained an allegation to the effect that on Aug. 17, 1950, the wife gave birth to a child, John Allen, of whom the husband was the father, but that at the date of the child's birth the husband was married to another woman, and the relief sought by the wife included, in addition to the dissolution of the marriage, prayers that the custody of the child be granted to the wife and that provision be made for his maintenance. The suit was not defended. The learned commissioner granted the wife a decree nisi for dissolution of her marriage to the husband, but refused her application for custody of the child. D

R. E. M. Elborne for the wife.

Comyn for the Queen's Proctor as amicus curiae.

Cur. adv. vult. E

Apr. 13. The following judgments were read.

SINGLETON, L.J.: The wife and the husband were married at the register office in Birmingham on May 15, 1952, the wife being then a widow. They had lived together before that time, and on Aug. 17, 1950, the wife had given birth to a child of whom the husband was the father. At the time of the birth of the child the husband was married to another woman. There were divorce proceedings between him and his wife, and after decree absolute he married the wife. The result is that the provisions of the Legitimacy Act, 1926, do not apply in the case of the child, and the subsequent marriage of the wife and the husband did not make him legitimate. The wife left the husband on July 5, 1952, and thereafter he committed adultery with one W. On May 6, 1953, the wife was granted leave to present a petition, notwithstanding the fact that three years had not elapsed since the celebration of the marriage. On Nov. 26, 1953, His Honour Judge LAWSON CAMPBELL, sitting on the special commission in divorce at Cambridge, granted the wife a decree of dissolution of marriage on the ground of the adultery of the husband. The wife asked for custody of the child, but the learned commissioner did not accede to that request. He thought it right to follow the decision of BARNARD, J., in *Harrison v. Harrison* (1), in which it G

was held that the court cannot make an order under the Matrimonial Causes Act, 1950, s. 26 (1), for the custody of a child, if the child's father or mother was married to a third person when the child was born. The wife appeals to this court.

A Section 26 (1) took the place of s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which replaced s. 35 of the Matrimonial Causes Act, 1857, as amended by s. 4 of the Matrimonial Causes Act, 1859. For the purposes of this appeal the wording of s. 26 (1) of the Matrimonial Causes Act, 1950, is the same as s. 35 of the Matrimonial Causes Act, 1857, which first gave power to the court to make orders of custody and maintenance of children:

B "In any proceedings for divorce or nullity of marriage or judicial separation, the court may . . . make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings . . ."

Section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, was in the same terms.

C On the face of them the words are wide enough to cover a child of the parties to the proceedings whether the child is legitimate or illegitimate. There is, however, a long line of authority to show that the word "children" in a statute prima facie means legitimate children. In *R. v. Tolley (Inhabitants)* (2) LORD DENMAN, C.J., said (7 Q.B. 600) that:

"The law does not contemplate illegitimacy. The proper description of a legitimate child is 'child'".

D And see the judgments in *Woolwich Union v. Fulham Union* (3), in which VAUGHAN WILLIAMS, L.J., having stated the general rule as to the meaning of the word "children", added ([1906] 2 K.B. 246):

E "It is of course true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute."

F The object of s. 35 of the Act of 1857 was to enable the court in a proper case to make provision for the custody and maintenance of "children the marriage of whose parents is the subject of such suit or other proceedings", which is a wider expression than "children of the marriage". It is said with some force that the reason for the introduction of the words was to include children of a marriage which had ceased to be a marriage by reason of a declaration of nullity. Be that so. The court is thereby empowered to make an order in respect of one branch of illegitimate children. What reason can there be for excluding other illegitimate children if the court is satisfied that they are children of parents whose marriage is the subject of the proceedings? It is a question of proof. G If an order was made under s. 35 of the Act of 1857, or if one is made today under s. 26 (1) of the Act of 1950, it was, or is, made for the purposes of the section, and for no other purpose. BARNARD, J., thought in *Harrison v. Harrison* (1) that the legislature had in mind only children of the marriage. That appears to me to be too narrow a construction to put on the words of the section. In *C. v. C.* (4) the Divisional Court held that the words of s. 193 (1) of the Act of 1925 were wide enough to cover the case of a child who, by reason of the subsequent marriage of the parents, was rendered legitimate under the provisions of the Legitimacy Act, 1926. H

Thus, in the history of this legislation there are, or have been, for consideration three different branches of illegitimate children: (i) The offspring of a marriage declared void. It is clear from the decision of this court in *Langworthy v. Langworthy* (5), that an order under s. 35 of the Act of 1857 can be made in respect of children of such a union. In the case of a decree in respect of a voidable

marriage under the Matrimonial Causes Act, 1937, s. 7 (2) (which was replaced by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 4 (1), now replaced by s. 9 of the Act of 1950), it is provided that any child born of a marriage avoided pursuant to s. 7 (1) (b) and (c) shall be a legitimate child of the parties. (ii) Children born before the marriage of their parents who are born illegitimate but who are legitimised by the subsequent marriage of their parents. Under the decision in *C. v. C.* (4) an order under the section can be made in respect of any such children. (iii) Children born before the marriage of their parents who are not legitimised by the subsequent marriage of their parents owing to the fact that at the time of the birth one of the parents was married to someone else. It is under this last category that the question in the present case arises. And it is well to remember that there might be a child three years of age falling under head (iii), and a child two years old under head (ii). Why should there be a distinction between the two, if it be right to say that the object of the sub-section is to provide for the maintenance, etc., of "children the marriage of whose parents is the subject of the proceedings?"

The answer to this question seems to be the view taken over many years as to the meaning of the word "children". The decision in *Green v. Green* (6) did not meet with the approval of the Divisional Court in *C. v. C.* (4), but I do not see that doubt was cast on the words of LORD MERRIVALE, P. ([1929] P. 104):

"An order for custody in a divorce suit—for reasons which I will presently point out—implies a finding of legitimacy . . . Some discussion took place at the hearing before me as to whether an order for custody in this case necessarily involves a finding or declaration of legitimacy. That this is so appears upon perusal of the statute which empowers the court to grant custody—originally the Matrimonial Causes Act, 1857, s. 35, and now the [Supreme Court of Judicature (Consolidation)] Act, 1925, s. 193. 'Children' in these enactments means legitimate children in the sense that at the time of the suit they are legitimate."

It is for this court to say whether or not those words can stand in view of the object of the section and in view of the fact that it must in its inception have been intended to apply to one class of illegitimate children. A similar view was expressed ([1947] 2 All E.R. 53) by LORD MERRIMAN, P., in *C. v. C.* (4).

One of the difficulties in the way of giving a literal meaning to the words of s. 26 (1) is the reluctance of judges over the years to treat as "children the marriage of whose parents is the subject of the proceedings" any children except legitimate children (apart from nullity cases). The decision in *C. v. C.* (4) gave an extended meaning to the words of s. 193 (1) of the Act of 1925, though, as a matter of construction, I do not find it easy to read into the then section words which would bring within it a child who was illegitimate prior to the passing of the Legitimacy Act, 1926, if the child was not already covered by its terms. Another difficulty is that the same words were repeated in the Act of 1950 after the decision of the Divisional Court in *C. v. C.* (4). Still it may well be that it was realised that there was a difference of opinion which the legislature left to the courts to determine. (In the year 1945 DENNING, J., in *Millard v. Millard & Addis* (7), had said ([1945] 2 All E.R. 527) that the test was "parenthood, not legitimacy.") I do not find much help from other sections of the Act of 1950, nor from the different expressions in s. 26 (1), (2) and (3) itself.

There is no decision of this court which binds us. An appeal similar to the present was heard by DENNING, L.J., and MORRIS, L.J., namely, *Packer v. Packer* (8). The learned lords justices held different opinions, as a result of which the appeal was dismissed in a case in which *Harrison v. Harrison* (4) had been followed by a special commissioner in divorce. The opinion of DENNING, L.J., was that, contrary to the view expressed in *Harrison v. Harrison* (1), s. 26 (1) of the Act of 1950 includes illegitimate as well as legitimate children, and that the test of the jurisdiction of the Divorce Court to make orders in respect of children

on dissolution of marriage is, therefore, parenthood and not illegitimacy. He considered that such a construction is consistent with reason and good sense and with the express power given by the sub-section to make provision for the illegitimate children of void marriages. The opinion of MORRIS, L.J., was that the word "children" in s. 26 (1) does not include illegitimate children. The prima facie meaning of the word "child" or "children" in a statute is that of a legitimate child or legitimate children, unless a wider meaning is more consonant with the object of the statute. The use of the phrase "the children the marriage of whose parents is the subject of the proceedings" in s. 26 (1) is not intended to confer a wider meaning on the word "children", but refers only to the express power given to the court by the section in respect of the children of void marriages.

DENNING, L.J. ([1953] 2 All E.R. 128), put the case in this way:

"I see no reason for confining the section to legitimate children. On the contrary there are strong reasons why it must extend to illegitimate children as well as legitimate children. That is shown by the fact that the section applies not only to proceedings for divorce but also to proceedings for nullity. It applies, for instance, to nullity on the ground of affinity, bigamy or want of form, and the court can make provision for the children of incestuous or bigamous or invalid marriages, although those children are clearly illegitimate: see *Langworthy v. Langworthy* (5). Once the word 'children' in the section is interpreted so as to include illegitimate children (as it must be), then the jurisdiction of the Divorce Court to make provision under s. 26 (1) depends on three requisites being fulfilled: (i) the application must be made in 'proceedings for divorce or nullity of marriage or judicial separation', and (ii) the application must relate to 'children', legitimate or illegitimate, and (iii) 'the marriage of the parents' of those children must be 'the subject of the proceedings.' When the section is analysed in that way it is clear that the test of jurisdiction is parenthood, not legitimacy."

I am impressed by this reasoning. It gives to the words of s. 26 (1) their natural meaning, and, if it is adopted, it enables the court to carry out the purposes of the sub-section, which is to make an order for custody and maintenance. Section 35 of the Act of 1857, undoubtedly, enabled an order to be made in respect of one class of illegitimate children. I cannot see why another class should be excluded if, as I think, the words of the section are sufficiently wide to cover them. It seems to me that it is more consonant with the object of the statute to include them. To include those within head (i) and head (ii) above, and to exclude those within head (iii), appears to me to defeat in part the object of s. 26 (1) and to be devoid of any real foundation. Two things should always be remembered when an order is desired. The first is the necessity of proof that the child is a child of the marriage which is the subject of the proceedings. The second is that an order made is one made under and for the purposes of the section, and for no other purpose.

In my opinion, no good reason is shown for limiting the meaning of the words of s. 26 (1) in the way that has been suggested. They should be given the meaning which on the face of them they bear, and the court ought not to be hindered from so holding by judgments as to the meaning of the word "children" in other Acts of Parliament. Only thus can the full purpose of the sub-section be achieved. I would allow the appeal. But as the other members of the court take an opposite view the appeal will be dismissed. It is with great hesitation that I venture to express on this difficult question an opinion different from that held by my brethren. It may be that in the result there will be a change in the law, for it cannot be doubted that the court ought to have power to make an order for the custody and maintenance of a child of the kind sought in this case if the parentage is clearly established.

JENKINS, L.J., stated the facts and continued: The question in the appeal is in effect whether or not, on the true construction of s. 26 (1) of the Matrimonial Causes Act, 1950, the jurisdiction of the court over the children of the parties to a marriage which becomes the subject of proceedings under the Act extends to a child born to those parties before their marriage in circumstances precluding its legitimation by such subsequent marriage under the provisions of the Legitimacy Act, 1926. Section 26 of the Matrimonial Causes Act, 1950, is in these terms:

"(1) In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court. (2) On an application made in that behalf, the court may, in any proceedings for restitution of conjugal rights, at any time before final decree, or, if the respondent fails to comply therewith, after final decree, make from time to time all such orders and provisions with respect to the custody, maintenance and education of the children of the petitioner and respondent as might have been made by interim orders if proceedings for judicial separation had been pending between the same parties. (3) On any decree of divorce or nullity of marriage, the court shall have power to order the husband, and on a decree of divorce made on the ground of the husband's insanity, shall also have power to order the wife, to secure for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all necessary parties."

This section reproduced without any material alteration s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 10 (4) of the Matrimonial Causes Act, 1937, which added to s. 193 a new sub-s. (3) in substantially the same terms as the present s. 26 (3) of the Act of 1950. Section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, reproduced without any material alteration, as sub-s. (1), the combined provisions of s. 35 of the Matrimonial Causes Act, 1857, and s. 4 of the Matrimonial Causes Act, 1859, and, as sub-s. (2), the provisions of s. 6 of the Matrimonial Causes Act, 1884.

It will, perhaps, be convenient to set out in full the sections of the Acts of 1857 and 1859 from which s. 193 (1) of the Act of 1925, now s. 26 (1) of the Act of 1950, is derived. Section 35 of the Act of 1857 reads:

"In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery."

Section 4 of the Act of 1859 reads:

"The court after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provision with respect to the custody, maintenance, and education of the children the marriage of whose parents was the subject of the decree, or for placing such children

under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending: and all orders under this enactment may be made by the Judge Ordinary alone or with one or more of the other judges of the court."

A The effect of these two sections is combined in s. 26 (1) of the Act of 1950 by making the jurisdiction conferred by the sub-section exercisable "from time to time, either before or by or after the final decree". It is important to observe that s. 35 of the Act of 1857, s. 193 (1) of the Act of 1925, and s. 26 (1) of the Act of 1950, all define the children to whom the jurisdiction extends in substantially the same terms—the words used in the Act of 1857, s. 35, being "the children the marriage of whose parents is the subject of such suit or other proceeding", and those used in the Act of 1925, s. 193 (1), and the Act of 1950, s. 26 (1), being B "the children the marriage of whose parents is the subject of the proceedings", and that the same formula, mutatis mutandis, appeared in s. 4 of the Act of 1859, namely, "the children the marriage of whose parents was the subject of the decree."

C To complete my citations from the statutes I may conveniently collect at this point various references to children in the Act of 1950 or its predecessors of which use was sought to be made in the course of the argument. In s. 26 (2), dealing with proceedings for restitution of conjugal rights, are the words "the children of the petitioner and respondent", while in s. 26 (3), dealing with secured provision, are the words "the children" simpliciter. In s. 2 (2) of the Act of 1950 (corresponding to s. 1 (2) of the Act of 1937) it is provided that, in determining any application for leave to present a petition within three years of the marriage, D regard shall be had, inter alia, to "the interests of any children of the marriage". Section 9 of the Act of 1950 (replacing s. 4 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, which replaced s. 7 (2) of the Act of 1937) provides that:

E "Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment".

Section 23 (1) of the Act of 1950 (replacing s. 5 (1) of the Act of 1949) empowers the court to make orders for maintenance where a husband has been guilty of wilful neglect to maintain his wife "or the infant children of the marriage." F Section 24 (1) and (2) of the Act of 1950 (replacing s. 191 (1) and (2) of the Act of 1925) enable settlements to be made of a wife's property "for the benefit . . . of the children of the marriage". The same phrase occurs in s. 45 of the Act of 1857, which was the precursor of s. 24 (1) of the Act of 1950. Section 25 of the Act of 1950 (replacing s. 192 of the Act of 1925, which in turn replaced s. 5 of the Act of 1859) empowers the court after pronouncing a decree for divorce or nullity of marriage to make orders for the variation of settlements "for the benefit of the children of the marriage", and the court may exercise the powers G conferred by the section "notwithstanding that there are no children of the marriage." Section 30 (3) of the Act of 1950 (replacing s. 189 (3) of the Act of 1925, which in turn replaced a corresponding provision contained in s. 33 of the Act of 1857) enables the court to direct a settlement of any damages recovered on a petition "for the benefit of the children, if any, of the marriage". H

Of the cases to which we were referred as bearing directly on the construction of s. 26 (1) of the Act of 1950 or the corresponding earlier enactments, the first in order of date is *Langworthy v. Langworthy* (5). In that case a decree nisi had been made declaring a de facto marriage void as not having been solemnised according to law, and the wife applied for an order making provision for the child of this de facto marriage, the relevant sections at that date being s. 35 of the Act of 1857 and s. 4 of the Act of 1859. The application was opposed by the

de facto husband on the ground, inter alia (11 P.D. 87), that there was no right to a provision "for the child of an invalid marriage is not a child of the 'marriage' of its parents." This argument was rejected by the Court of Appeal for the reasons thus stated by COTTON, L.J. (ibid., 88):

"Now, does the enactment apply to this child although there was no valid marriage? I am of opinion that it does. The section refers to the children not 'of the marriage' but 'the marriage of whose parents is the subject of such suit or other proceedings.' The section includes sentences of nullity of marriage, and must, therefore, in my judgment, be considered as enacting that in cases where there is no valid marriage the children of the union may be provided for. I am of opinion, therefore, that the judge acted within his jurisdiction, and in the circumstances of this case I think that he exercised that jurisdiction reasonably."

We were next referred to a series of cases concerning the effect of the Legitimacy Act, 1926, on the jurisdiction of the court under s. 26 (1) of the Act of 1950 or its immediate predecessor, s. 193 (1) of the Act of 1925, the question being whether or not the jurisdiction extended to a child legitimated under the Legitimacy Act, 1926, by the subsequent marriage of its parents which later became the subject of proceedings for dissolution as being a child "the marriage of whose parents was the subject of the proceedings." The first case in this series is *Bednall v. Bednall & Shieussawa* (9), in which HILL, J., held (1927] P. 227) that there was no jurisdiction on the grounds that in a suit to which only the husband and wife were parties the court was not competent to find the facts necessary to make the child a legitimate child by virtue of the Legitimacy Act, 1926, and that the legitimacy of the child had not otherwise been declared or established in any properly constituted proceedings. In so deciding the learned judge must be taken to have held, or to have proceeded on the assumption, that the jurisdiction of the court under s. 193 (1) of the Act of 1925, where proceedings for dissolution, as distinct from nullity, of marriage were concerned, was confined to legitimate children of the marriage. It does not, however, appear that any argument to the contrary based on the language of s. 193 (1) was addressed to the court, as no reference is made in the report to that sub-section or its predecessors.

The next was *Green v. Green* (6), in which LORD MERRIVALE, P., approved and followed *Bednall v. Bednall & Shieussawa* (9). *Green v. Green* (6) is noteworthy for the fact that the argument now advanced on behalf of the wife was raised apparently for the first time in any reported case. Sir Thomas Inskip, A.G., appearing for the King's Proctor, is reported (1929] P. 102) as having said:

"It does not appear from the report [of *Bednall v. Bednall & Shieussawa* (9)] that the provisions of the [Supreme Court of] Judicature (Consolidation) Act, 1925 . . . s. 193, were brought to the notice of the court. That section re-enacted the former Matrimonial Causes Act, 1857 . . . s. 35, giving power to the court to deal with the custody of children, the marriage of whose parents is the subject of the suit; that power is not, on the face of the statutes, confined to the case of children that are legitimate: *Jackson (otherwise Macfarlane) v. Jackson* (10)."

I should mention that in *Jackson (otherwise Macfarlane) v. Jackson* (10) an order for custody was made in nullity proceedings in respect of a child of the annulled marriage without any argument on the question of jurisdiction, and that it, accordingly, adds nothing to *Lamguthy v. Lamguthy* (5). Moreover, in the present case the child in question was by the operation of the Legitimacy Act legitimate as from the date of the Act and is in the same position as any other child of a marriage. *Green v. Green* (6) is also unworthy for the views of LORD

MERRIVALE, P., on the present question, which are thus expressed ([1929] P. 104):

A “The Legitimacy Act, 1926, extends legitimacy in fact to issue otherwise illegitimate. It also provides for ascertainment by legal process of status of the legitimacy so introduced. An order for custody in a divorce suit -- for reasons which I will presently point out—implies a finding of legitimacy. This was recognised in *Bednall v. Bednall & Shivussawa* (9). A declaration of legitimacy was there sought with a consequential grant of custody. In the present case no declaration of legitimacy was prayed, but this does not help the now petitioner . . . Some discussion took place at the hearing before me as to whether an order for custody in this case necessarily involves a finding or declaration of legitimacy. That this is so appears upon perusal of the statute which empowers the court to grant custody—originally the B Matrimonial Causes Act, 1857, s. 35, and now the [Supreme Court of Judicature (Consolidation)] Act, 1925, s. 193. ‘Children’ in these enactments means legitimate children in the sense that at the time of the suit they are legitimate. Ascertainment of their legitimacy is as necessary when the Legitimacy . . . Act, 1926, is invoked, as it would be if parties of foreign origin, who under their native law had legitimatised ante-nuptial offspring, should afterwards C become naturalised or domiciled here, and be parties in a matrimonial suit.”

In *Jones v. Jones* (11) HILL, J., followed his own decision in *Bednall v. Bednall & Shivussawa* (9) and that of LORD MERRIVALE, P., in *Green v. Green* (6).

D A different view was taken by DENNING, J., in *Millard v. Millard & Addis* (7), where he held that the subsequent marriage of the natural parents of a child in circumstances rendering the child legitimate according to the terms of the Legitimacy Act, 1926, sufficed to give the court jurisdiction under s. 193 (1) of the Act of 1925 without legitimisation proceedings. Moreover, the learned judge went further and expressed the view ([1945] 2 All E.R. 527) that the test of jurisdiction under s. 193 (1) of the Act of 1925 was “parenthood, not legitimacy”, a view which, if accepted, would entitle the wife to succeed in her application E for custody in the present case, subject to her evidence as to the husband’s paternity of the child being accepted as sufficient.

F The effect of the Legitimacy Act, 1926, was next considered by a Divisional Court (LORD MERRIMAN, P., and JONES, J.) in *C. v. C.* (4), where the question for decision was whether a child who had been legitimated under the provisions of the Legitimacy Act, 1926, but had not been the subject of any proceedings in which his legitimisation had been declared or established, was “a child of the marriage” within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. LORD MERRIMAN, P., delivering the judgment of the court, stated the questions for consideration this way ([1947] 2 All E.R. 52):

G “We are confronted here with two separate points, one of which is of importance both to the jurisdiction of this Division and to the jurisdiction of magistrates’ courts with regard to custody, while the other affects only the jurisdiction of magistrates’ courts. The first point is whether *Bednall v. Bednall & Shivussawa* (9), *Green v. Green* (6) and *Jones v. Jones* (11) were rightly decided. It was held in these cases that the Divorce Court has no jurisdiction under s. 193 of the [Supreme Court of Judicature (Consolidation)] Act, 1925, to deal with the custody of a legitimated child as being ‘a child, H the marriage of whose parents is the subject of the proceedings’, unless and until a formal declaration of legitimacy by virtue of the [Legitimacy Act.] 1926, has been obtained. Manifestly, if these cases were rightly decided in relation to the words used in s. 193 of the [Supreme Court of Judicature (Consolidation)] Act, 1925, the absence of such a declaration of legitimacy would be equally fatal to the jurisdiction to treat a legitimated child as ‘a child of the marriage’ within the meaning of the Summary Jurisdiction

(Separation and Maintenance) Acts, 1895 to 1925. This point, therefore, affects both jurisdictions. The second point is whether, even if these cases are held to be wrongly decided and the decision of DENNING, J., in *Millard v. Millard & Addis* (7), is held to be right, it would still be impossible to hold that a legitimated child is a 'child of the marriage' within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, although he is a 'child the marriage of whose parents is the subject of the proceedings' within the meaning of s. 193 of the [Supreme Court of Judicature (Consolidation)] Act, 1925."

A

LORD MERRIMAN, P., then went on to consider whether or not *Bednall v. Bednall & Shirussawa* (9) and the cases following it (that is, *Green v. Green* (6) and *Jones v. Jones* (11)) or *Millard v. Millard & Addis* (7) were rightly decided, and in the course of his observations on that question he said (*ibid.*):

B

"In *Millard v. Millard & Addis* (7) ([1945] 2 All E.R. 528) DENNING, J., placed great reliance on the decision of the Court of Appeal in *Largworthy v. Largworthy* (5), which is referred to as showing that the test under s. 193 of the [Supreme Court of Judicature (Consolidation)] Act, 1925, [which is in the same terms as s. 35 of the Matrimonial Causes Act, 1857, the section there under discussion], is 'parenthood not legitimacy'. That case established that a child of the union who is rendered illegitimate by the annulment of the marriage can be dealt with under s. 193, for the very reason, as is pointed out by COTTON and FRY, L.J.J. (11 P.D. 89), that the section expressly refers to nullity proceedings, but in relation to proceedings for divorce, at any rate, we think that to say that parenthood, not legitimacy, is the test, goes too far. It cannot, in our opinion, be suggested that, although the parenthood is undisputed, an illegitimate child who cannot be legitimated is the subject of custody proceedings under s. 193, on the divorce of the spouses who are, in fact, his parents, but we agree with DENNING, J., that the fact that the wording of s. 193 is wide enough to cover the case of a child of the union rendered illegitimate by the annulment of the marriage of his parents, tends to support the view that in divorce proceedings it is also wide enough to include a child who has been rendered legitimate."

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LORD MERRIMAN, P., went on to express the conclusion of the court to the effect that the decisions in *Bednall v. Bednall & Shirussawa* (9) and the cases which followed it were wrong, and that the decision of DENNING, J., in *Millard v. Millard & Addis* (7) was right, and said (*ibid.*, 53):

F

"In our opinion, s. 193 of the [Supreme Court of Judicature (Consolidation)] Act, 1925, gives the court jurisdiction in such a case, and a decree of legitimacy under s. 188 of the [Supreme Court of Judicature (Consolidation)] Act, 1925, is not a condition precedent to the exercise of that jurisdiction."

I should next refer to *Harrison v. Harrison* (1), which raised the actual question in issue in the present appeal, the wife having given birth to the child, of whom the husband was the father, while the parties were living in adultery, the wife being then married to another man, so that the child was not legitimated by the subsequent marriage of the parties, in proceedings for the dissolution of which an application for custody of the child was made by the wife under s. 26 (1) of the Act of 1950. BARNARD, J., in a considered judgment, held that as the child was not legitimated by the subsequent marriage of its parents, but remained illegitimate, the court could not make an order for its custody under s. 26 (1) following the views expressed on this point by LORD MERRIVALE, P., in *Green v. Green* (6) and by the Divisional Court in *C. v. C.* (4), and rejecting the contrary view expressed by DENNING, J., in *Millard v. Millard & Addis* (7), *Harrison v. Harrison* (1) was followed in *Webb v. Webb* (12).

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Finally, *Packer v. Packer* (8) came before a division of this court consisting of DENNING and MORRIS, L.J.J., on appeal from a special commissioner in divorce,

who, on facts indistinguishable from those of the present case, had held on the authority of *Harrison v. Harrison* (1) that the court had no jurisdiction under s. 26 (1) to make an order for the maintenance of the illegitimate and illegitimated child to whom the application related. On the hearing of the appeal DENNING, L.J., adhered to the view he had expressed in *Millard v. Millard & Addis* (7) and was for allowing the appeal on the ground that s. 26 (1) did extend to illegitimate children. MORRIS, L.J., on the other hand, was for dismissing the appeal on the ground that s. 26 (1) did not so extend, and the court being thus equally divided the appeal was dismissed.

In this state of the authorities it is clear that the learned commissioner in the present case had no option but to refuse the wife's application for custody of the child on the ground that the court had no jurisdiction to grant it under s. 26 (1). The question is, no doubt, open to review in this court, in the sense that there is no actual decision binding us to accept the conclusion reached in *Harrison v. Harrison* (1) as correct. In holding *Harrison v. Harrison* (1) to have been wrongly decided we would be rejecting a formidable preponderance of judicial opinion expressed or implied in judgments delivered over a period of nearly seventy years. COTTON, L.J., could hardly have used the language he did in *Langworthy v. Langworthy* (5) if he had understood s. 35 of the Act of 1857 and s. 4 of the Act of 1859 as giving the court jurisdiction with respect to any illegitimate child of whom the parties to the marriage before the court could be shown to have been the natural parents. The decisions in *Bednall v. Bednall & Shicussawa* (9), *Green v. Green* (6), *Jones v. Jones* (11) and *C. v. C.* (4) are wholly inconsistent with the view that the jurisdiction extends to any illegitimate child of the parties to the marriage in question, for on that view legitimation would have been an entirely irrelevant consideration. As appears above, LORD MERRIVALE, P., in *Green v. Green* (6) and the Divisional Court in *C. v. C.* (4) expressed clear opinions to the contrary. Moreover, notwithstanding this manifest trend of judicial opinion in regard to the construction and scope of s. 35 of the Act of 1857 and s. 4 of the Act of 1859, and of their immediate successors, s. 193 (1) of the Act of 1925, the legislature in framing s. 26 (1) of the Act of 1950 was content to preserve the same form of words to define the children to whom the jurisdiction extended, namely, "children the marriage of whose parents is the subject of the proceedings." In these circumstances I am not prepared to hold that we should overrule *Harrison v. Harrison* (1) unless I am satisfied that the construction of s. 26 (1) on which it is based is clearly untenable.

The main arguments in support of the appeal may be thus summarised: (i) Section 26 (1) does not confer the jurisdiction with respect to "children of the marriage which is the subject of the proceedings", but with respect to "children the marriage of whose parents is the subject of the proceedings". This peculiar periphrasis, as contrasted with the expression "children of the marriage" used in the various other sections referred to above, must have been used advisedly and for some purpose. It is literally apt to include illegitimate children whose natural parents subsequent to their birth contract a marriage which becomes the subject of proceedings. (ii) Admittedly, the words "child" or "children" in an Act of Parliament *prima facie* mean "legitimate child" or "legitimate children": see *Woolwich Union v. Fulham Union* (3) ([1906] 2 K.B. 246, 247). Section 26 (1), however, extends to proceedings for nullity of marriage, and, therefore, to children of void marriages who must clearly be illegitimate. As the law stood in 1857 and 1925 this category of illegitimacy was wider than it is now, as it included children of voidable marriages when annulled, whose case is now covered by the status of legitimacy conferred by s. 9 of the Act of 1950. Accordingly, the word "children" in this sub-section cannot be construed as confined to legitimate children, and must be read as meaning children whether legitimate or illegitimate, and as bearing the same meaning in relation to proceedings for the dissolution of a valid marriage as it

bears in relation to proceedings for nullity in respect of a void marriage. (ii) Considerations of reasonableness and convenience demand that the construction contended for by the wife should be placed on s. 26 (1). An illegitimate and unlegitimated child whose natural parents after its birth contract a marriage which becomes the subject of divorce proceedings is just as much in need of care and provision as a child born illegitimate but legitimated by a subsequent marriage of its natural parents which becomes the subject of divorce proceedings. There might be two illegitimate children in the same family, one born in adultery and, therefore, not legitimated by the subsequent marriage of its natural parents, the other born at a time when its natural parents were free to marry and, therefore, legitimated by such subsequent marriage. It is contrary to common sense that the court should have jurisdiction with respect to the second child, but not with respect to the first. The jurisdiction should in reason extend to both in accordance with the needs of both.

The main arguments against the appeal are substantially these: (i) "Children" in an Act of Parliament *prima facie* means "legitimate children": *Woodrich Union v. Fullam Union* (3). Equally, in an Act of Parliament "parents" *prima facie* means lawful parents, and does not include a putative father. (ii) Therefore, in s. 26 (1) "children" must be construed as referring to legitimate children and "parents" as referring to lawful parents except in cases in which the circumstances contemplated by the sub-section are such that there are, *ex hypothesi*, no legitimate children and no lawful parents to whom they can refer. (iii) Thus, admittedly, "children" must include illegitimate children and "parents" must include *de facto* as distinct from lawful parents where the proceedings in question are proceedings for nullity of a void marriage from which no lawful parenthood or legitimate offspring could arise. It does not follow that the words should not bear their primary meaning of "legitimate children" and "lawful parents" where the proceedings in question are proceedings for the dissolution of a valid marriage of which there may well have been legitimate children. (iv) The marriage referred to in the words "the children the marriage of whose parents is the subject of the proceedings" must be a marriage by virtue of which the parents stand to the children in the lawful relationship of parent and child or would so stand on the footing that the marriage was valid. In other words, it must be a marriage on which, or on the validity of which, if disputed, the status and rights of the children concerned depend. Otherwise, it is a marriage which in no way affects the children, and there is no reason why proceedings in regard to it should give the court jurisdiction over them. For instance, a child born in adultery to natural parents who afterwards marry is and remains an illegitimate child, and neither the marriage nor its subsequent dissolution or annulment affects its status or rights in any way. (v) The extent to which s. 26 (1) includes illegitimate children is rightly stated by COTTON, L.J., in *Langworthy v. Langworthy* (5). In other words, the children must be children of the marriage concerned whether the marriage is valid or void, and in the latter case the marriage ranks as a marriage and they rank as children of it for the purposes of the sub-section although the marriage is actually invalid. (vi) The periphrastic form of words used in s. 26 (1) and its predecessors was adopted owing to the difficulty which might arise in nullity cases from the use of the expression "children of the marriage"—in other words, to forestall the argument which, notwithstanding this precaution, was, after all, unsuccessfully raised in *Langworthy v. Langworthy* (5). (vii) The use of the expression "children of the marriage" in other parts of the Act, for the most part in provisions which may be described as ancillary to the jurisdiction conferred by s. 26 (1), is against, rather than in favour of, the wife's construction of the sub-section, particularly where such provisions are traceable to the Acts of 1857 and 1859, while the reference to "the children of the petitioner and respondent" in s. 26 (2), and to "the children" in s. 26 (3) are at least equally appropriate to the opposite view. (viii) Reasonableness and convenience are matters for the legislature, and not

for the court, whose function is to construe the statute. But the wife's construction would involve much inconvenience in regard to evidence and procedure in cases of disputed paternity, particularly in the case of the birth of an allegedly illegitimate child to a married woman who subsequently marries the putative father. In such a case the presumption of legitimacy would apply, and the paternity of the child could not well be adjudicated on in the absence of the presumptive father. As to the allegedly unreasonable distinction between a child legitimated by subsequent marriage of its natural parents and a child of the same natural parents not so legitimated, the short answer is that, as the law stood when s. 35 of the Act of 1857 was framed, both would have been illegitimate, and neither would have been within the jurisdiction conferred by the section. The construction of the almost identical terms of the re-enacted provisions should not be altered because in the meantime Parliament has thought fit to alter the position of one and not the other of these hypothetical children.

For my part, I find the arguments against the appeal on the whole more cogent than those adduced in support of it, and am disposed to adopt the reasoning contained in the judgments of BARNARD, J., in *Harrison v. Harrison* (1) and of MORRIS, L.J., in *Packer v. Packer* (8) in preference to that of DENNING, L.J., in *Packer v. Packer* (8). At all events, it is, to my mind, clear that the arguments in support of the appeal afford no sufficiently cogent reason for departing from what may fairly be described as having been the received interpretation of s. 26 (1) and its predecessors over so long a period. In my view, therefore, this appeal fails and should be dismissed.

HODSON, L.J.: The question in this appeal is whether the wife is in law entitled to an order for the custody of a child born to her as a result of intercourse with the husband whom she subsequently married, the child having been born at a time when the husband was married to another woman. The circumstances of the child's birth preclude legitimation per subsequens matrimonium under the provisions of the Legitimacy Act, 1926, and custody has, accordingly, been refused by His Honour Judge LAWSON CAMPBELL sitting as a special commissioner in divorce.

The question depends on the construction of s. 26 (1) of the Matrimonial Causes Act, 1950, which is in these terms:

"In any proceedings for divorce or nullity of marriage or judicial separation, the court may . . . make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings."

The sub-section is the successor of s. 35 of the Matrimonial Causes Act, 1857, as amended by s. 4 of the Matrimonial Causes Act, 1859, which were replaced without material alteration by s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, the predecessor of s. 26 (1) of the Act of 1950.

The argument for the wife can be stated shortly: (i) The proceedings are proceedings for divorce. (ii) The application relates to a child. (iii) The marriage of the parents of the child is the subject of the proceedings. Accordingly, the language of the sub-section clearly covers the application made in the present case, and on the facts an order should be made. This argument is taken from the judgment of DENNING, L.J., in *Packer v. Packer* (8), where he expressed the opinion ([1953] 2 All E.R. 129) that "the test of jurisdiction is parenthood, not legitimacy." In *Packer v. Packer* (8) he adhered to the view he had previously expressed in *Millard v. Millard & Addis* (7), when sitting at first instance. The construction contended for by the wife is covered by the literal meaning of the words of the sub-section, and if that sub-section stood in isolation from the other sections of the Act of 1950 and their predecessors and were bare of relevant authority, I think it would be difficult to resist the wife's argument.

The sub-section, however, does not stand in isolation, and there are a number

of other provisions in the Act of 1950 and its predecessors which are relevant to the question under consideration. Section 2 (2) of the Act of 1950 provides that in determining any application for leave to present a petition for divorce before the expiration of three years from the date of the marriage regard shall be had, inter alia, to "the interests of any children of the marriage." Section 23 (1) of the Act of 1950 gives power to make orders for maintenance when a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife "or the infant children of the marriage." Section 24 (1) of the Act of 1950 gives power to make settlements of the property of a guilty wife "for the benefit of the innocent party, and of the children of the marriage or either or any of them." Section 24 (2) gives a similar power in suits for restitution of conjugal rights brought by husbands to order settlements to be made "for the benefit of the petitioner and of the children of the marriage or either or any of them". Section 25 enables the court, after pronouncing a decree for divorce or for nullity of marriage, to make orders with reference to the application of the settled property "either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit . . ." Section 26 (2) enables the court in proceedings for restitution of conjugal rights to make "orders and provisions with respect to the custody, maintenance and education of the children of the petitioner and respondent . . ." Section 26 (3) gives power on any decree of divorce or nullity of marriage to order the husband, and, in certain cases, the wife, "to secure for the benefit of the children such gross . . . or annual sum of money as the court may deem reasonable . . ."

The powers of the court are thus, in many of the cases which are dealt with by the sections which I have mentioned, plainly limited to the children of the marriage, and one asks the question: Why did the legislature in 1857 select the different language of s. 35 which is substantially the same as that employed in s. 26 (1) of the Act of 1950? The answer hitherto accepted was, I think, given by COTTON, L.J., in *Langworthy v. Langworthy* (5). In that case a child was born of a union held by the court to be null and void, and COTTON, L.J., used this language (11 P.D. 88) in speaking of s. 35 of the Act of 1857:

"Now, does the enactment apply to this child although there was no valid marriage? I am of opinion that it does. The section refers to the children not 'of the marriage' but 'the marriage of whose parents is the subject of such suit or other proceedings'. The section includes sentences of nullity of marriage, and must, therefore, in my judgment, be considered as enacting that in cases where there is no valid marriage the children of the union may be provided for."

If this is a full explanation of the language of s. 35, as I think it is, I agree with MORRIS, L.J., who held in *Packer v. Packer* (8) that s. 26 (1) of the Act of 1950 (reproducing s. 35 of the Act of 1857) refers to children of the marriage union even when such marriage is declared to be null and void. In my opinion, however, it does not follow that the words of the sub-section in their context are wide enough to cover children who are not children of the marriage union. The legal meaning of "children of the marriage" has altered since 1857 by the addition to their number of legitimated children, for in 1926 the Legitimacy Act was passed. This Act, by s. 1 (1), for the first time introduced legitimation per subsequens matrimonium into the law of this country, and a class of persons hitherto illegitimate became legitimised when the necessary facts existed.

The effect of this legislation was to render such persons legitimate whether or not the necessary steps were taken to obtain a declaration of legitimacy by appropriate proceedings. It was at first considered that such children could not form the subject matter of an order for custody unless formal proceedings had been taken for a declaration of their legitimacy. In *Bodwell v. Bodwell & Shillington* (9) HALL, J., reached this conclusion on the ground that in a suit in which only the husband and wife were parties the court was not competent to

find the facts necessary to make the child a legitimated child by virtue of the Legitimacy Act, 1926. The same learned judge reached a like conclusion in *Jones v. Jones* (11), although in that case steps had been taken to re-register the child in accordance with the provisions of the Legitimacy Act, 1926. Between these two cases the question was argued before LORD MERRIVALE, P., in *Green v. Green* (6), Sir Thomas Inskip, A.-G., appearing on behalf of the King's Proctor to assist the court. The Attorney-General addressed to the court the very

A argument now put forward by the wife that on the true construction of the relevant section the power to make orders for custody was not confined to legitimate children. If this argument had been accepted, there would have been no need to consider the question of legitimacy under the Legitimacy Act, 1926. LORD MERRIVALE, P., however, must have rejected this argument, for he based his decision on the same ground as that on which HILL, J., had made his stand, B namely, that in proceedings for divorce an order for custody of a child alleged to be legitimated by the marriage of its natural parents cannot be made where the child has not already been declared to be legitimated. LORD MERRIVALE, P., was of opinion that an order for custody would imply a finding or declaration of legitimacy. He said ([1929] P. 104):

C “That this is so appears upon perusal of the statute which empowers the court to grant custody—originally the Matrimonial Causes Act, 1857, s. 35, and now the [Supreme Court of Judicature (Consolidation)] Act, 1925, s. 193. ‘Children’ in these enactments means legitimate children in the sense that at the time of the suit they are legitimate.”

D It will be seen that in these cases the order for custody was refused because it was considered that, in effect, the order would operate “in rem”, not because the children concerned could not, if the appropriate steps were taken, be brought within the scope of s. 193 (1) of the Act of 1925.

E These cases were overruled on this point by a Divisional Court consisting of LORD MERRIMAN, P., and JONES, J., in *C. v. C.* (4), where the court held that a decree of legitimacy under s. 188 (1) of the Act of 1925 was not a condition precedent to the exercise of the jurisdiction to make an order for custody of a child legitimated by the subsequent marriage of his parents and by virtue of the provisions of the Legitimacy Act, 1926. The court followed the view expressed ([1945] 2 All E.R. 527) by DENNING, J., in *Millard v. Millard & Addis* (7) that ([1947] 2 All E.R. 53) “the question of custody is an issue between the parents: *Thomasset v. Thomasset* (13) ([1894] P. 301), per LINDLEY, L.J.”, and pointed out that in an earlier case F of *Evans v. Evans & Blyth* (14), the court had directed an issue to be tried as to the status of a child in proceedings for variation of a marriage settlement without proceedings under the Legitimacy Act, 1926, having been taken. The court did not, however, accept the view which had been propounded by DENNING, J., in *Millard v. Millard & Addis* (7) that where parenthood was undisputed an illegitimate child who could not be legitimated was the subject of custody proceedings G under s. 193 (1) on the divorce of the spouses who were in fact his parents, and did not question the contrary view expressed or implied in the overruled cases to which I have referred.

H *C. v. C.* (4) was decided in 1947, and affirms the construction of s. 193 (1) and its predecessor which, as I think the authorities show, had hitherto generally been held. It is to be noted that when s. 193 (1) was re-enacted in s. 26 (1) of the Act of 1950, it was reproduced in the same form, and the legislature may thus be taken, if not to have accepted the construction placed on the sub-section by the courts, at least to have missed the opportunity of correcting a misconception by making it clear that illegitimate children who could not be legitimated by the subsequent marriage of their parents were proper subjects of orders for custody.

In my opinion, the construction of the sub-section hitherto generally accepted is further supported by authority as exemplified by such cases as *Woolwich*

Union v. Fulham Union (3) ([1906] 2 K.B. 246) where VAUGHAN WILLIAMS, L.J., pointed out that where the words "child or children" occur in a statute the prima facie meaning is "legitimate child or legitimate children." I am in agreement with the judgments delivered by JENKINS, L.J., in the present case and by MORRIS, L.J., in *Packer v. Packer* (8), and with that given by BARNARD, J., in *Harrison v. Harrison* (1), which was the authority against which the appeal in *Packer v. Packer* (8) was directed. In my opinion, the wide construction contended for by the wife should be rejected in favour of that which I have described as the accepted interpretation of the section in question. I would, therefore, dismiss the appeal.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Buckle & Co.*, Peterborough (for the wife); *Treasury Solicitor*.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

PYRENE CO., LTD. v. SCINDIA STEAM NAVIGATION CO., LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), March 15, 16, 17, April 14, 1954.]

Shipping—Carriage by sea—Bill of lading incorporating Hague Rules—Goods damaged in course of loading—Limitation of ship's liability—Carriage of Goods by Sea Act, 1924 (c. 22), s. 3 and sched., art. I (b), (e), art. II, art. IV (5).

By the Carriage of Goods by Sea Act, 1924, sched., art. I (b): "Contract of carriage" applies only to contracts of carriage covered by a bill of lading . . . in so far as such document relates to the carriage of goods by sea, including any bill of lading . . . issued under or pursuant to a charterparty from the moment at which such bill of lading . . . regulates the relations between a carrier and a holder of the same". By art. I (e): "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship", and by art. II: "... under every contract of carriage of goods by sea the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth".

In August, 1948, the plaintiffs entered into a contract with the Government of India, through a department of the government ("I.S.D.") by which they agreed to sell to the Indian government a number of airfield crash tenders, *f.o.b.* London. All arrangements for the carriage of the goods were made by I.S.D. through their agents, who were also freight brokers for the plaintiffs and nominated one of the defendants' ships for loading under the contract. In April, 1951, the plaintiffs, in accordance with instructions issued by I.S.D., delivered one of the tenders to the Port of London for loading on board the ship. In the course of loading by the defendants' stevedores, but before it was across the ship's rail, the tender was dropped and damaged through the fault of the ship. Under the contract of sale the property in the tender had not then passed to I.S.D. A bill of lading, which was subject to the rules set out in the schedule to the Act of 1924 ("the Hague Rules"), was later prepared to cover the whole shipment, and in due course was issued to I.S.D., but with the tender deleted from it. The plaintiffs had the tender repaired and claimed in tort the amount of the cost of the repair from the defendants. The defendants admitted liability, but contended that the amount of the ship's liability was limited under art. IV (5) of the Hague Rules.

Held: (i) the reference to "when the goods are loaded on" in art. I (e) was not intended to specify a precise moment of time, but merely related

to the first of a series of operations constituting the carriage of goods by sea and covered by the bill of lading, and it could not be said that the contract covered by the bill only became operative when the tender passed the ship's rail, for the "loading" referred to in art. II, which was undertaken by the defendants, extended to the whole operation including that part of the operation taking place on the shore side of the ship's rail.

A *Goodwin, Ferreira & Co., Ltd. v. Lamport & Holt, Ltd.* (1929) (34 Lloyd's Rep. 192), applied.

(ii) when the contract of carriage was made it was contemplated that a bill of lading would be issued, and, therefore, the contract was "covered" by the bill of lading within art. I (b) and the contract was, from its inception, one to which the rules applied.

B Reasoning of LORD CLYDE in *Harland & Wolff, Ltd. v. Burns & Laird Lines, Ltd.* (1931) (40 Lloyd's Rep. 286), applied.

(iii) the circumstances of the case raised the inference that it was intended that the plaintiffs should participate in the contract of affreightment so far as it affected them, and art. I (b), by its express reference to the carrier and the holder of the bill of lading, did not exclude the plaintiffs (who had never held the bill) from the purview of the rules; and, therefore, notwithstanding that the plaintiffs were not expressly made a party to the contract, the limitation on the amount recoverable imposed by art. IV (5), of the rules, restricted the amount which the plaintiffs could recover in tort.

C Semble: alternatively, by delivering the goods alongside, the plaintiffs impliedly invited the defendants to load them, and the defendants, by lifting the goods, impliedly accepted that invitation; the implied contract so created must incorporate the defendants' usual terms, for they would not contract for the loading of the goods on terms different from those which they offered for the voyage as a whole; and on that ground the plaintiffs would be subject to the restrictions contained in the rules.

D FOR THE CARRIAGE OF GOODS BY SEA ACT, 1924, schedule, art. I, art. II, art. IV, see HALSBURY'S STATUTES, Second Edn., Vol. 23, pp. 886, 887, 889.

E Cases referred to:

- (1) *Harris v. Best, Ryley & Co.*, (1892), 68 L.T. 76; 41 Digest 564, 3886.
- (2) *Argonaut Navigation Co., Ltd. v. Ministry of Food, S.S. Argobec*, [1949] 1 All E.R. 160; [1949] 1 K.B. 572; [1949] L.J.R. 353; 2nd Digest Supp.
- (3) *Glengarnock Iron & Steel Co., Ltd. v. Cooper & Co.*, (1895), 22 R. (Ct. of Sess.) 672; 32 Sc.L.R. 546; 3 S.L.T. 36; 41 Digest 453, *t.*
- F** (4) *Goodwin, Ferreira & Co., Ltd. v. Lamport & Holt, Ltd.*, (1929), 34 Lloyd's Rep. 192; 141 L.T. 494; Digest Supp.
- (5) *Harland & Wolff, Ltd. v. Burns & Laird Lines, Ltd.*, (1931), 40 Lloyd's Rep. 286; 1931 S.C. 722; Digest Supp.
- (6) *Paterson Zochonis & Co. v. Elder Dempster & Co.*, [1923] 1 K.B. 420; 92 L.J.K.B. 524; 128 L.T. 577; *reversd.* H.L. sub nom. *Elder Dempster & Co. v. Paterson Zochonis & Co.*, [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 41 Digest 478, 3118.
- G** (7) *White v. Warwick (John) & Co., Ltd.*, [1953] 2 All E.R. 1021.
- (8) *Gilbert Stokes v. Dalgety*, (1948), 81 Lloyd's Rep. 337; [1948] 48 S.R.N.S.W. 435; 65 W.N. 196.
- H** (9) *Waters v. Dalgety*, [1951] 2 Lloyd's Rep. 385; [1951] 52 S.L.R. 235; 69 W.N. 23.
- (10) *A. M. Collins & Co. v. Panama Railroad Co.*, [1952] A.M.C. Only the second
- (11) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 388; sub nom. *Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp. Only the second
- (12) *Les Affréteurs Réunis Société Anonyme v. Leopold Wolff, Ltd.* (4). [1919] A.C. 801; 88 L.J.K.B. 861; 121 L.T. 392; whole operation of

- (13) *Waters v. Monarch Life Assurance Co.*, (1856), 5 E. & B. 879; 25 L.J.Q.B. 102; 26 L.T.O.S. 217; 119 E.R. 705; 29 Digest 311, 2568.
- (14) *Lichhammer v. Mason*, (1794), 5 Term. Rep. 683; 101 E.R. 380; *subsequent proceedings*, 6 Term Rep. 131; 101 E.R. 473; 41 Digest 384, 2297.
- (15) *Sargent v. Morris*, (1820), 3 B. & Ald. 277; 106 E.R. 665; 41 Digest 469, 3006.
- (16) *Wimble, Sons & Co. v. Rosenberg & Sons*, [1913] 2 K.B. 743; 82 L.J.K.B. 1251; 109 L.T. 294; 39 Digest 575, 1800.
- (17) *The Termagant*, (1914), 19 Com. Cas. 239; 30 T.L.R. 377; 41 Digest 500, 3278.
- (18) *The Galileo*, [1914] P. 9; 83 L.J.P. 27; 110 L.T. 614; 19 Com. Cas. 44; *affd.* H.L., [1915] A.C. 199; 83 L.J.P. 102; 111 L.T. 656; 19 Com. Cas. 459; 41 Digest 376, 2219.

ACTION for damages for negligence.

In August, 1948, the plaintiffs entered into a contract with the Government of India, through the Indian Store Department (known as I.S.D.), by which they agreed to sell a number of "Pyrene" airfield crash tenders, f.o.b. London. In February, 1951, the plaintiffs notified I.S.D. that one of the tenders was ready for delivery. I.S.D., through their shipping agents, Bahr, Behrend & Co. (who were also freight brokers for the defendants), arranged for the tender to be shipped on the s.s. *Jalazad*, belonging to the defendants. In pursuance of instructions contained in a letter dated Apr. 7, 1951, from I.S.D., the plaintiffs delivered the tender at the Royal Albert Dock in the Port of London for delivery to the defendants for loading. On Apr. 16, 1951, the tender was put into a Port of London barge and delivered to the defendants alongside the *Jalazad*, and, while the defendants' stevedores were in the process of lifting it on board the ship by means of the ship's tackle and before it was across the ship's rail, it was, through the fault of the ship, dropped and damaged. Under the contract of sale, the property in the tender had not then passed to I.S.D. On Apr. 28, 1951, a bill of lading which was subject to the provisions of the Carriage of Goods by Sea Act, 1924, and, therefore, incorporated the Hague Rules, as provided by s. 3 of that Act, was prepared to cover the whole shipment in the *Jalazad*, and in due course was issued to I.S.D., but with the tender deleted from it. The plaintiffs had the damaged tender repaired at the cost of £966 14s. 8d., and they claimed that amount from the defendants.

Megaw, Q.C., and *R. A. MacCrindle* for the plaintiffs.

Mocatta, Q.C., and *M. R. E. Kerr* for the defendants.

Cur. adv. vult.

Apr. 14. DEVLIN, J., read the following judgment. This case raises questions of interest and importance on the interpretation of the Hague Rules and their applicability to a f.o.b. seller. The plaintiffs sold a piece of machinery, a fire tender, to the Government of India (which acted in this matter through a department known for short as I.S.D.) for delivery f.o.b. London. I.S.D. nominated the *Jalazad*, one of the defendants' vessels, as the ship to be loaded under the contract of sale, and through their agents, Bahr, Behrend & Co., made all the arrangements for the carriage of the goods. While the tender was being lifted on board the vessel by the ship's tackle and before it was across the rail it was, through the fault of the ship, dropped and damaged. Under the contract of sale the property had not then passed to I.S.D. The damage to the whole cost £966 to repair and the plaintiffs sue for that sum. The defendants tender deletion claim that the amount is limited under art. IV (5) of the Rules in tort the amount stated in that rule is £100, but this is subject to art. IX which provides that the figure is to be taken to be gold value. There are doubts as to the effect of this latter article, and they have been very much discussed by the parties to this case by the acceptance of the British Arbitration Act, 1926, which fixes the limit at

£200. It is, therefore, for the defendants to establish that they are entitled to limit their liability. To do this they must show privity of contract between themselves and the plaintiffs, that the contract incorporated the rules, and that the rules are effective to limit their liability. The plaintiffs dispute all these points: they claim in tort for the damage done to their goods.

A The fire tender was not the only piece of machinery supplied by the plaintiffs for shipment on board this ship, though it was the only piece that was damaged before shipment. A bill of lading had been prepared to cover the whole shipment, and it was issued to I.S.D. in due course but with the fire tender deleted from it. The bill of lading incorporated the Hague Rules and was subject to their provisions, as by the Carriage of Goods by Sea Act, 1924, s. 3, it was bound to be. It is not disputed that, in this case, as in the vast majority of cases, the contract of carriage was actually created before the issue of the bill of lading
B which evidences its terms.

I think it is convenient to begin by considering the effect of the rules. For counsel for the plaintiffs contends that, even if a bill of lading covering the fire tender had been issued incorporating the rules, the holder of the bill would not be subject to immunity in respect of an accident occurring at this stage of the loading. If this is so, it disposes of the defendants' plea. If it is not so, I shall
C have to consider whether the rules affect the contract of affreightment when no bill of lading is issued, and whether the plaintiffs were a party to that or any similar contract. The argument of counsel for the plaintiffs turns on the meaning to be given to art. I (e) which defines "carriage of goods" as covering

"the period from the time when the goods are loaded on to the time when they are discharged from the ship".

D Counsel says these goods never were loaded on to the ship. In a literal sense obviously they were not. But counsel does not rely on the literal sense; there are rules which could hardly be made intelligible if they began to operate only after the goods had been landed on deck. He treats the word "on" as having the same meaning as in "free on board"; goods are loaded on the ship as soon as they are put across the ship's rail, which the tender never was. He submits
E that the rule (which, of course, has effect in English law only by virtue of its place in the schedule to the Carriage of Goods by Sea Act, 1924) must be construed in accordance with English principles. He relies on *Harris v. Best, Ryley & Co.* (1), and *Argonaut Navigation Co., Ltd. v. Ministry of Food, S.S. Argobec* (2) ([1949] 1 All E.R. 163), which lay down the rule that loading is a joint operation, the shipper's duty being to lift the cargo to the rail of the ship (I shall refer to that as the first stage of the loading) and the shipowner's to take it on board and
F stow it (I shall refer to that as the second stage).

Counsel contends, therefore, that the accident occurred outside the period specified in art. I (e). So, he says, art. IV (5) (which limits liability), and, indeed, all the other rules which regulate the rights and responsibilities of the shipowner, do not apply. They are made applicable by art. II which provides that:

G "... under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and
discharge of such goods, shall be subject to the responsibilities and liabilities
and entitled to the rights and immunities hereinafter set forth. The whole contract
of carriage is defined in art. I (b); the term "contract of carriage" applies to
loading and discharging
H "applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relating only the second stage of the operation of the goods by sea . . ."

Then it is para. (c) of art. I that contains the definition of reasoning discharging on which counsel relies. It is in this way he argues that, contrary to the decision in *At & Holt, Ltd.* (4), the accident in this case falls within the period covered by this last definition, the whole operation of

In my judgment, this argument is fallacious, the cause of the whole operation of

lying in the supposition inherent in it that the rights and liabilities under the rules attach to a period of time. I think they attach to a contract or part of a contract. I say "part of a contract" because a single contract may cover both inland and sea transport; and, in that case, the only part of it that falls within the rules is that which, to use the words in the definition of "contract of carriage" in art. I (b), "relates to the carriage of goods by sea". Even if "carriage of goods by sea" were given by definition the most restricted meaning possible—for example, the period of the voyage—the loading of the goods (by which I mean the whole operation of loading in both its stages and whichever side of the ship's rail) would still *relate* to the carriage on the voyage and so be within the "contract of carriage".

Article II is the crucial article which, for this purpose, has to be construed. It is this article that gives the carrier all his rights and immunities, including the right to limit his liability. He is entitled to do that "in relation to the loading" and "under every contract of carriage". Now, I shall have to consider later the meaning of "loading" in art. II and whether it is such as to exclude what I have called the first stage, i.e., the operations on the shore side of the ship's rail. For the moment, I am concerned only to see whether its meaning is cut down by the definition in art. I (e) on which counsel for the plaintiffs relies. The only phrase in art. II that can cut it down is the one I have quoted: "under every contract of carriage"; it is only in so far as art. I (e) operates through the definition of "contract of carriage" that it can have any effect on art. II. I have already sought to demonstrate that, however limited the period in art. I (e) may be, the loading in both its stages must still *relate* to it, and so be within the definition of contract of carriage. A precise construction of art. I (e), while not irrelevant, is in no way conclusive of the point I have to decide, which turns, I think, on the meaning of "loading" in art. II.

But before I try to elucidate that, let me state my view of art. I (e). For, as I have said, though not dominant, it is not irrelevant: in construing "loading" in art. II you must have regard to similar expressions throughout the rules, art. I (e) included. In my judgment, no special significance need be given to the phrase "loaded on". It is not intended to specify a precise moment of time. Of course, if the operation of the rules began and ended with a period of time a precise specification would be necessary. But they do not. It is legitimate in England to look at s. 1 of the Act, which applies the rules, not to a period of time, but "in relation to and in connection with the carriage of goods by sea". The rules themselves show the same thing. The obligations in art. III (1), for example, to use due diligence to make the ship seaworthy and man and equip her properly are independent of time. The operation of the rules is determined by the limits of the contract of carriage by sea and not by any limits of time. The function of art. I (e) is, I think, only to assist in the definition of contract of carriage. As I have already pointed out, there is excluded from that definition any part of a larger contract which relates, for example, to inland transport. It is natural to divide such a contract into periods, a period of inland transport, followed, perhaps, by a period of sea transport and then again by a period of inland transport. Discharging from rail at the port of loading may fall into the middle, all the arriving on to the ship into the second. The reference to "when the goods were loaded on" in art. I (e) is not, I think, intended to do more than identify the rail it was, there in the series which constitute the carriage of goods by sea, to the place they discharged "denotes the last". The use of the rather loose phrase "loaded on" rather than "loaded" supports this view.

For the defendant's counsel for thinking that it would be wrong to stress the phrase in art. I (e) "when the goods were loaded on". It is no doubt, necessary for an English court to decide the law of England, but that is a different thing from assuming that the law of England is the only law. If one is inquiring whether the phrase "loaded on" has a different meaning from "loaded" or "loading" or whether it was not intended to identify the rail it was, there in the series which constitute the carriage of goods by sea, to the place they discharged "denotes the last". The use of the rather loose phrase "loaded on" rather than "loaded" supports this view.

in the light of a conception which may be peculiar to English law. The idea of the operation being divided at the ship's rail is certainly not a universal one. It does not, for example, apply in Scotland: *Glengarnock Iron & Steel Co., Ltd. v. Cooper & Co.* (3) (22 R. (Ct. of Sess.) 676, per LORD TRAYNER). It is more reasonable to read the rules as contemplating loading and discharging as single operations. It is, no doubt, possible to read art. I (e) literally as defining the period as being from the completion of loading till the completion of discharging. But the literal interpretation would be absurd. Why exclude loading from the period and include discharging? How give effect to the frequent references to loading in other rules? How reconcile it with art. VII which allows freedom of contract

"prior to the loading on and subsequent to the discharge from . . ."?

Manifestly both operations must be included. That brings me back to the view that art. I (e) is naming the first and last of a series of operations which include, in between loading and discharging, "handling, stowage, carriage, custody and care". This is, in fact, the list of operations to which art. II is, by its own terms, applied. In short, nothing is to be gained by looking to the terms of art. I (e) for an interpretation of art. II.

I think, therefore, that art. I (e), which was the spearhead of argument of counsel for the plaintiffs, turns out to be an ineffective weapon. But that still leaves it necessary to consider the meaning of "loading" in art. II. Just how far does the operation of loading, to which art. II grants immunity, extend? Now I have already given reasons against presuming that the framers of the rules thought in terms of a divided operation, and in the absence of such a presumption the natural meaning of "loading" covers the whole operation. How far can that be pressed? Article III (2), for example, provides: "the carrier shall properly and carefully load", etc. If "load" includes both stages, does that oblige the shipowner, whether he wants to or not, to undertake the whole of the loading? If so, it is a new idea to English lawyers, though, perhaps, more revolutionary in theory than in practice. But, if not, and "load" includes only the second stage, then should it not be given a similar meaning in art. II with the result that immunity extends only to the second stage? There is, however, a third interpretation to art. III (2). The phrase "shall properly and carefully load" may mean that the carrier shall load and that he shall do it properly and carefully, or that he shall do whatever loading he does properly and carefully. The former interpretation, perhaps, fits the language more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think, correctly in CARVER'S CARRIAGE OF GOODS BY SEA, 9th ed., p. 186, is to define, not the scope of the contract service, but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only on different systems of law but on the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view, the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.

I reject the interpretation of loading in art. II as covering only the second stage of the operation. Such authority as there is is against it. If loading under the rules does not begin before the ship's rail, by parity of reasoning discharging should end at the ship's rail; but so to hold would be contrary to the decision of ROCHE, J., in *Goodwin, Ferreira & Co., Ltd. v. Lamport & Holt, Ltd.* (4).

Since the shipowner in this case in fact undertook the whole operation of

loading it is unnecessary to decide which of the other two interpretations is correct. I prefer the more elastic one, that which I have called the third. There appears to be no binding authority on the point. I have noted the view expressed in *CARVER*; on the other hand, *TEMPERLEY'S CARRIAGE OF GOODS BY SEA ACT, 1924*, 4th ed., p. 26, and *SCRUTTON ON CHARTERPARTIES*, 15th ed., p. 160, consider that the carrier is responsible for the whole of the loading. However, it is sufficient for me to say that, on the facts of this case, the rights and immunities under the rules extend to the whole of the loading carried out by the defendants and, therefore, counsel for the plaintiffs' first point fails. I think, if I may so put it, that it is a good thing that it should fail. There must be many cases of carriage to which the rules apply where the ship undertakes the whole of the loading and discharging; and it would be unsatisfactory if the rules governed all but the extremities of the contract. It so happens that, in this case (rather unusually), the exemption of the extremities would benefit the shipper. For the form of bill of lading which would have applied is made subject to the rules simpliciter and does not set out the traditional mass of clauses which the rules have rendered generally ineffective. If they were there the shippers would probably fare worse under them than under the rules. It would certainly be a triumph for the innate conservatism of those who have not scrapped their small print if, though only on the outer fringes, it was to come into its own. But the division of loading into two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail has lost much of its nineteenth century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail.

The next contention on behalf of the plaintiffs is that the rules are incorporated in the contract of carriage only if a bill of lading is issued. The basis for this is in the definition of art. I (b) of "contract of carriage". I have already quoted it, and it "applies only to contracts of carriage covered by a bill of lading". The use of the word "covered" recognises the fact that the contract of carriage is always concluded before the bill of lading, which evidences its terms, is actually issued. When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it they enter into it on those terms which they know, or expect, the bill of lading to contain. Those terms must be in force from the inception of the contract; if it were otherwise the bill of lading would not evidence the contract but would be a variation of it. Moreover, it would be absurd to suppose that the parties intend the terms of the contract to be changed when the bill of lading is issued, for the issue of the bill of lading does not necessarily mark any stage in the development of the contract; often it is not issued till after the ship has sailed, and if there is pressure of office work on the ship's agent it may be delayed several days. In my judgment, whenever a contract of carriage is concluded and it is contemplated that a bill of lading will in due course be issued in respect of it, that contract is from its creation "covered" by a bill of lading and is, therefore, from its inception a contract of carriage within the meaning of the rules and to which the rules apply. There is no English decision on this point; but I accept and follow without hesitation the reasoning of the Lord President, LORD CLYDE, in *Harland & Wolff, Ltd. v. Burns & Laird Lines, Ltd.* (5).

Counsel for the plaintiffs contends that the parties in this case contemplated a shipped bill of lading and, therefore, that they intended the application of the rules to the contract to be conditional on the issue of a shipped bill. No doubt, the parties contemplated a shipped bill of lading. But then they also contemplated a shipment. When no shipment took place there was nothing in this contract, I think, to prevent the shipper from demanding under art. III (3), a "received for shipment" bill if it were of any use to him. Counsel's point, I think, is that, if a bill of lading as contemplated is issued, the terms of it (including the rules) operate retrospectively; if the bill is not issued, the terms

do not come into operation at all. But I can see no reason for treating the bill of lading differently from any other formal contractual document. If the agreement was made "subject to" bill of lading there would be room for counsel's argument; but there would also be no legal contract at all until the bill of lading was issued, and it is not suggested that this is the case here.

A I have now arrived at the conclusion that the rules apply to the contract between the defendants and I.S.D. so as to entitle the defendants, if they were sued by I.S.D., to limit their liability. The plaintiffs' last contention is that they were not a party to the contract between the defendants and I.S.D., or to any similar contract, and that, even if they were, the limitation would not apply to them.

B It is convenient to take the last part of this contention first, for it raises only a short point. Even if, so it is argued, the plaintiffs were a party to the contract made by I.S.D. and the rules were a part of the contract, the rules could not affect the plaintiffs; for, by their own terms, they regulate only the relations between the carrier and the holder of the bill of lading and the plaintiffs were never holders of the bill of lading. Article II grants rights to, and imposes responsibilities on, the carrier "under every contract of carriage". Prima facie those rights and responsibilities must be against or towards every other party to the contract. But, so it is contended, "contract of carriage" by its definition C excludes all parties except the carrier and the holder of the bill of lading. This contention derives from the concluding words of art. I (b)

"from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same".

D In my judgment, those words do not apply to bills of lading generally, but only to bills of lading issued under a charterparty; and even then they are intended to define, not the parties to the contract, but the moment at which the bill of lading becomes a contractual document within the meaning of the rules. I base this conclusion on the sense of the paragraph as a whole as well as on its punctuation. If there is any doubt the French text (set out in CARVER, 9th ed., p. 1065) makes it quite clear. Having regard to the preamble to the Act and the fact that the E French text is the only authoritative version of the convention, I think, notwithstanding the objection of counsel for the plaintiffs, that it is permissible to look at it. I agree that it is not conclusive, but it may help to solve an ambiguity if there be one. I agree also that, unless the court is assisted by a French lawyer, it should be looked at cautiously, but the appreciation of this particular point needs no more French than every schoolboy knows, and I think it would be F pedantic to ignore it.

G I come next to the question whether the plaintiffs are privy to the contract of carriage. A similar question has arisen before in relation to stevedores and other agents of the carrier. If the carrier employs a third party, such as stevedores, to perform part of his duties under the contract of carriage, can the third party claim the protection of the contract; or can the shipper, if his goods are damaged, sue the third party in tort? The point arose in *Elder Dempster & Co. v. Paterson Zochonis & Co.* (6). The bill of lading was issued on behalf of time charterers; but the goods were handled and damaged by the crew who were servants of the shipowner. The charterers were protected by exceptions to the bill of lading; but the shipper claimed to sue the shipowner in tort for the action of his servants. The claim failed. SCRUTTON, L.J., in the Court of Appeal ([1923] 1 K.B. 441), and VISCOUNT CAVE ([1924] A.C. 533), put it on the ground of agency—the H charterer in entering into the contract of carriage acted on behalf and for the benefit of those others who might be given duties to perform under it. There is in the case another ratio decidendi which I shall note later; but recently DENNING, L.J., in *White v. John Warwick & Co., Ltd.* (7), preferred the view I have just stated. *Elder Dempster & Co. v. Paterson Zochonis & Co.* (6) was not concerned with exceptions or immunities in the Hague Rules, but the principle is the same. Two New South Wales cases, *Gilbert Stokes v. Dalgety* (8), and

Waters v. Dalgety (9), and one United States case, *A. M. Collins & Co. v. Panama Railroad Co.* (10), have been concerned with the Hague Rules and have allowed stevedores to claim the benefit of them. In the last of the three the majority judgment in the United States Court of Appeals applied ([1952] A.M.C. 2059) the law as set out in the RESTATEMENT OF THE LAW, TITLE AGENCY, s. 347:

"An agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal".

(Incidentally, if these decisions are right, they are inconsistent with the argument I last dealt with that the rules apply only as between the carrier and the holder). All these people were on the carrier's side; they were his privies and came into the contract under his aegis. In the case I have to consider, the third party is on the shipper's side; if he was privy to the contract it was the act of the shipper that made him so. If he was privy to it he cannot, of course, take the benefits without the burdens or enforce liability without limitation if the contract gives limitation.

There is nothing novel about the idea of a third party coming in to enforce a contract either as an undisclosed principal or as a beneficiary. DENNING, L.J., in *Smith v. River Douglas Catchment Board* (11) ([1949] 2 All E.R. 188), reviews the main categories into which such third parties commonly fall. The principle is very familiar in mercantile contracts: *Les Affréteurs Réunis Société Anonyme v. Leopold Walford (London), Ltd.* (12) is an example given by DENNING, L.J., arising out of a charterparty. It is a principle that has constantly to be invoked where the property in the subject-matter of the contract is likely to be transferred during the currency of the contract. In marine insurance the policy is always expressly taken out for the benefit of those to whom the property "doth, may or shall appertain". In non-marine insurance there is no set form, but similar words may produce the same result: see, for example, *Waters v. Monarch Life Assurance Co.* (13). In bills of lading the indorsement of the bill passes the title to the goods by virtue of the custom of merchants as found in *Lickbarrow v. Mason* (14), but did not, at common law, transfer the benefit of the contract of carriage. The Bills of Lading Act, 1855, s. 1, gives the indorsee or named consignee a statutory right to sue; the Supreme Court of Judicature Act, 1873, s. 25, later performed the same function for the assignee under the ordinary contract. But just as before 1873 the assignee could always sue in the name of the assignor, so before 1855 the consignee could sue in the name of the consignor. The principle was described by LORD BLACKBURN in BLACKBURN ON CONTRACT OF SALE, 3rd ed., p. 422, as follows (the language quoted is LORD BLACKBURN'S written before 1855):

"Even if the assignee of the bill of lading had acquired the full legal and equitable property in the goods, so that the damage arising from the non-delivery was exclusively his, still he was compelled to bring any action on the contract in the name of the original contractor as his trustee; for, in general, contracts do not by the law of England run with goods, and no custom has ever been recognised making the contract contained in a bill of lading an exception".

The author goes on to say (p. 423):

"If, however, the goods when shipped are not the property of the shipper, he in general acts in shipping them as agent for the owner of the goods".

Sargent v. Morris (15) is an authority on this point.

In this type of case the seller, as shipper, makes the contract for the benefit of the buyer. The converse may be equally true. There is no difficulty in principle about the concept of a local buyer making a contract of affreightment for the benefit of the shipper as well as for himself. But it is necessary that I should examine in greater detail than I have hitherto done the circumstances in which the contract was made in order to determine whether the inference of agency

A can properly be drawn from them. The contract of sale provided, as I have said, for delivery f.o.b. London, the price including dock and harbour dues and port rates to be paid by the seller; and further expressly provided that freight was to be engaged by the buyer, who was to give due notice to the seller when and on board what vessel the goods were to be delivered. Payment was to be made twenty-one days after delivery and after receipt of certain documents for which the contract called, such as invoice, inspection certificate, etc., and of the dock company's or mate's receipt. In the special circumstances of this case and because of delay in shipment, payment was, in fact, made in advance, but on the terms that that should not affect the seller's obligations as to delivery. As I have said, it was agreed that the property did not pass till delivery over the ship's rail.

B It is worth noting that the problem which I have to consider does not arise as a matter of course in every f.o.b. contract. The f.o.b. contract has become a flexible instrument. In what counsel called the classic type as described, for example, in *Wimble, Sons & Co. v. Rosenberg & Sons* (16), the buyer's duty is to nominate the ship and the seller's to put the goods on board for account of the buyer and procure a bill of lading in terms usual in the trade. In such a case the seller is directly a party to the contract of carriage, at least until he takes out the bill of lading in the buyer's name. Probably the classic type is based on the assumption that the ship nominated will be willing to load any goods brought down to the berth or at least of which she is notified. Under present conditions, when space often has to be booked well in advance, the contract of carriage comes into existence at an earlier point of time. Sometimes the seller is asked to make the necessary arrangements, and the contract may then provide for his taking the bill of lading in his own name and obtaining payment against the transfer, as in a c.i.f. contract. Sometimes the buyer engages his own forwarding agent at the port of loading to book space and to procure the bill of lading; if freight has to be paid in advance this method may be the most convenient. In such a case the seller discharges his duty by putting the goods on board, getting the mate's receipt and handing it to the forwarding agent to enable him to obtain the bill of lading. The present case belongs to this third type; and it is only in this type, I think, that any doubt can arise about the buyer being a party to the contract.

The contract of carriage in this case was made in the office of Bahr, Behrend & Co., for they are both agents for I.S.D. and freight brokers for the defendants. An instruction came to Bahr, Behrend & Co. from I.S.D. to arrange for the shipment of these goods among other cargo, and a note by Bahr, Behrend & Co. dated Mar. 29, 1951, records that the shipment was booked per the s.s. *Jalazad*. The ordinary practice is for I.S.D. to prepare a bill of lading (the defendants have a special form for Government of India shipments) and to send it to Bahr, Behrend & Co. Bahr, Behrend & Co. check the items on it from a return made out by the cargo superintendent after shipment and then sign and issue the bill of lading on behalf of the defendants, generally some days after the ship has sailed dependent on the volume of the cargo to be dealt with. It is the practice in the Port of London for all loading to be done by the port authority at the ship's expense. The whole charge, therefore, for loading from alongside is paid by the ship and covered by the freight; in this case, it included the cost of lighterage from the dock to the ship's side. On Apr. 7 Bahr, Behrend & Co., on behalf of I.S.D., notified the plaintiffs that space had been engaged and instructed them to dispatch the goods to arrive alongside the vessel. The question at once arises: If, as the plaintiffs contend, there is no contractual relationship between them and the defendants, how do they get these goods on board? If the ship sails off without loading the goods the plaintiffs are in breach of their contract of sale: have they no redress against the ship? Counsel for the plaintiffs argues that they would have none, and that, vis-à-vis the seller, the ship in

loading acts as a volunteer. This seems to me to be a position which none of the three parties would have accepted for a moment.

Let me look at the situation first from the standpoint of the shipper, I.S.D. In the ordinary case, such as I have been considering above, where the shipper takes out a bill of lading or an insurance policy, he has, at the time of the contract, himself got the property in the goods; the question whether he contracts for the benefit of subsequent owners depends on proof of his intention at the time of contracting. But where, as in this case, he has not got the property at the time of the contract and does not intend to acquire it before the contract begins to operate, he must act as agent. He cannot intend otherwise; the intention is inherent in the act; he must either profess agency or confess himself a wrongdoer. For if the shipowner lifts the seller's goods from the dock without the seller's authority he is guilty of conversion to which the shipper by requiring him to do it makes himself a party.

Let me look at it now from the standpoint of the ship. If the shipowners were sued for conversion they would surely have redress against the shipper. A person who requests a carrier to handle goods must have the right to deal with them or it would not be safe to contract with him. A shipowner cannot be supposed to inquire whether the goods he handles do, or do not, belong to the shipper who entrusts them to his care; if the goods are not the shipper's there must be implied a warranty of authority by him that he has the right to contract with regard to them.

Then, from the standpoint of the seller, if his goods are left behind and it is said to him: "You made no contract with the ship; what else did you expect?", he would answer, I think, that he naturally supposed that all the necessary arrangements had been made by the shippers.

In brief, I think the inference irresistible that it was the intention of all three parties that the seller should participate in the contract of affreightment so far as it affected him. If it were intended that he should be a party to the whole of the contract his position would be that of an undisclosed principal and the ordinary law of agency would apply. But that is obviously not intended; he could not, for example, be sued for the freight. This is the sort of situation that is covered by the wider principle—the third party takes those benefits of the contract which appertain to his interest therein, but takes them, of course, subject to whatever qualifications with regard to them the contract imposes. It is argued that it is not reasonable to suppose that the seller would submit to the terms of a contract the details of which he does not know, and which might not give him the sort of protection of which he would approve. I do not think that, as a matter of business, this is so. Most people board an omnibus or train without considering what protection they will get in the event of an accident. I see nothing unreasonably imprudent in a seller assuming that the buyer, whose stake in the contract is greater than his, would have obtained whatever terms are usual in the trade; if he were legally minded enough to inquire what they were, the answer would be that, by statutory requirement, the contract was governed by the Hague Rules.

If this conclusion is wrong, there is an alternative way by which, on the facts of this case, the same result would be achieved. By delivering the goods *ad quodam*, the seller impliedly invited the shipowner to load them, and the shipowner, by lifting the goods, impliedly accepted that invitation. The implied contract so created must incorporate the shipowner's usual terms, none other could have been contemplated; the shipowner would not contract for the loading of the goods on terms different from those which he offered for the voyage as a whole. This simple solution was the one which Lord SUMNER preferred in *Edger Thompson & Co. v. Peterson Zocher & Co.* (6), and which was adopted in respect of the stevedores' liability in the cases I have mentioned. But, as I have said, the problem in these cases was a rather different one, and I do not think the solution

fits so well the circumstances of this case. First, it means that, if the goods were not lifted, there would be no contract; and while that does not arise in this case a solution that leaves it in the air is not so acceptable as one that covers it. Secondly, I find it difficult to infer that the shipowner, by lifting the goods, intended to make any new contract. He would not know where the property in the goods lay. I think he must have supposed that he was acting under a contract already made through Bahr, Behrend & Co. and on the assumption that Bahr, Behrend & Co. had authority to make it. Thirdly, I doubt whether the seller intended to make any separate contract when he sent down the goods. I think that he, too, would have supposed that they would be dealt with under the contract of affreightment. But while I do not accept this as the right solution, I think it is preferable to the alternative of a "bald bailment" which LORD SUMNER rejected ([1924] A.C. 564) in *Elder Dempster & Co. v. Paterson Zochonis & Co.* (6), and for which counsel for the plaintiffs, is, in effect, contending in this case.

The Termagant (17), which counsel for the plaintiffs cited, is not, in my view, an authority that goes beyond its facts. In that case the plaintiffs obtained from the Union-Castle line a through bill of lading for cargo from Port Natal to Glasgow. The bill of lading gave liberty to tranship "at the company's expense . . . but at merchant's risk". The cargo was unloaded in the Thames to a barge belonging to the defendants which was to take it to a coasting steamer to carry it to Glasgow. The contract made between the Union-Castle line and the barge included the London lighterage clause with its comprehensive exceptions. The barge sank and the cargo was lost and the cargo owners as plaintiffs sued the barge owners as defendants. They seem to have put their case primarily in contract and only alternatively in tort. They alleged a contract to be inferred from the receipt of the goods and a breach of duty thereunder. They were probably not very frightened of the London lighterage clause because they alleged that the barge was unseaworthy, and doubtless relied on that fact to displace the exceptions in the clause; on the other hand, they seemed doubtful about relying on unseaworthiness as a tort. The main defence was that the plaintiffs had no privity of contract with the defendants. The plaintiffs replied that the Union-Castle were acting as their agents in putting the goods on the barge, and that they (the plaintiffs) were, therefore, parties to the contract with the barge. Alternatively, the plaintiffs argued that if there was no contract they could succeed in tort. BARGRAVE DEANE, J., found for the plaintiffs in tort on their alternative contention, saying that (19 Com. Cas. 245)

"the barge owners have been guilty of a tort in supplying a vessel which was dangerous for the purpose for which it was supplied".

He held that there was no contract between the plaintiffs and the barge owners.

It is obvious that a through bill of lading necessarily contemplates that the first carriers will not perform the whole of the contract; they must, therefore, have implied authority to tranship the goods at some point in the voyage and send them forward by another carrier. But it does not follow from that that they have any authority from the shipper to make on his behalf a special contract with the second carrier. *Prima facie* the second carrier is, I should have thought, discharging on behalf of the first carrier the duties which the first carrier has undertaken in the through bill of lading shall be performed; there is, of course, no reason why a person who has not undertaken to discharge his contractual duties personally should not delegate them to someone else. The position, therefore, of the second carrier in relation to the shipper would appear to be very much the same as that of the stevedores in relation to the cargo owner in the United States and Australian cases I have referred to. At any rate, it is, I think, plain that the first carrier would not, in the absence of express words, have any authority from the shipper to make a contract with the second carrier on the shipper's behalf in terms less favourable to the shipper than those contained in

the through bill. In *The Termagant* (17) the through bill contained the term I have already recorded "liberty to tranship at merchant's risk". Whether this is sufficient authority may be doubtful, and, in particular, whether it permits the first carrier to subject the shipper to the London lighterage clause. It is difficult to know quite how far it goes: see *The Galileo* (18) (19 Com. Cas. 58, per LORD SUMNER). I do not think that the decision of BARGRAVE DEASE, J., therefore, helps at all in the point I have to consider. The circumstances of this case did not, for the reasons I have given, give rise to any implication that the first carrier had any authority to contract with the barge on behalf of the shippers who were the owners of the property. Whether or not there was any express authority depends on the construction of the bill of lading in that case.

In my judgment, the plaintiffs are bound by the Hague Rules as embodied in the contract of carriage and, accordingly, can recover no more than £200. There will be judgment for them for that sum. *Judgment for the plaintiffs.*

Solicitors: *Hair & Co.* (for the plaintiffs); *Holman, Fenwick & Wilton* (for the defendants).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

THE STONEDALE No. 1. RICHARD ABEL & SONS, LTD. OWNERS OF THE DUMB BARGE STONEDALE No. 1 v. MANCHESTER SHIP CANAL CO.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), March 15, 16, 17, 18, April 13, 1954.]

Shipping—Limitation of liability—Expenses of removing barge sunk in canal—Canal undertakers' statutory right of recovery—Barge sunk through improper navigation of owners' servants—No fault or privity in owners—"Injury or damage to the canal"—"Loss or damage . . . caused to property or rights of any kind"—Manchester Ship Canal Act, 1897 (c. cviii), s. 9—Merchant Shipping Act, 1894 (c. 60), s. 503 (1)—Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (c. 32), s. 1, s. 3—Manchester Ship Canal Act, 1936 (c. cxxiv), s. 32 (2).

While being towed by their own steam tug in the Manchester Ship Canal, a barge of the plaintiffs sank and became an obstruction in the canal through the improper navigation of their servants, but without the fault or privity of the plaintiffs. Following a request by the plaintiffs, the defendants, the ship canal company, removed the obstruction and they claimed to recover the whole cost from the plaintiffs as expenses incurred in raising, removing, marking, lighting, watching and otherwise controlling the barge under s. 32 (2) of the Manchester Ship Canal Act, 1936. The plaintiffs brought an action for a declaration of limitation of their liability.

Held: (i) the expenses were not incurred in respect of "injury or damage to the . . . canal" or to the works connected therewith within the meaning of s. 9 of the Manchester Ship Canal Act, 1897, which meant actual physical damage to the canal.

Dicta of LORD PORTER ([1950] 2 All E.R. 426), LORD NORMAND (ibid., 435), LORD MORTON OF HENRYTON (ibid., 439), and LORD RADCLIFFE (ibid., 443), in *Warrington Harbour & Dock Board v. Telford & S. Phoenix*, applied.

(ii) the expenses were not damages, but expenses recoverable by statute, and, therefore, did not come within the class of "any loss or damage . . . caused to property or rights of any kind . . . by reason of the improper navigation" of a ship within the meaning of s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900.

The Millic ([1940] P. 1), approved.

(iii) the plaintiffs, therefore, were not entitled to limit their liability under either of those enactments.

AS TO STATUTORY LIMITATION OF LIABILITY OF SHIPOWNERS, see HALSBURY, Hailsham Edn., Vol. 30, pp. 943-945, paras. 1305-1308; and FOR CASES, see DIGEST, Vol. 41, pp. 920-922, Nos. 8104-8120.

FOR THE MERCHANT SHIPPING ACT, 1894, s. 503 (1), and FOR THE MERCHANT SHIPPING (LIABILITY OF SHIPOWNERS AND OTHERS) ACT, 1900, s. 1 and s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 23, pp. 656 and 781, 782.

Cases referred to:

- (1) *The Countess*, [1921] P. 279; *affd.* C.A., [1922] P. 41; 91 L.J.P. 161; 127 L.T. 313; *reversd.* H.L., sub nom. *Mersey Docks & Harbour Board v. Hay, The Countess*, [1923] A.C. 345, 490; 92 L.J.P. 65; 129 L.T. 325; 41 Digest 943, 8351.
- (2) *Der Conservancy Board v. McConnell*, [1928] 2 K.B. 159; 97 L.J.K.B. 487; 138 L.T. 656; 92 J.P. 54; Digest Supp.
- (3) *Workington Harbour & Dock Board v. Towerfield S.S. (Owners)*, [1950] 2 All E.R. 414; [1951] A.C. 112; 2nd Digest Supp.
- (4) *The Millie*, [1940] P. 1; 109 L.J.P. 17; 161 L.T. 280; 2nd Digest Supp.
- (5) *The Cairnbahn*, [1914] P. 25; 83 L.J.P. 11; 110 L.T. 230; 41 Digest 799, 6597.
- (6) *Arrow Shipping Co. v. Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 63 L.J.P. 146; 71 L.T. 346; 41 Digest 822, 6807.
- (7) *The Brabo*, [1947] 2 All E.R. 363; [1948] P. 33; *affd.* H.L., sub nom. *Tyne Improvement Comrs. v. Armement Anversoils S/A (The Brabo)*, [1949] 1 All E.R. 294; [1949] A.C. 326; [1949] L.J.R. 435; 2nd Digest Supp.
- (8) *The Ella*, [1915] P. 111; 84 L.J.K.B. 97; 41 Digest 820, 6797.
- (9) *Great Western Ry. Co. v. Mostyn (Owners), The Mostyn*, [1928] A.C. 57; 97 L.J.P. 8; 138 L.T. 403; 92 J.P. 18; Digest Supp.

APPEAL by the plaintiffs against an order of WILLMER, J., dated July 31, 1953, dismissing an action for a declaration that the plaintiffs were not liable in respect of loss of or damage to vessels, goods, merchandise, property or rights of any kind arising out of the sinking of their dumb barge, Stonedale No. 1, in the Manchester Ship Canal on Feb. 14, 1952, beyond the aggregate amount of £8 per ton of the tonnage of the Stonedale No. 1 and of the Warrendale, the plaintiffs' steam tug towing the Stonedale No. 1 at the time of the accident, i.e., a total sum of £1,681 2s. 6d. The Stonedale No. 1 had been sunk through the improper navigation of the Stonedale No. 1 and of the Warrendale by the servants of the plaintiffs, but without the actual fault or privity of the plaintiffs. The defendants had removed the obstruction in their ship canal caused by the sinking, and they claimed to recover from the plaintiffs all expenses incurred by them in connection with raising, removing, marking, lighting, watching, and otherwise controlling the Stonedale No. 1 under s. 32 of the Manchester Ship Canal Act, 1936. The expenses amounted to £7,609 1s. 4d. The plaintiffs contended that they were entitled to limit their liability under s. 9 of the Manchester Ship Canal Act, 1897, or s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. WILLMER, J., held that s. 9 of the Act of 1897 applied only to physical "injury or damage" to the actual structure of the canal, and that, though the effect of s. 32 of the Act of 1936 was not to exclude the provisions of the Act of 1900, the expenses were not caused by the improper navigation of the barge within the meaning of s. 1 of that Act, and that there was, therefore, no right of limitation of liability under either provision. The plaintiffs appealed.

Carpmael, Q.C., and *Bucknill* for the plaintiffs.

Naisby, Q.C., and *H. E. G. Browning* for the defendants.

Apr. 13. The following judgments were read.

SINGLETON, L.J.: On Feb. 14, 1952, the Stonedale No. 1 and other barges of the plaintiffs were in tow to the plaintiffs' steam tug, Warrendale, in the Manchester Ship Canal. In the course of the towing the Stonedale No. 1 grounded in the vicinity of Hooton Wharf, sank and became an obstruction. Telephone conversations took place between the officers of the defendants and the plaintiffs and letters passed on the same day, Feb. 14. The letter from the defendants, after referring to the telephone conversation, continues:

"We will have to look to you for all costs which will be incurred in connection with the marking, raising, or destruction of the wreck, and I shall be glad to receive your undertaking that liability is admitted. In accordance with the provisions of the Manchester Ship Canal Act, 1936, I am required to give you notice that, unless we have received written intimation of your intention to yourselves remove the wreck by mid-day on Saturday, Feb. 16, 1952, we will take such steps as may be necessary for its removal."

The letter from the plaintiffs, also dated Feb. 14, is in these terms:

"Further to our telephone conversation regarding barge Stonedale No. 1 which lies sunk in the Manchester Ship Canal between Eastham and Ellesmere Port; we confirm having asked you to proceed with the lifting operations as soon as possible."

As a result the barge was raised and removed by the defendants, who rendered the plaintiffs an account of the expenses incurred amounting to £7,609 1s. 4d. The plaintiffs did not pay the amount claimed, but in turn commenced this limitation action.

I refer to the statement of claim. Having set out in para. 1, para. 2 and para. 3 the facts I have mentioned, the plaintiffs pleaded:

"(4) On or about July 22, 1952, the [defendants] made a claim against the plaintiffs for the said raising of the Stonedale No. 1 in the sum of £7,609 1s. 4d. (5) The said sinking was caused by the improper navigation of the Stonedale No. 1 and of the Warrendale by the servants of the plaintiffs. (6) The said sinking occurred without the actual fault or privity of the plaintiffs or any one of them."

Paragraph 7 sets out the registered tonnage of the tug and of the barge. Paragraph 8 reads:

"The plaintiffs have reason to believe that the amount they are liable in respect of the said sinking will exceed the limit of their statutory liability calculated at the rate of £8 per ton of the tonnage of the Stonedale No. 1 and of the Warrendale ascertained as aforesaid."

Then para. 9:

"The plaintiffs are willing and hereby offer to pay into court the sum of £1,681 2s. 6d., being the aggregate amount of £8 per ton of the tonnage of the Stonedale No. 1 and of the Warrendale ascertained as aforesaid together with interest thereon at four per cent. per annum from the date of the said sinking until such payment",

and the plaintiffs claim a declaration that they are not liable beyond the amount of £8 per ton in respect of the tug and the barge, which amount was the sum of £1,681 2s. 6d.

There were further particulars given to which I need not refer, and the defence denies that the plaintiffs are entitled to the relief they claim. Paragraph 2 of the defence is in these terms:

"These defendants say that in accordance with the provisions of s. 32 of the Manchester Ship Canal Act, 1936, they are entitled to recover from the plaintiffs all expenses incurred by them under the said section in connection

with raising, removing, marking, lighting, watching and otherwise controlling the dumb barge Stonedale No. 1 and that the plaintiffs are not entitled to limit their liability under the provisions of the Merchant Shipping Acts or the Manchester Ship Canal Act, 1897, in respect of the claim made by these defendants referred to in para. 4 of the statement of claim."

They also plead that by the letter which I have read:

A "The plaintiffs requested these defendants to proceed with the lifting operations of the Stonedale No. 1 and thereby impliedly undertook to pay to these defendants all expenses incurred by them in so complying with their request."

B WILLMER, J., held that the claim to limit the amount failed. The plaintiffs appeal to this court. The claim of the defendants was based on s. 32 of the Manchester Ship Canal Act, 1936, which provides:

C " (1) Whenever any vessel is sunk stranded or abandoned in part of—
D (a) any river canal waterway navigable channel lock or dock forming part of the harbour and port of Manchester or of the undertaking; or (b) any area within which the company are or may hereafter be empowered to dredge the bed banks shores and channels of the River Weaver or the estuary thereof; or (c) any area within which the company are or may hereafter be empowered to dredge the bed banks shores and channels of the River Mersey or the estuary thereof for the purpose of making accesses to the Manchester Ship Canal; the company may if they think fit cause the vessel to be raised or removed or (in the case of any vessel which it is not reasonably practicable to remove) to be blown up or otherwise destroyed in such manner as to clear such river canal waterway navigable channel lock dock or area therefrom. (2) The company may recover from the owner of any such vessel all expenses incurred by the company under this section in connection with that vessel or in raising removing or saving any furniture tackle and apparel thereof or any cargo goods chattels and effects raised or saved therefrom or in marking lighting buoying or otherwise controlling such vessel either summarily as a civil debt or as a debt in any court of competent jurisdiction. Provided always that the company may if they think fit and shall if so required by the owner of the vessel cause such vessel and any furniture tackle apparel cargo goods chattels and effects or any part of the same respectively so raised removed or saved as aforesaid to be sold in such manner as they think fit and out of the proceeds of the sale may after paying any duties of customs or excise which shall be payable in respect of the said cargo goods chattels and effects reimburse themselves for any such expenses and shall hold the surplus if any of those proceeds in trust for the persons entitled thereto and in case such proceeds shall be insufficient to reimburse the company such expenses the deficiency may be recovered by the company in manner aforesaid. (3) The company shall (except in case of emergency) before raising removing blowing up or destroying any such vessel under the provisions of this section give to the owner of the vessel twenty-four hours' notice of their intention so to do and if within twelve hours after the expiration of such notice the owner gives to the company notice in writing of his intention himself to raise and remove the vessel he shall be at liberty so to do in lieu of the company ",

H with a proviso which I need not read.

By sub-s. (6):

" In this section the word ' owner ' in relation to any vessel sunk stranded or abandoned as aforesaid means the owner of that vessel at the time of the sinking stranding or abandonment thereof."

By sub-s. (7):

" The powers conferred on the company by this section shall be in addition

to and not in derogation of any other powers exercisable by them for or with respect to the removal of wrecks."

It will be seen that the request for payment of the amount is, on the face of it, unanswerable. The barge was stranded. The defendants complied with the provisions of s. 32, and, *prima facie*, they are entitled to be paid. There is no admission that the amount claimed is correct, but no question has been raised on it.

The claim of the plaintiffs in the limitation action gives rise to a number of questions. It is common ground that the stranding was due to faulty navigation, and it is not suggested that there was actual fault or privity on the part of the owners. It is said that the amount expended was due to faulty navigation from which damage flowed, and that the owners are entitled to limitation of those damages so that no more than £1,681 2s. 6d. is recoverable. There are no other persons claiming.

The right of a shipowner to limit damages has existed for very many years: see the EARL OF BIRKENHEAD in *The Countess* (1) ([1923] A.C. 352). It is unnecessary to consider the position before the Merchant Shipping Act, 1894. Section 503 (1) of that Act provides:

"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,) (a) Where any loss of life or personal injury is caused to any person being carried in the ship; (b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; (c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond the following amounts . . .",

and then the amounts are set out in the later part of the section. Paragraphs (a) and (b) of that section give the right generally in respect of loss of life or injury to persons being carried in a ship, or to goods being carried in the ship, against the owners of which the claim is made. In cases of loss of life or injury, or of damage to goods in another ship, the right to limit was given where the occurrence was due to faulty navigation. In all cases the occurrence must be without actual fault or privity of the owners. By the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 1, a considerable extension of the right to limit damages was given. That section provides:

"The limitation of the liability of the owners of any ship set by s. 503 of the Merchant Shipping Act, 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship."

It is claimed that the wording of this section covers the present case, and that the owners are thereby entitled to limit their damages. Again, s. 3 of the Act of 1900 provides:

"The limitation of liability under this Act shall relate to the whole or any losses and damages which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act."

Alternatively, the plaintiffs claim that they are entitled to the right under s. 9 of the Manchester Ship Canal Act, 1897, which provides:

"The owners of any vessel or of any share in such vessel which without actual fault or privity of the owners shall cause any injury or damage to the portion of the canal extending from the entrance at Eastham (including that entrance) up to the westerly end of the pier of the Mode Wheel Locks or to the banks locks or works comprised in such portion shall not be liable in respect of such injury or damage to an amount exceeding £8 for every registered ton of such vessel."

The answer of the defendants is that none of these matters arises; that they are not asking for damages. On the contrary, they say their claim is for payment of expenses incurred under the provisions of s. 32 of the Act of 1936, and that no question of limitation enters into that.

It is necessary to consider the position of a harbour or dock authority, such as the ship canal, before the Act of 1936. The provisions of the Harbours, Docks, and Piers Clauses Act, 1847, were incorporated with the defendants' private Acts, the first of which was passed in 1885. Section 56 of the Act of 1847 provides:

"The harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber shall be repaid by the owner of the same; and the harbour master may detain such wreck or floating timber for securing the expenses, and on non-payment of such expenses, on demand, may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand."

By s. 74:

"The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel, where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ and put his vessel in charge of."

Under s. 74 of the Act of 1847 the owners of a vessel are answerable to the authority for any damage done by such vessel to the harbour, dock, or pier, or works connected therewith, whether the damage was caused by negligence or not. Before 1900 there was no general right to limit damages of this nature. I assume that the words of s. 1 of the Merchant Shipping Act, 1900, are wide enough to give such a right. A claim was made in the initial stages of *Dee Conservancy Board v. McConnell* (2), but it failed on the words of the section "without their actual fault or privity."

Section 9 of the Manchester Ship Canal Act, 1897, extended the then existing right of shipowners using the ship canal to limit the amount of damages, and provided that, where injury or damage was caused by a vessel to the canal (so far as is material to this case), or to the banks, locks, or works comprised therein, the owners were not to be liable in respect of such injury or damage to an amount exceeding £8 for every registered ton of such vessel so long as there was not actual fault or privity of the owners. This section does not mention negligence. I

agree with WILLMER, J., that s. 9 does not help the plaintiffs in this case. The stranding of the Stonedale No. 1 did not cause "injury or damage" to the canal or to the works connected therewith. That is my opinion on the reading of the section, and it follows, I think, from what was said in four of the speeches in the House of Lords in *Workington Harbour & Dock Board v. Towerfield S.S. (Queens)* (3). In that case it was held that the damage recoverable under s. 74 of the Act of 1847 was confined to that physically caused to the harbour works and did not include consequential loss of revenue through inability to use the harbour. LORD RADCLIFFE said ([1950] 2 All E.R. 443):

"I only wish to make it plain that, in my view, the section is confined to damage, not damages. I think that it covers no more than the actual physical damage which a vessel may do to the works which constitute the harbour, dock or pier."

The introduction of the words "injury or" before the word "damage" in s. 9 does not extend the liability.

I now come to the position arising under s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. The words of this section

"... shall extend and apply to all cases where ... any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable ..."

are certainly very wide. And by s. 3 the limitation of liability applies whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act. Counsel for the plaintiffs submitted that this case fell within the words of s. 1, and, that being so, that nothing in s. 32 of the Manchester Ship Canal Act, 1936, could take away the right of the plaintiffs to limit the damages. In *The Mollie* (4), a case arising under the same section (s. 32) of the Manchester Ship Canal Act, 1936, LANGTON, J., held that the owners were not entitled to limit the damages, and the basis of his decision appears to have been that the words of s. 1 of the Merchant Shipping Act, 1900, were not wide enough to cover an expense of this nature. The learned judge said ([1940] P. 10):

"On the other hand I am very greatly impressed by the inadequacy of the language, even in this widely drawn section, to cover an item of expense not immediately connected with the actual occurrence of the original loss. Without attempting to enter too deeply into the baffling problem of causation, I doubt whether this expense can be said to be directly caused by the improper navigation of the *Millie*, and for both of these reasons, though principally upon the ground of the inadequacy of the language, I am of opinion that the statute does not cover the expenses incurred by the canal company."

It is clear from the judgment of WILLMER, J., that he found difficulty in following the reasoning of LANGTON, J., on this head. Left to himself he would have held that the plaintiffs' claim to limit the damages succeeded, but he thought it right to follow the decision of LANGTON, J.

If those responsible for the management of a ship are guilty of faulty navigation (or negligence) which causes damage to others, the measure of damages is governed by the ordinary rule, i.e., they are recoverable if they are the natural and probable results of the wrongful act. In *Dee Conservancy Board v. McConnell* (2) SCRUTTON, L.J., said ([1928] 2 K.B. 166):

"What are the damages caused by the negligence of a person who deposits an obstruction on the soil of another and so blocks a right of way? I should have thought that if the person who deposits the obstruction declines to remove it, which is the position here, the damages are the reasonable cost of removing it. The second respondents were not bound to allow this

obstruction to remain blocking their berth for all time; they were entitled to remove it to minimise the damage, and they incurred the expense which the judge has found to be the reasonable cost of removing it. It seems to me also that the first respondents who, as I have said, have the duty of maintaining a navigable channel, have a common law right to remove the obstruction. The obstruction was deposited in a place which affected both respondents who thereupon jointly made a contract with a salvage association to remove it, the cost of doing this being paid partly by the one respondent and partly by the other. In those circumstances judgment ought to have been entered for both respondents for one sum to be recovered once and not twice."

It does not appear that those words of SCRUTTON, L.J., were cited to LANGTON, J., when he had before him the case of *The Millie* (4). In *The Cairnbahn* (5) LORD SUMNER said ([1914] P. 33):

"The word 'loss' is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer."

It was incumbent on the defendants to keep open navigation of the canal, and it was in their interest to do so. It seems to me that, in an action by them for damages for negligence in a case in which a vessel had stranded and done damage through negligent navigation, and in which they had found it necessary to remove the obstruction, one of the heads of damage would be the cost of removing the obstruction so that the canal could be used for the purpose for which it was constructed. If that is right, it appears to follow that, in such a case, the ship-owners could succeed in a claim to limit their liability under the terms of s. 1 of the Merchant Shipping Act, 1900.

But that does not dispose of this appeal. The claim of the defendants is not founded in damages. It is based on s. 32 of the Manchester Ship Canal Act, 1936. The section may be said to take the place of s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847. Under the last-mentioned section the harbour master may remove any wreck or obstruction which impedes navigation, and the expense of removing it "shall be repaid by the owner of the same", and the harbour master may claim the wreck for securing the expenses, and on non-payment on demand he may sell the wreck, rendering the overplus (if any) to the owner on demand. One difficulty which arose on the working of s. 56

was that, if the owner abandoned the wreck before the expenses were incurred, he was no longer the owner for the purposes of the section, and the expenses could not be recovered from him: see *The Crystal* (6). This difficulty was met by sub-s. (6) of s. 32 of the Manchester Ship Canal Act, 1936, by providing that the word "owner" means the owner at the time of the sinking, stranding or abandonment. There are other changes of importance, and it can be said that

the section sets up a complete code as to the rights of the defendants, the ship canal company, whenever any vessel is sunk, stranded or abandoned in the canal as the Stonedale No. 1 was. In some ways the section limits the powers of the defendants, or gives additional rights to the shipowners. The defendants may, if they think fit, cause the vessel to be raised or removed. By sub-s. (2) the defendants may recover from the owner of any such vessel all expenses incurred by the defendants, with a proviso that the defendants may and shall if so required by the owner cause the vessel, etc., to be sold. By sub-s. (3), the defendants shall (except in case of emergency) before raising, removing, blowing up or destroying any such vessel give to the owner twenty-four hours' notice of their intention so to do, and the owner may within twelve hours give notice of his intention to raise and remove the vessel, in which case, subject to safeguards, he is to be at liberty to do it himself. And sub-s. (4) provides that the defendants shall give to the owner seven days' notice before selling. The section is entirely

independent of any question of damages. It is essential that navigation of the canal be kept open, and Parliament has given to the defendants powers to enable them to bring this about as far as possible.

So far as I can find, there is no case in which it has been held that the expense of removing a wreck under the provisions of s. 56 of the Act of 1847 falls within the limitation proceedings of s. 1 of the Merchant Shipping Act, 1900. It is expense incurred in doing something authorised by the section, and the mode in which it can be recovered is laid down. It appears that a point of this kind might have been taken in *The Countess* (1). The report of the case in the court of first instance ([1921] P. 279) shows that there were heavy claims for damages arising from faulty navigation. It was agreed that the statutory amount of the shipowners' liability calculated in accordance with the Merchant Shipping Acts was £4,468 4s. 9d. There was another sum of £1,048, the expenses of raising and removing the vessel under the powers given by s. 7 of the Mersey Docks and Harbour Act, 1912. This section is in some respects similar to s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847. The board have power to remove a vessel sunk or stranded within the port which, in the judgment of the marine surveyor, is an obstruction to the safe use of the port, or likely so to become, and the board may sell the vessel, and out of the proceeds retain the expenses to which they have been put. There is no express provision that the board can recover the expenses from the shipowner. No doubt, the procedure laid down in s. 530 of the Merchant Shipping Act, 1894, would be followed. The shipowners in fact paid into court this additional sum of £1,048. They did not suggest that it was part of the damages incurred through their faulty navigation. In other words, they did not claim that the cost of raising and removing the vessel fell to be included in the £4,468 4s. 9d., the amount to which they were entitled to have the damages limited. This case reached the House of Lords on other points. In the Court of Appeal ATKIN, L.J., pointed out ([1922] P. 60) that the limitation suit did not affect the dock board's right to the expenses incurred in removing the obstruction. It is interesting, at least, to see that the question was not raised by anyone.

The researches of HODSON, L.J., have brought to light another authority of some importance, not from the point of view of the decision, but from some words of SCOTT, L.J., which throw light on the problem now before the court. The case is *The Brabo* (7) which is reported elsewhere, but of which the ALL ENGLAND LAW REPORTS is the most complete report of the judgment of SCOTT, L.J. The action was brought to recover the expenses of removing a wreck under s. 42 of the Tyne Improvement Act, 1890. SCOTT, L.J., said ([1947] 2 All E.R. 367):

"First, it is necessary to bear in mind the nature of the plaintiffs' claim. That claim is in respect neither of a contract, express or implied, nor of a tort. . . . it is based on a section in one of the plaintiffs' special Acts . . .",

and after the learned lord justice had read the agreed judgment of the court in that case he added observations of his own (*ibid.*, 370):

"There is a further principle of legislative policy regarding maritime commerce, to which also this appeal invites public attention, that of limitation of shipowner's liability. That principle has been applied in the western world for two centuries or more, the basic rule on the continent making the value of the ship at the end of the voyage the limit of her owner's liability, whereas the United Kingdom in the middle of last century converted that measure into a staring limit per ton of registered tonnage, based on the then average value of ships. On the continent the cost of wreck removal, when recoverable from the owner of the ship, has always been treated as one of the marine liabilities of the voyage and, as such, has been brought within the continental system of limitation of shipowners' liability. In the United Kingdom that has never been the case. The right of recovery was only

obtained from Parliament by the harbour authorities gradually, and the ship-owners were never given the right to limit that liability."

I need say nothing as to the experience of SCOTT, L.J., in this matter. It is worth mentioning that he was leading counsel for the Mersey Docks and Harbour Board in *The Countess* (1), when the case was argued in the Court of Appeal. I have referred to that case and to the words of ATKIN, L.J.

A Under s. 32 of the Ship Canal Act, 1936, there is an additional step, viz., the giving of notice to the owner before the raising or removal of the vessel, on which counsel for the defendants submitted that the expense of removal was not damages resulting from faulty navigation, but was expense incurred by the defendants because the shipowner had not on notice removed his stranded vessel. I prefer to look on the case in this way. There is no claim for damages. The defendants' claim is in respect of an expense incurred by them under the terms of the statute, which gives them a right to recover, not damages, but expense incurred in performing their duty or obligation to keep navigation open. If the question is looked at in this way there is no conflict between the private Act and the provisions as to limitation in the Merchant Shipping Acts. The section enables the defendants to recover from the plaintiffs all the expenses incurred. The plaintiffs cannot avoid a great part of their liability by saying that they were negligent in causing the original obstruction. A decision to the contrary might well result in the plaintiffs being much better placed if their vessel, sunk through faulty navigation, was of considerable value, and they left the defendants to raise it and to return it to them. In my judgment, an amount payable under s. 32 is not an amount of damages, and shipowners are not entitled to limitation in respect of the amount.

D Counsel for the defendants further submitted that, by the telephone conversation, and by the letters to which I have referred, the plaintiffs undertook to pay the reasonable cost of the removal of the barge; in other words, that there was constituted a contract under which the defendants can recover the total amount. I am unable to see that a contractual obligation was entered into. The letters were, in my view, merely procedure under s. 32 (3) of the Act of 1936, and they do not give the defendants any rights outside the terms of that section. In my opinion, the appeal should be dismissed.

JENKINS, L.J.: This is an appeal by the plaintiffs, Richard Abel & Sons, Ltd., the owners of the dumb barge, Stonedale No. 1, and of the steam tug, Warrendale, from an order of WILLMER, J., dated July 31, 1953, in so far as it pronounced that the plaintiffs were not entitled to limit their liability in respect of a claim by the defendants, the Manchester Ship Canal Co., for the expenses incurred by them in connection with the raising, removing, marking, lighting, watching and otherwise controlling the wreck of the dumb barge Stonedale No. 1. The casualty giving rise to the defendants' claim occurred on Feb. 14, 1952, when the tug was towing the barge along the defendants' canal inward bound from Eastham Lock, and at a point near Hooton Wharf, owing to improper navigation by the plaintiffs' servants in charge of the two vessels, the barge ran aground and sank, thus causing an obstruction in the canal.

G On the same day there were telephone conversations about the casualty between representatives of the parties, in the course of which the defendants told the plaintiffs that the raising of the barge was a matter which needed prompt action because all traffic on the canal had been suspended. The plaintiffs told the defendants that they were not proposing to attempt to raise the barge, but would leave it to the defendants to do so as early as possible so as to minimise delays to traffic, and the defendants asked the plaintiffs to confirm in writing their decision not to raise the barge themselves. Also on Feb. 14, 1952, the plaintiffs and the defendants wrote to each other letters in the following terms. The letter from the plaintiffs to the defendants reads:

"Dear Sir, Further to our telephone conversation regarding barge

Stonedale No. 1 which lies sunk in the Manchester Ship Canal between Eastham and Ellesmere Port; we confirm having asked you to proceed with the lifting operations as soon as possible."

The letter from the defendants to the plaintiffs reads:

"Dear Sirs, Concrete barge, Stonedale 1. With reference to conversation per telephone this afternoon, with your Mr. Anderson, I confirm that when the above-named barge was negotiating the ship canal inward bound about 14.45 hours today she was involved in collision with the outward bound Snapshot and subsequently sunk in the vicinity of Hooton Wharf".

That reference to a collision is agreed to have been a mistake, as the barge in fact sank through running aground and not through colliding with any other vessel. The letter continues:

"We will have to look to you for all costs which will be incurred in connection with the marking, raising, or destruction of the wreck, and I shall be glad to receive your undertaking that liability is admitted. In accordance with the provisions of the Manchester Ship Canal Act, 1936, I am required to give you notice that, unless we have received written intimation of your intention to yourselves remove the wreck by mid-day on Saturday, Feb. 16, 1952, we will take such steps as may be necessary for its removal."

It seems that these letters must have crossed in the post. Neither of them can be regarded as answering the other, and it does not appear that either of them was ever in fact answered. Some reliance was placed on them on the defendants' side as constituting, in conjunction with the telephone conversations, a contract under which the plaintiffs agreed to pay without limitation the whole of the costs incurred by the defendants in and about the raising of the barge. Without entering on the merits of that contention at this stage, I would say that, at all events, these letters and telephone conversations must have made it abundantly plain to the plaintiffs that, in default of the plaintiffs raising the barge themselves, the defendants, in exercise of the powers conferred on them by the Manchester Ship Canal Act, 1936, would raise the barge and hold the plaintiffs liable for all expenses incurred in so doing.

The relevant provisions of the Manchester Ship Canal Act, 1936, are contained in s. 32 of that Act. My Lord has already sufficiently referred to that section, and I need not read it again. The section to which I have just referred may be described as an elaboration of s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847, which was applied to the canal by the Manchester Ship Canal Act, 1885. Section 56 of the Clauses Act of 1847 has, again, been sufficiently referred to by my Lord. It may be added that the provisions in s. 32 of the Act of 1936 as to sale of the vessel and recovery of the expenses out of the proceeds follow with variations a somewhat similar power contained in s. 530 of the Merchant Shipping Act, 1894, which, however, does not appear to have conferred any right of recourse against the owner provisionally in the event of any deficiency in the proceeds of sale. It may also be added that the definition of "owner" in s. 32 (6) appears to have been designed to meet the decision in *The Crystal* (6) that the "owner" in s. 56 of the Act of 1847 means the owner at the time when the expenses are incurred, and, therefore, does not include a former owner who has abandoned the vessel before that time. It will be convenient also in order at this point to s. 74 of the Act of 1847, which played some part in the argument, but as my Lord has already read it I do not propose to read it again.

The plaintiffs having declined to raise the barge, the defendants in due course raised it themselves and (as they were expressly entitled to do by the terms of s. 32 (2) of the Act of 1936) claimed payment by the plaintiffs of the expenses incurred in so doing, amounting (as claimed by the defendants) to £7,509 15s. 4d. This claim the plaintiffs sought to meet by commencing the present action for limitation of their liability in reliance on s. 503 (1) of the Merchant Shipping

Act, 1894, as extended by s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, and/or alternatively, on s. 9 of the Manchester Ship Canal Act, 1897. It is common ground that either of these provisions, if applicable, would have the effect of limiting the plaintiffs' liability to the defendants (whose claim is in fact the only one arising out of the stranding and sinking of the barge) to £8 per ton of the combined tonnage of the tug and the barge, which limited sum is agreed to amount to £1,681 2s. 6d. Section 503 of the Merchant Shipping Act, 1894, again, my Lord has read. My Lord has also read s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. Section 2 of the same Act contains provisions limiting the liability to damages of dock or canal owners and harbour or conservancy authorities, the details of which are not material for the present purpose. My Lord has already read s. 3 of the same Act, and I will not read it again. Section 9 of the Manchester Ship Canal Act, 1897, has also been read by my Lord.

The casualty in the present case, admittedly, took place without the plaintiffs' actual fault or privity, but by reason of the improper navigation by their servants of the tug and the barge, and also, admittedly, took place in that portion of the canal to which s. 9 of the Act of 1897 applies. There appears to have been only one previous case in which the owners of a sunk, stranded or abandoned vessel have claimed limitation of their liability to pay the defendants the expenses incurred by them in exercise of their powers under s. 32 of the Act of 1936. That was the case of *The Millie* (4), where, in circumstances not distinguishable in any material respect from those of the present case, LANGTON, J., held, apparently with some hesitation, that the owners could not limit their liability in respect of the expenses in question. The primary ground for his decision appears to have been that these expenses were not "loss or damage . . . to property or rights of any kind" within the meaning of s. 1 of the Act of 1900, and, therefore, could not be made the subject of limitation under that section. But he also considered it at least doubtful whether such expenses could be said to be proximately caused "by the improper navigation or management of the ship" within the meaning of the same section, a doubt which, if well founded, would afford an additional reason for holding the section inapplicable. It is right that I should here mention two points concerning this decision. First, it appears from the report that LANGTON, J., was erroneously informed by counsel that s. 9 of the Act of 1897 applied to the place at which the casualty there in question took place, and consequently referred to it in his judgment as applicable, though without expressing any view as to the scope or effect of the right of limitation thereby conferred. Secondly, LANGTON, J., does not appear to have had cited to him the case of *Dee Conservancy Board v. McConnell* (2), in which it was held that the statutory rights conferred on a conservancy authority by s. 56 of the Act of 1847 were not available against owners who had abandoned a wreck, and, therefore, ceased to be owners, before the expenses of raising the wreck were incurred, but that where a vessel, through negligence, has sunk in such a position as to cause an obstruction in a navigable channel maintained by a conservancy authority, that authority, independently of any statutory rights it may have, has a right at common law to recover as damages the reasonable cost of removing the obstruction.

In the present case WILLMER, J., after rejecting the contention of the defendants to the effect that, even if, contrary to their submission, the expenses in question would otherwise have been a proper subject of limitation, the telephone conversations and letters to which I have referred constituted a contract under which the plaintiffs agreed to pay them in full, continued thus:

"The question to be decided, therefore, comes to this. Assuming that the canal company, in raising the wreck of the Stonedale No. 1, were, in the contemplation of both parties, acting under the statutory powers conferred by s. 32 of the Act of 1936, as I am satisfied they were, are they entitled to

recover the expenses in full, notwithstanding that the sinking of the *Stonedale* No. 1 was caused by the improper navigation of the plaintiffs' vessels? The defendants say that the improper navigation of the plaintiffs' vessels is an irrelevant consideration, for it was the plaintiffs' failure to remove the obstruction, and not the negligent making of the obstruction, which was the cause of the expenses being incurred by the canal company, and which, therefore, forms the basis of their claim. The plaintiffs, on the other hand, contend that since the decision of the Court of Appeal in *Dee Conservancy Board v. McConnell* (2) it is impossible to escape the conclusion that the cost of removing this wreck was a loss or damage resulting directly from the improper navigation of the plaintiffs' vessels, and, as such, clearly within the wide words of s. 1 of the Merchant Shipping Act, 1900. They contend, furthermore, that, having regard to the express words of s. 3 of the Act, it can make no difference whatsoever whether their liability is regarded as arising at common law or (as the defendants say) under the defendants' private Act. For myself, I confess that I find the logic of the plaintiffs' argument difficult to resist, and if the matter were *res integra* I should be disposed to hold that the expenses here in question were (a) within the words 'loss or damage . . . caused to property or rights', and (b) were caused 'by reason of the improper navigation or management' of the plaintiffs' vessels. But I find myself quite unable to distinguish *The Millie* (4), which is a direct decision to the contrary. As LANGTON, J., himself said in that case, the point to be decided is 'a nicely balanced one.' I bear in mind that in any limitation suit a heavy burden is upon the plaintiffs to establish their right to relief. In this case they must, in my view, accept the added burden of satisfying the court that *The Millie* (4) was wrongly decided. I find myself unable to say that the plaintiffs have discharged this burden to my satisfaction. If *The Millie* (4) was indeed wrongly decided, I think that it is for the Court of Appeal, and not for me, to say so. For myself, I do not feel able to do other than follow the decision of LANGTON, J., and to hold that the plaintiffs have not made out their claim to limit their liability as against the canal company. In my judgment, therefore, the action fails so far as the canal company is concerned."

Counsel for the plaintiffs has argued before us that *The Millie* (4) was wrongly decided and should be overruled, and, consequently, that the judgment of WILLMER, J., in which he merely followed *The Millie* (4) against his own inclination, should be reversed on grounds which can, I think, fairly be summarised as follows: (i) Section 32 (2) of the Act of 1936 does not expressly or by necessary implication exclude the application of s. 1 of the Act of 1900 or s. 9 of the Act of 1897. (ii) Therefore, one or other of those limitation provisions must be applied to the liability here in question, provided it is a liability of a kind to which that provision extends. (iii) Inasmuch as the sinking of the barge and consequent obstruction of the canal was due to the negligence of the plaintiffs' servants, the defendants could, quite apart from s. 32 (2), have recovered from the plaintiffs at common law the damages suffered by the defendants in consequence of that negligence, including the reasonable cost of raising and removing the barge: *Dee Conservancy Board v. McConnell* (2); *The Ella* (8). Those damages would clearly have been limited by virtue of s. 1 of the Act of 1900, for the plaintiffs' liability to pay them would have been a liability to damages in respect of "loss or damage" to the defendants' rights as statutory proprietors of the canal, which must necessarily include a right to the unobstructed use of the canal. (iv) Thus, where a vessel is sunk or stranded in the canal through the negligence of those in charge of her, the sum recoverable by the defendants as expenses is nothing more nor less than a sum of damages recoverable at common law independently of s. 32 (2) of the Act of 1936, and that section in such a case merely provides a statutory method of recovering the amount without altering its

essential character as a sum of damages. It follows that, where the sinking or stranding is due to the negligence of those in charge of the vessel not involving the actual fault or privity of the owners, the limitation provided for by s. 1 of the Act of 1900 applies to the liability under s. 32 (2) just as it would apply to a claim for the like amount as damages at common law. In other words, where the sinking or stranding occurs in circumstances giving rise to a common law claim, s. 32 (2) does not displace the limitation provided for by the Act of 1900, which applies just as it was held in *The Countess* (1) to be applicable notwithstanding the special provision made by s. 94 of the Mersey Dock Acts Consolidation Act, 1858, for the recovery of damage to dock property

“through the misconduct negligence or default of the master of any vessel or any other person on board of any vessel.”

- B It is true that the Act of 1900 was later in date than the section considered in *The Countess* (1), while it is earlier in date than s. 32 (2) of the Act of 1936, but this makes no real difference, since s. 32 (2) does little more than reproduce the substance of enactments which were in force before the passing of the Act of 1900.
- C (v) The fact that a statute imposes an absolute liability on the owners of a vessel irrespective of negligence is no ground for excluding limitation in cases in which the damages claimed are found to be due to improper navigation not involving the actual fault or privity of the owners. For example, the owner of a vessel is answerable under s. 74 of the Act of 1847 for damage done by such vessel without any negligence whatever: see *The Mostyn* (9); yet it can hardly be doubted (though there seems to be no reported decision on the point) that an owner is entitled to limit his liability under that section by virtue of s. 1 of the Act of 1900, if in the particular case the damage is shown to have been caused by improper navigation not involving his actual fault or privity: see s. 3 of the Act of 1900, which expressly provides that the Act is to apply

“... whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act.”

- E (vi) In any case, s. 9 of the Act of 1897 provides for limitation of liability in respect of injury or damage caused to the relevant portion of the canal or the banks locks or works comprised in such portion, not confining the limitation provided for to cases of improper navigation, but merely requiring that there should be no actual fault or privity on the part of the owners of the vessel concerned. The language of s. 9 is wide enough to include injury or damage in the shape of obstruction of the canal, and its effect is to confer a right to limitation with respect to all claims for expenses under s. 32 of the Act of 1936 irrespective of negligence.

- F These arguments are not without force, but I have come to the conclusion that they should be rejected for the following reasons. As to s. 9 of the Act of 1897, it is to be observed that in *The Towerfield* (3) the words

“any damage done by such vessel . . . to the harbour, dock, or pier, or the quays or works connected therewith”

- G in s. 74 of the Act of 1847 were held by LORD PORTER ([1950] 2 All E.R. 426), LORD NORMAND (ibid., 435), LORD MORTON OF HENRYTON (ibid., 439) and LORD RADCLIFFE (ibid., 443) to be confined to physical damage, to what LORD NORMAND called (ibid., 435) “the opera manufacta of the undertaking” and not to include damages for loss of the use of the harbour in question while the channel was blocked. We were invited by counsel for the plaintiffs to treat the passages expressing this view as merely obiter. It is not clear to me that they were, as the point appears to have been argued, but, obiter or not, I think it would be wrong for this court, in face of these four concurrent opinions, to place a different construction on the closely similar language of s. 9 of the Act of 1897. In my view, therefore, we should follow WILLMER, J., in treating s. 9 as confined to

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physical injury or damage to the canal and the works comprised in it and not as extending to the cost of removing a sunken or stranded vessel which has done no physical damage, but has merely become by reason of its sinking or stranding an obstruction to the canal.

It follows that the plaintiffs, in order to succeed, must bring the case within s. 1 of the Act of 1900. That section is confined to liability to damages, and although the range of damages to which it extends includes damages in respect of any loss or damage to property or rights of any kind caused by the improper navigation or management of a vessel, provided that there is no actual fault or privity on the part of the owners, no claim which is not a claim to damages can fall within it. I agree that, if a vessel was sunk or stranded in the canal through the negligence of those in charge of her, and the defendants brought an action for damages at common law in respect of the obstruction, her owners (provided there was no actual fault or privity on their part) could limit under the Act of 1900. The position may well be the same where a statute (e.g., s. 74 of the Act of 1847) imposes, irrespective of negligence, a liability in damages on the owners of a vessel which does damage to the canal, provided that in the particular case the necessary conditions of improper navigation and absence of actual fault or privity on the part of the owners can be established.

But a close consideration of s. 32 of the Act of 1936 leads me to the conclusion that the liability of the owner of a sunken or stranded vessel under that section to pay the expenses incurred by the defendants in and about the raising and removal of the vessel is not a liability to damages at all. The object of the section is to enable the defendants in their own interests and in those of all users of the canal to secure that their navigation is kept clear of obstructions in the shape of sunken, stranded or abandoned vessels and to cause this to be done either by and at the expense of any such vessel or at the option of the owner by the defendants at his expense. In the latter case the expenses incurred by the defendants, so far as not met by a sale of the salvaged vessel, are, according to the terms of the section, expressed to be recoverable, not as damages, but as a civil debt. It should be borne in mind that, when the defendants put into operation their powers under s. 32 in any given case, the vessel concerned, unless and until it is raised, is from the owner's point of view a total loss, as well as being from the defendants' point of view an undesirable obstruction to their canal. The operation of raising the vessel may, or may not, be beneficial to the owner according to the value of the vessel when raised as compared with the cost of raising it. If the cost of raising the vessel exceeds its value when raised, the effect of the section (whether the owner does the work himself or leaves it to be done by the defendants at his expense) is to put the owner so much more out of pocket than he would have been if the vessel had been left where it was. On the other hand, if the cost of raising the vessel is less than its value when raised, the owner will have profited by the transaction. I find difficulty in seeing how the statutory obligation placed by s. 32 on the owner concerned either to recover his own vessel himself at his own expense or to pay the defendants their expenses of recovering it, with results that may, or may not, be to his financial advantage according to the circumstances of the particular case, can be classed as a liability to pay damages.

The option conferred on the owner by s. 32 (3) is, to my mind, important. Under that sub-section, before dealing with the vessel themselves, the defendants, except in case of emergency, must give the owner twenty-four hours' notice of their intention to act, whereupon the owner has twelve hours within which to choose whether he will do the work himself or leave it to be done by the defendants at his own expense. If he does the work himself, the expenses he incurs are clearly not damages. He pays no damages to the defendants or anyone else. He simply pays his own expenses incurred by himself in recovering his own property, it may very well be to his own financial advantage. If he elects to leave the raising to be done by the defendants at his expense, and the defendants

proceed to do it, the expenses incurred by the defendants in so doing, which the owner becomes liable to pay, do not, to my mind, assume any different character. They are still expenses of raising the owner's own vessel which, on his electing not to do and pay for the work himself, the defendants have by statutory authority incurred on his behalf. Supposing the vessel when raised is worth £10,000 and the expenses incurred by the defendants in raising it amount to £2,000, the owner will have profited by the good offices of the defendants to the extent of £8,000, either by the recovery of the vessel itself or (in the event of a sale, which the owner is entitled under sub-s. (2) to demand) in the shape of the surplus proceeds of sale. Bearing in mind that, at the time the section is brought into operation, the vessel is lying useless in the canal, I find it impossible to hold that the expenses payable by the owner in such a case are in the nature of damages sustained by the defendants, and not merely expenses incurred by the defendants on the owner's behalf in recovering his own property for his own benefit. If that is so when the raising benefits the owner, I fail to see how the liability for the expenses incurred can alter its character and become a liability in damages because in the result the costs of raising in the particular case turn out to exceed the value of the vessel when raised, a circumstance which, in the event of unforeseen difficulties occurring in the raising operation, or the damage sustained by the vessel being found on raising and surveying her to be greater than was anticipated, might well not emerge until a late stage in the operation, perhaps not until after its completion. Accordingly, s. 32 does not, in my opinion, impose a liability in damages to which limitation can be applied.

I would be disposed to go further and hold that the terms of s. 32 are so far inconsistent with limitation of liability as to exclude it by necessary implication. Even if the views expressed above as to the effect of the section do not command universal approval, it is, at all events, plain that the section is not concerned with damages at large, but in each case with specifically defined expenditure, namely, the expenses actually incurred in and about the raising of a particular vessel. That in itself sets a limit to the liability in question. Then the section makes it clear that the liability thus defined and limited is to be met in full by the owner, for sub-s. (2) provides that the defendants may recover *all* expenses incurred. The same sub-section empowers the defendants to sell the vessel, and reimburse themselves for any such expenses, and hold any surplus in trust for the owner. In the event of that power being exercised, and of a surplus resulting, I find it difficult to see how limitation could be applied so as to entitle the owner to recover from the defendants any part of the expenses so deducted by them. Furthermore, there is the option conferred on the owner to do the work himself at his own expense. Counsel for the plaintiffs does not contend that, on exercising the option, the owner can claim any limitation on the expenses he himself incurs. If limitation applies in the event of the owner electing to leave the raising to the defendants, while the owner has to pay the expenses in full if he elects to do the work himself, the option becomes no more than a trap, and no prudent owner would ever exercise it. I think the option affords strong ground for holding that limitation is by necessary implication excluded, owing to the absurd results which would otherwise ensue. Finally, limitation would mean either that the owner could limit even in a case in which the value of the vessel when raised exceeded the full cost of raising by no matter how much, or else that limitation would fall to be applied or excluded according to the financial result of the operation. The former alternative, which would enable an owner to recover a valuable vessel at the expense of the defendants to the extent of the difference between the full and the limited cost of raising it, I reject as repugnant to justice and common sense, while the latter alternative seems to me impossible.

If there was no other ground for holding s. 1 of the Act of 1900 inapplicable, I do not think it would be right to hold it excluded merely on the ground that its application would produce the inequitable result of placing an owner, whose

vessel has been sunk or stranded by the negligence of his servants, in a better position than one who has suffered a similar casualty without any negligence at all on the part of those in charge of her; for this seems to be a necessary product of limitation in all cases where an unqualified liability irrespective of negligence is imposed by statute on the owner of a vessel doing damage—for instance, in cases under s. 74 of the Act of 1847, to which it seems probable that s. 1 of the Act of 1900 applies, given the necessary element of improper navigation not involving the actual fault or privity of the owner. But I am fortified in the view I have formed of the effect of s. 32 by the circumstance that it does avoid this inequity.

As already mentioned, LANGTON, J., founded his decision in *The Millie* (4) partly on a doubt whether there was any direct causal connection between the improper navigation of the *Millie*, to which her sinking was due, and the expenses of raising her claimed under s. 32 of the Act of 1936. I doubt whether this line of reasoning can be maintained consistently with *Dee Conservancy Board v. McConnell* (2) which, as I have said, does not appear to have been cited to LANGTON, J., and I prefer to base my decision on the ground that, for the reasons I have endeavoured to state, I do not think expenses incurred in raising a vessel under s. 32 are in the nature of damages.

Apart from *The Millie* (4) we were not referred to any reported case in which a claim for expenses under s. 56 of the Act of 1847 or under s. 32 (2) of the Act of 1936 has been held to be subject to limitation under s. 1 of the Act of 1900. Nor, on the other hand, were we referred to any report of any actual decision the other way. But it is, I think, significant that in *The Countess* (1), both at first instance and in this court, and in the House of Lords, it was on all sides taken for granted that the expenses of raising the offending vessel under s. 7 of the Mersey Dock and Harbour Board Act, 1912, were recoverable by the dock board in full without any question of limitation. Thus, ATKIN, L.J., said ([1922] P. 60):

"The limitation suit does not in any way affect the defendants' rights to these expenses, and the sole question for determination is whether the statutory conditions have been complied with."

I am also impressed by the passage to which my Lord has referred from the judgment of SCOTT, L.J., in *The Brabo* (7) ([1947] 2 All E.R. 370), where that great authority on this branch of the law took it as well known that limitation did not apply to the costs of wreck removal under statutory powers such as those discussed in the present case.

Accordingly, for the reasons I have endeavoured to state, while I cannot wholly accept the grounds on which LANGTON, J.'s decision in *The Millie* (4) was based, I think the conclusion to which he came was the right one. I have only to add that I agree with WILLMER, J., in thinking that the letters and telephone conversations mentioned earlier in this judgment cannot fairly be held to amount to a contract excluding any right to limitation which the plaintiffs would otherwise have had. But, as, in my view, they had no such right, my finding in favour of the plaintiffs on this issue cannot affect the result, which, in my judgment, is that this appeal fails and should be dismissed.

HODSON, L.J.: I have had the opportunity of reading in advance the judgments which have been delivered by SINGLETON and JESKINS, L.J.J., and I agree with their conclusions and with their reasons, and have nothing to add.

Appeal dismissed.

Solicitors: *Batsons & Co.*, Liverpool (for the plaintiffs). *Hill Dickinson & Co.*, Liverpool (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WATERMAN v. WALLASEY CORPORATION.
HESKETH v. SAME.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, JJ.),
April 27, 1954.]

Shop—Sunday closing—Garage—Lawful opening for sale of petrol, oil and motor accessories—Information given about motor cars—Trial run in car—Shops Act, 1950 (c. 28), s. 47.

W. and H. were garage proprietors and were entitled, under the Shops Act, 1950, sched. V (1) (h), to keep their premises open on Sundays for the sale of motor accessories, petrol, and oil. On Sunday, Aug. 2, 1953, the manager of W.'s garage allowed prospective customers to inspect a motor car which was displayed for sale. On the same day an employee of H. took prospective customers out for trial runs. On summonses against W. and H., charging that each had failed to close his shop on a Sunday, contrary to s. 47 of the Shops Act, 1950,

HELD: the purpose of the Act was to protect shop assistants, and as these shops were lawfully open, it was stretching the Act too far to say that an offence was committed merely because inquiries were made about a motor car which was exposed for sale, and, therefore, the summons against W. must be dismissed, but taking people for demonstration runs in a motor car made a material difference in the sense that there was some evidence from which the conclusion could reasonably be drawn that the shop was not closed for the selling of cars on Sunday as s. 47 required, and, therefore, H. was guilty of an offence under the section.

FOR THE SHOPS ACT, 1950, s. 47 and sched. V (1) (h), see HALSBURY'S STATUTES, Second Edn., Vol. 29, pp. 229, 253.

Cases referred to:

(1) *Willesden Urban District Council v. Morgan*, [1915] 1 K.B. 349; 84 L.J.K.B. 373; 112 L.T. 423; 79 J.P. 166; 24 Digest 933, 222.

(2) *London County Council v. Freeman, Hardy & Willis*, (1913), 77 J.P. Jo. 245.

CASES STATED by Wallasey justices.

On Oct. 28, 1953, at a court of summary jurisdiction an information was preferred by the respondents, Wallasey Corporation, against the appellant, Waterman, charging that he, being the occupier of a shop in which the business of a dealer in used and second-hand motor vehicles was carried on, did not close the said shop for the serving of customers on a Sunday, contrary to s. 47 and s. 59 (1) of the Shops Act, 1950. A similar information was preferred against the appellant, Hesketh.

On the hearing of the informations the justices found the following facts. Both appellants were dealers in used and second-hand motor vehicles. Their premises were normally open seven days a week for the sale of petrol, oil and motor accessories. On Sunday, Aug. 2, 1953, at about 11.55 a.m., a man, woman and child entered the premises of the appellant Waterman, and, with the manager of the garage, walked over to a car and examined it, and a discussion took place. The woman opened the door of the motor car and examined its interior. No money was seen to pass. At about 12.05 p.m. another man and woman, with the said manager, inspected the car and a discussion took place lasting some minutes. The manager opened the rear off-side door of the car to allow the woman to enter and to sit in the rear seat. No money passed, and the man and woman walked away. On the said Sunday a man entered the premises of the appellant Hesketh, examined cars which were exposed for sale, and discussed several of the cars with one of the employees. About ten minutes later a motor cyclist rode up, dismounted, and examined the vehicles. The motor cyclist was thereafter taken by one of the employees for a drive in one of the cars. Another employee also demonstrated cars to a man and a woman

and drove them away from the premises in a car which had been exposed for sale. No sale of any vehicle was seen to be effected on that date.

It was contended by the appellants (i) that each of the said premises could lawfully be opened as a shop on the material date by reason of sched. V, para. 1 (h), to the said Act, and that the appellants and their employees could lawfully be present for the purpose of serving customers; (ii) that there was no serving of customers within the meaning of s. 47 of the Act in connection with the appellants' business as dealers in used and second-hand motor vehicles, and that the mere display, inspection, and demonstration of such vehicles did not amount in law to the serving of customers; (iii) that the Act was designed to prevent and render unlawful sales to customers in a shop on Sunday, but did not render unlawful the transactions in question, which were not sales. It was contended by the respondents (i) that, if the appellants or any of their employees were on their respective premises and were available and ready to serve in connection with the appellants' businesses as dealers in used or second-hand motor vehicles, the offence charged was committed; (ii) that, in view of the actions of the appellants' employees, the premises were not closed for the serving of customers within the meaning of the Act. The justices were referred to *Willesden Urban District Council v. Morgan* (1) and *London County Council v. Freeman, Hardy & Willis* (2).

The justices were of the opinion that the contentions of the respondents were correct, found the appellants guilty, and imposed a fine of £3 each.

G. J. Bean for the appellants.

Nicklin for the respondents.

DONOVAN, J.: Section 47 of the Shops Act, 1950, provides:

"Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday: Provided that a shop may be open for the serving of customers on Sunday for the purposes of any transaction mentioned in sched. V to this Act",

and in sched. V there is mentioned "1. The sale of . . . (h) aircraft, motor, or cycle supplies or accessories." The appellant, Waterman, kept a shop which was lawfully open on Sunday for the sale of motor accessories. The justices found that in the window motor cars were displayed for sale with the prices on them. There were two instances of what may have been prospective customers being allowed by the appellant's employees to examine a car, a discussion followed, but no sale took place and no money passed. What in fact happened was that somebody interested in a car asked, and received answers to, questions about it. On those facts it was contended that Waterman had infringed s. 47 by not closing his shop for the service of customers on Sunday, the precise question being: Was this shop closed though there were customers there who might want to buy a motor car? The question is nice, but we think that the shop was so closed. No sale was effected.

The purpose of the Act is to protect shop assistants, but, if a shop may lawfully be open, as this one might, and someone inspects a motor car which can lawfully be sold the next day, in our view, it is stretching the Act too far to say that the shop is open for the serving of customers who wish to buy a car. In the course of the argument the case was put of a chemist's shop which is open on a Sunday for the sale of medicine: if somebody goes in for a bottle of aspirin and is shown a container and how it works, it seems to us that it is extravagant to say that the shop is open for the sale of containers or for the service of customers who may wish to buy a camera. There is no evidence, in our view, which justified the justices in saying that this shop was open merely because someone came along and asked about a car. We think on the facts of the present case and dealing only with whether or not a shop may be lawfully open, that the justices adopted too

narrow and rigorous a construction of s. 47, and we think this conviction must be quashed.

The case of the appellant, Hesketh, is different in that people were taken for demonstration runs in a car. We think that that fact makes a material difference in the sense that it was some evidence from which the justices could reasonably draw the conclusion that the shop was not closed on Sunday as s. 47 requires. That being so, the appeal by Hesketh is dismissed.

LORD GODDARD, C.J.: I agree.

HILBERY, J.: I also agree.

Orders accordingly.

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the appellants); *Chamberlain & Co.*, agents for *A. G. Harrison*, town clerk Wallasey (for the respondents).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

R. v. MOORE.

[LEEDS ASSIZES (Pearson, J.), March 15, 16, 1954.]

Criminal Law—Evidence—Wife—Competence as witness—Husband charged with arson of wife's property—Married Women's Property Act, 1882 (c. 75), s. 12—Criminal Evidence Act, 1898 (c. 36), s. 4 (1).

On a charge against a husband of arson of his wife's property the evidence of the wife is admissible under s. 12 of the Married Women's Property Act, 1882 and s. 4 (1) of the Criminal Evidence Act, 1898.

AS TO EVIDENCE OF WIFE OF DEFENDANT, see HALSBURY, Halsbury's Laws of England, Vol. 9, pp. 217-220, paras. 304-306; and FOR CASES, see DIGEST, Vol. 14, pp. 450-453, Nos. 4757-4805.

Case referred to :

(1) *R. v. Creamer*, [1919] 1 K.B. 564 ; 88 L.J.K.B. 594; 120 L.T. 575; 14 Cr. App. Rep. 19; 15 Digest 974, 10,898.

TRIAL on indictment.

At Leeds Assizes on Mar. 15, 1954, before PEARSON, J., and a jury, Harry Moore was charged on an indictment, by the first count with arson, contrary to s. 2 of the Malicious Damage Act, 1861, the particulars being that on Nov. 20, 1953, he maliciously set fire to a certain dwelling-house, namely, 293, Mount Street, Bradford [the property of and] in the occupation of Annie Moore, James Moore, Ann Moore and Edith May Moore being therein; by the second count with arson, contrary to s. 3 of the Act, the particulars being that on the said date he maliciously set fire to the said dwelling-house with intent to injure or defraud; and by the third count with arson, contrary to s. 7 of the Act, the particulars being that on the said date he maliciously set fire to certain curtains [the property of the said Annie Moore] in the said dwelling-house in such circumstances that if the building had thereby been set fire to the offence would amount to felony. The words in brackets were added by way of amendment to the indictment after HIS LORDSHIP'S ruling on the admissibility of the wife's evidence. When the wife, Annie Moore, was called to give evidence counsel for the defence submitted that she was not a competent witness against her husband and the case is reported on this point only.*

Snowden for the Crown.

Payton for the defendant.

* After the ruling of PEARSON, J., on this point, the witness on being re-called declined to give evidence. The defendant was found Guilty on the first count.

PEARSON, J.: In this case there is a preliminary question as to the admissibility of the evidence of Mrs. Moore, the wife of the accused, as a witness for the prosecution. She was called as a witness before the magistrates so that her deposition is available. The prosecution is for arson, and the charges are under s. 2, s. 3 and s. 7 of the Malicious Damage Act, 1861. It is argued on behalf of the defence that her evidence is not admissible because she is neither a competent nor a compellable witness. The prosecution, while not contending or conceding that her evidence is necessarily essential to their case, ask that the question may be decided. I am invited to assume it is common ground that the house property which was either set on fire or was in danger of being set on fire was in a sense the property of Mrs. Moore because she held the lease or tenancy of it, so that the house would be her leasehold property. The starting-point is the general rule which I take to be correctly set out in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, 33rd ed., p. 497:

"At common law, as a general rule, the husband or wife of a prisoner is not a competent witness for the Crown *against* the prisoner."

From that general rule there are, in the first place, certain exceptions at common law which I take to be correctly set out in the same edition of ARCHBOLD at pp. 497 and 498, but none of those exceptions is relied on here. There are, however, certain statutory exceptions under s. 4 (1) of the Criminal Evidence Act, 1898, as it has been amended by subsequent Acts, and reliance is placed by the prosecution on either or both of two of those as being applicable to this case.

The first is s. 12 of the Married Women's Property Act, 1882, as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 5 and scheds. I and II, the main provision of which is this:

"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own . . . property, as if she were a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

In my view, the question falls to be decided mainly on the wording of that clause. The criminal proceedings here are to punish an alleged act of arson in respect of the wife's own property, as I assume it to be, and quite clearly, unless the scope of the words is restricted by some later part of the section, the words "have . . . the same remedies and redress by way of criminal proceedings for the protection and security of her own . . . property" are wide enough to cover this case. Obviously, her property requires to be secured against arson as well as against other offences.

It is contended by the defence that the section does not apply because this prosecution was not by Mrs. Moore, but on the facts before me that appears to be incorrect, because I have a recognizance by Mrs. Moore, the condition being that she is to appear at the assizes and prefer or cause to be preferred a bill of indictment against the accused in respect of the offence in question, which is arson. So that on the facts it seems that this is a prosecution brought by her. It is also contended that the scope of this provision is restricted to offences of larceny and, possibly, other offences under the Larceny Act, 1916. The grounds relied on for that contention on the part of the defence are, in the first place, derived from further words in this section:

"In any indictment or other proceeding under this section it shall be sufficient to allege such property to be [the wife's] property . . ."

That is not, in fact, alleged in terms in this present indictment, but that can be cured by an amendment. Although the indictment does not use the word

"property", it does refer to this house being "in the occupation of Annie Moore." Then the section goes on:

" . . . and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife."

The defence point out that the wording there is "unless such property shall have been wrongfully taken by the husband", which certainly tends to suggest that the subject-matter finally contemplated is an offence under the Larceny Act, or some similar offence, because the wording is "shall have been wrongfully taken" and not "shall have been wrongfully taken or set on fire". That is an argument which, I think, has some merit, but I do not think one can assume that the scope of the exception contained in the proviso is necessarily the same as the scope of the main clause. *Prima facie*, one would expect it to be rather less wide than the scope of the main clause. My view on that is that the main clause should have its proper effect according to the meaning of the words and should, therefore, include this case of arson.

The other matters relied on in support of that contention are, first, s. 36 of the Larceny Act, 1916, which refers only to offences under that Act, but the answer seems to me to be that any section of the Larceny Act, 1916, could refer only to offences under that Act. The point would have been much stronger there if there had been some other Act relating to arson which did not contain a provision similar to s. 36 of the Larceny Act, 1916, but I am not aware of any such Act relating to arson and no such Act has been cited to me. The present action is brought under the Malicious Damage Act, 1861. Secondly, a case was cited to me, namely, *R. v. Creamer* (1), and a passage was cited of the judgment of the court, which in terms refers only to larceny. DARLING, J. ([1919] 1 K.B. 569) says:

"At common law a wife could not commit larceny of her husband's property, but by s. 12 and s. 16 of the Married Women's Property Act, 1882, it was for the first time made possible to prosecute a wife for stealing her husband's goods. Those sections have been reproduced in s. 36 of the Larceny Act, 1916, which provides that no proceedings under the Act shall be taken by a husband against his wife while they are living together, nor while they are living apart as to any act done by the wife while they were living together, unless the property has been wrongfully taken by the wife when leaving or deserting or about to leave or desert her husband."

But that case was concerned with an indictment for receiving certain money well knowing it to have been stolen, and I do not think that passage in the judgment of the court contains any implication that the provision of s. 12 of the Married Women's Property Act, 1882, was necessarily limited to larceny and kindred offences. There was also cited to me a passage from *EVERSLEY ON DOMESTIC RELATIONS*, 6th ed., p. 171—and I understood a similar passage would be found in the earlier editions—where it is said:

"A special exception was created by the Married Women's Property Act, 1882, and the Married Women's Property Act, 1884, enabling husband or wife to give evidence against each other, on the prosecution of the one by the other for larceny of his or her property committed on desertion."

That sentence would certainly seem to convey an implication that the scope of the provision is limited to matters of larceny only, but it is only a short sentence,

and, at any rate, s. 36 of the Act of 1916 would apply to more than cases of larceny as such. Once more, I think one should come back in the end to the wording of the section itself. As I have said, the main proviso primarily governs the decision, and I think this case falls within that main provision.

There is a further question raised by the defence under s. 12 of the Married Women's Property Act, 1882. The proviso states

" . . . that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together . . . "

The contention of the defence was that at the material time these people were living together, or, at any rate, that it had not been shown that they were at that time separated. On the evidence which is now before me, I hold that the consortium had ceased and, therefore, that part of the proviso is not applicable.

Secondly, the prosecution rely on another statutory exception to the general rule I have mentioned, and that is under sched. 1 to the Children and Young Persons Act, 1933, because the Criminal Evidence Act, 1898, as amended by s. 15 of the Act of 1933, refers to that schedule. Schedule 1 to the Act of 1933 mentions a number of offences under various sections, and then there is a general clause at the end: " Any other offence involving bodily injury to a child or young person ". The argument is that the charge in the present indictment is that the accused set fire to a certain house in which three children were at that time. It was suggested, therefore, that the offence charged was one which involved bodily injury to a child or young person. The wording of that last item I have mentioned tends to suggest that, perhaps, it should be read to some extent *eiusdem generis* with the offences which have been previously specified. I have looked at the sections referred to, in so far as they can be found, in ARCHBOLD, but they cannot all be found there, so I did not get much help from those other sections one way or the other. I, therefore, think it is reasonable to consider whether, within the reasonable meaning of those words, the offence charged does involve " bodily injury to a child or young person ". It seems to me that the answer is " No ", and, under the first count I hold that the charge there is not one which involves " bodily injury to a child or young person " within the meaning of that schedule.

For those reasons, under s. 12 of the Married Women's Property Act, 1882, and s. 4 (1) of the Criminal Evidence Act, 1898, I hold that the evidence is admissible.

Solicitors: W. H. Leatham, town clerk, Bradford (for the Crown); H. Dunsbury, Bradford (for the defendant).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

WHALLEY v. BRIGGS MOTOR BODIES, LTD.

[LEEDS ASSIZES (Streatfeild, J.), March 4, 1954.]

Factory—Protection of eyes—Operation in factory by independent contractor using implement moved by mechanical power—No duty owed to contractor's employee by occupier of factory—Factories Act, 1937 (c. 67), s. 49, s. 139—Protection of Eyes Regulations, 1938 (S.R. & O., 1938, No. 654), schedule.

A By s. 49 of the Factories Act, 1937: "In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process".

B The plaintiff was employed by H. who had contracted with the defendants to make fresh bed-plates at their factory. While the plaintiff was breaking up old concrete by operating a pneumatic pick which was either the property of or hired by H. some of the broken concrete flew up and injured his left eye. No goggles had been provided for the plaintiff by either H. or the defendants. The plaintiff subsequently received payments of workmen's compensation from H. The plaintiff then brought an action against the defendants alleging negligence and breach of statutory duty under s. 49 of the Act and the Protection of Eyes Regulations, 1938, made under that section and applicable to the process in which the plaintiff was engaged.

D HELD: (i) the processes referred to in s. 49 were the processes of the occupier of the factory and the words "persons employed in the process" refer to employees of the occupier; in the present case the processes were not the processes of the defendants nor was the plaintiff their employee; and, therefore, the defendants had a complete answer to the action.

E (ii) the plaintiff being employed by H. in connection with the pick which was either owned or hired by H., so far as respected an offence arising out of its use, s. 139 of the Factories Act, 1937, was fatal to the plaintiff's claim as by that section H. was deemed to be the occupier of the factory and not the defendants.

(iii) the plaintiff having recovered workmen's compensation from H. and knowing the nature of the payments, his remedy against the defendants was barred by s. 30 of the Workmen's Compensation Act, 1925.

F Cases referred to:

- (1) *Kerr v. Cook & Harland & Wolff, Ltd.*, (1953), 103 L.Jo. 187.
- (2) *Whineup v. Joseph Woodhead & Sons (Engineers), Ltd.*, [1951] 1 All E.R. 387; 115 J.P. 97; 2nd Digest Supp.
- (3) *Lavender v. Diamints, Ltd.*, [1949] 1 All E.R. 532; [1949] 1 K.B. 585; [1949] L.J.R. 970; 2nd Digest Supp.
- G (4) *Whitby v. Burt, Boulton & Hayward, Ltd.*, [1947] 2 All E.R. 324; [1947] K.B. 918; [1947] L.J.R. 1280; 177 L.T. 556; 2nd Digest Supp.
- (5) *Olsen v. Magnesium Castings & Products, Ltd.*, [1947] 1 All E.R. 333; 2nd Digest Supp.
- (6) *Griffiths v. Evans*, [1953] 2 All E.R. 1364.
- H (7) *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639; 72 L.J.K.B. 857; 89 L.T. 318; 34 Digest 495, 4087.
- (8) *Page v. Burtwell*, [1908] 2 K.B. 758; 77 L.J.K.B. 1060; 99 L.T. 542; 1 B.W.C.C. 267; 34 Digest 495, 4088.
- (9) *Huckle v. London County Council*, (1910), 27 T.L.R. 112; 4 B.W.C.C. 113; 34 Digest 495, 4090.
- (10) *Aldin v. Stewart*, 1916 S.C. 13; 34 Digest 495, l.
- (11) *Reid v. Stevenson*, 1928 S.C. (Ct. of Sess.) 799; 21 B.W.C.C. 576; Digest Supp.

ACTION for damages.

The plaintiff alleged that the defendants occupied premises at Doncaster which constituted a factory for the purposes of the Factories Act, 1937 and thus the defendants, by their defence, admitted. The plaintiff further alleged that on July 29, 1947, he was employed in the factory in breaking up a concrete floor by means of a portable pneumatic pick when fragments of concrete flew into both his eyes and injured him owing to the negligence of the defendants and breach of their statutory duty under the Protection of Eyes Regulations, 1938. In addition to denying these further allegations the defendants alleged contributory negligence by the plaintiff, and said that the plaintiff had recovered compensation under the Workmen's Compensation Act, 1925, from his employer, T. A. Hanson, in respect of the alleged injury, and, by reason of s. 30 of that Act, was not entitled to recover damages in respect thereof.

Drabble, Q.C., for the plaintiff.

Veale, Q.C., and *G. N. Black* for the defendants.

STREATFEILD, J.: On July 29, 1947, the plaintiff sustained an accident in the course of his work as the result of which he has lost his left eye. On Apr. 10, 1953, he issued a writ against the defendants claiming damages in respect of that injury.

The plaintiff was employed by a building contractor of the name of Hanson who had a contract to make fresh bed-plates for the machinery at the defendants' premises near Doncaster where they carry on business as the makers of motor car bodies. Hanson and his employees, including the plaintiff, had to break up some of the existing concrete before it could be renewed in order to make bed-plates. On July 29, 1947, the plaintiff was operating a pneumatic pick which was either the property of or was hired by his own employer, Hanson. He was working it for some weeks before this date. He tells me that he had never worn goggles when he did so, and, although he had asked his employer for them, they had not been forthcoming. On this particular date when he was working his employer's pick at the defendants' premises some of the broken concrete flew up, blinded him for the time being in both eyes, and caused this injury to his left eye. He was off work for eleven weeks following the accident. He then had to wait his turn to undergo an operation. He went back to work for some five months, but in the meanwhile he had drawn from his employer, Hanson, weekly payments which he described himself as being the compensation of workmen in lieu of wages, a slightly longer appellation than the well-known term of workmen's compensation. I am perfectly satisfied that the plaintiff had heard about workmen's compensation, whether or not he was aware of his alternative legal rights, and he received weekly payments for which he signed. The receipts which he signed were in no way qualified to indicate that his acceptance of workmen's compensation was without prejudice. He went on working for a time when, of course, his compensation ceased. He had four operations and during the time when he was off work he continued to receive his workmen's compensation. In 1949 the efforts to save the eye having failed, he had to have it removed in order to save the possibility of the other eye being affected. Once more when he was off work he received workmen's compensation, and it appears that shortly after that he went to consult a solicitor, a Mr. Capes, who turned out to be his employer's solicitor. I gathered from him that he consulted Mr. Capes with a view to accepting or obtaining some lump sum settlement of his workmen's compensation. £200 was offered and, because of its inadequacy, it was refused. In 1951 he changed his solicitors, and the writ in this action was issued in 1953. In the meanwhile, no doubt, on the advice of his present solicitors, he ceased to accept workmen's compensation.

It is in that state of affairs that he brings this action against the occupiers of the premises where he was working at the time of his injury and against his employer. His form of action against the defendants is that by their negligence

or breach of statutory duty they failed to provide suitable goggles or effective screens to protect his eyes. The statutory provision on which reliance is placed is s. 49 of the Factories Act, 1937, which reads as follows:

"In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process."

In pursuance of s. 49, the Protection of Eyes Regulations, 1938 (S.R. & O., 1938, No. 654) were made by the Secretary of State. Among the processes to which the regulations are to apply is the breaking or dressing of stone, concrete or slag: see the schedule to the regulations. Counsel for the plaintiff contends that this was a process of breaking concrete and was a process which involved a special risk of injury to the eyes from flying particles or fragments and, therefore, the occupiers were under a duty to the plaintiff to provide him with goggles. It is admitted that goggles were not provided in the sense that they were available for his use, although, apparently, the defendants did provide goggles for their own employees.

The defendants' answer, both to the allegation of breach of statutory duty under s. 49 and the allegation of negligence in failing to provide goggles, is that s. 49 and the common law impose no duty on the occupiers to provide goggles for the protection of the employees of a contractor who is on their premises in order to carry out this special operation of breaking up concrete. Counsel for the defendants in the course of his careful argument has drawn my attention to a large number of other sections in the Factories Act, 1937, throwing light on the meaning of the word "process" and the meaning of the words "persons employed in the process", which are the words contained in s. 49. He has drawn my attention, among others, to s. 12, s. 14 and s. 26, to mention three of them, and I have come to the conclusion, without going into an elaborate judgment on this point, that his argument on s. 49 is correct. In my view, the processes which are referred to in s. 49 are the processes of the occupiers of the factory and the words "persons employed in the process" refer to employees of the occupier. In this case, although it is true that it was on the premises of the defendants that these processes were being carried out, in fact they were not their processes and the plaintiff was not their employee. In those circumstances I have come to the conclusion that counsel's first point, which is a complete answer to this action, must prevail.

If I am wrong about that, and for this purpose I will assume that there was a duty under that section, that is not the end of the argument. Counsel for the defendants goes on to argue that in any event s. 139 of the Act is fatal to the plaintiff's claim. Section 139 reads:

"Where in a factory the owner or hirer of a machine or implement moved by mechanical power is some person other than the occupier of the factory, the owner or hirer shall, so far as respects any offence under this Act committed in relation to a person who is employed in or about or in connection with that machine or implement, and is in the employment or pay of the owner or hirer, be deemed to be the occupier of the factory".

In other words, as applied to this factory, although the defendants are the occupiers of the factory in the ordinary course of events, this being an accident which occurred to a man who was employed in connection with a machine or implement moved by mechanical power which was either the property of or hired by another person, then, for the purposes of that machine and any offence which may arise out of its use, it is the owner or hirer who is deemed to be the occupier and not the ordinary occupier of the factory. Counsel for the plaintiff

contends that that argument is not open to the defendants in this case on the pleadings by virtue of para. 1 of the defence, under which para. 1 of the statement of claim is admitted. Para. 1 of the statement of claim merely alleges that at all material times the defendants occupied for the purposes of their business as motor body builders and assemblers these premises which constituted a factory for the purposes of the Factories Act. They did and that was admitted; but I do not think that that precludes the defendants from raising what is a pure point of law the moment the facts are established that this was a machine or implement moved by mechanical power and it was either the property of or hired by the plaintiff's employers, persons other than the defendants. I am satisfied that it was either the property of or hired by the plaintiff's employers and I think that s. 139 does apply, because, although in terms it says "so far as respects any offence under this Act committed in relation to a person who is employed in or about or in connection with" the machine, by virtue of s. 130 an offence is constituted if there is a contravention of the provisions of the Act. Therefore, it is not confined merely to prosecution for an offence as opposed to a contravention of the Act. In those circumstances, in my judgment, counsel's second point is also correct and is likewise fatal to the plaintiff's claim.

If I am wrong about that and if the defendants did owe a duty to the plaintiff and were in breach of it, the plaintiff would be entitled *prima facie* to damages, but the point has been taken against him that by virtue of s. 30 of the Workmen's Compensation Act, 1925, his remedy against the defendants is now barred. Section 30 of the Act says:

"Where the injury for which compensation is payable under this Act, or any scheme certified under this Act, was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act or such scheme for such compensation, but, shall not be entitled to recover both damages and compensation . . .".

It is to be observed that s. 30 in the Act of 1925, like the corresponding section of the Act of 1906, differs from s. 29 which deals with alternative remedies against the employer both under the Act and independently of it at common law. Under s. 29 the workman in terms has an option to elect between two remedies. The words "at his option" are in that section. Those words are absent from s. 30. As it seems to me, and I think it is in accordance with authority, the matter to be decided under s. 30 of the Act is whether the plaintiff has recovered workmen's compensation. If he has recovered it, then his remedy against a third person for damages is barred. For that purpose, unlike the alternative remedies against his own employers under s. 29, it seems to me that it is not a matter of inquiry whether the workman knew that he had an option between the two remedies, one under the Act and one at common law. Under s. 29 he would not be barred unless he had not only a knowledge of the nature of what he received but also of his right to opt between two remedies. Under s. 30 that is not a requirement and all that it is necessary to ascertain is whether he has in fact recovered compensation. As has been pointed out in the cases to which my attention has been drawn, recovery of compensation does not necessitate the bringing of proceedings for that purpose. If in fact a man makes a claim and if in fact he receives payment of compensation and if he knows the nature of that compensation and receives it as such, then that is sufficient to constitute recovery of workmen's compensation under the Act. As I have already indicated, I am quite satisfied that the plaintiff, although in 1947 he may not have been aware of that fact that he might have a remedy against some other party, nevertheless was fully aware of the nature of the compensation that he was receiving over and over again and signing for over and over again. In those circumstances I have come to the conclusion that as a matter

of fact the plaintiff did receive workmen's compensation under the Act, and, that being so, s. 30 of that Act bars his remedy against the third person on whose premises he was injured.

On each one of these grounds, therefore, I have come to the conclusion that the plaintiff's claim fails and there must be judgment for the defendants.

Judgment for defendants.

A Solicitors: *Ward, Bracewell & Co.*, Doncaster (for the plaintiff); *Gardiner & Co.* (for the defendants).

[*Reported by G. M. SMAILES, Esq., Barrister-at-Law.*]

B ADEBAYO v. NIGERIA (OFFICIAL RECEIVER).

[PRIVY COUNCIL (Lord Oaksey, Lord Keith of Avonholm and Sir Lionel Leach), March 23, 24, April 6, 1954.]

Privy Council—Nigeria—Company—Winding-up—Voluntary winding-up—Liquidator nominee of controlling shareholder of company—Proposal for reconstruction of company—Petition by official receiver for compulsory winding-up—Admission of creditors' evidence—Exercise of discretion of court to order compulsory winding-up—Companies Ordinance (Laws of Nigeria, 1948, c. 38), s. 132 (2), s. 140.

D In December, 1952, a limited liability company incorporated under the laws of Nigeria resolved that it should be wound-up voluntarily, and the appellant was appointed liquidator. At the same time it was resolved that the company should be reconstructed, and the appellant filed a motion for an order that he might be at liberty to convene meetings of creditors to discuss and approve a scheme of reconstruction. Before this motion was disposed of, the respondent presented a petition to the court that the company should be wound-up by the court under s. 132 (2) of the Companies Ordinance (Laws of Nigeria, 1948, c. 38), and that he be appointed liquidator. The appellant filed a counter affidavit, applied for subpoenas to a number of persons whom he wished to call as witnesses, and filed a number of affidavits of creditors who were prepared to give evidence. In February, 1953, on the hearing of the petition, the trial judge stated that the company was virtually a one-man company, that the appellant was the nominee of a shareholder who had complete control of the company, that, in those circumstances, it would be contrary to public interest and to the interest of creditors generally to allow the company to continue the voluntary winding-up, and that he did not think it necessary to call evidence in relation to other matters. He, accordingly, ordered the company to be wound-up by the court.

G HELD: it did not necessarily follow, because a company was controlled by one shareholder and a liquidator in a voluntary liquidation might be regarded as his nominee, that a voluntary winding-up could not be continued with due regard to the interests of the creditors; in the light of s. 132 (2) and s. 140 of the Companies Ordinance, and in the circumstances of the case, the wishes of the creditors were relevant matter for consideration; the appellant should have been allowed to lead the evidence he desired to call, and, he having been refused that opportunity, it could not be said that the trial judge was in a position properly to exercise a discretion to order a compulsory winding-up; and, therefore, the appeal must be allowed and a re-trial of the petition ordered.

Re Medical Battery Co. ([1894] 1 Ch. 444), distinguished.

H EDITORIAL NOTE: The Companies Ordinance (Laws of Nigeria, 1948, c. 38), s. 132 (2) and s. 140, correspond to the Companies Act, 1948, s. 224 (2) and

s. 346 (1), for which, see HALSBURY'S STATUTES, Second Edn., Vol. 3, pp. 643, 723.

AS TO SUPERSEDING VOLUNTARY WINDING-UP, see HALSBURY, *Summary* Edn., Vol. 6, p. 757, para. 1533; and FOR CASES, see DIGEST, Vol. 10, pp. 1034-1038, Nos. 7178-7203.

Case referred to:

(1) *Re Medical Battery Co.*, [1894] 1 Ch. 444; 63 L.J.Ch. 189; 69 L.T. 799: A
10 Digest 870, 5896.

APPEAL by the liquidator in a voluntary winding-up from an order of the West African Court of Appeal, dated May 18, 1953, affirming in part an order of the Supreme Court of Nigeria, dated Feb. 6, 1953.

Graville Sharp, Q.C., Ramsay and E. Gardiner Smith for the appellant. B
R. O. Wilberforce for the respondent.

Apr. 6. **LORD KEITH OF AVONHOLM:** This appeal arises out of the liquidation of a company under the Companies Ordinance, c. 38, of the Laws of Nigeria, 1948.

The Nigerian Farmers and Commercial Bank, Ltd. is a limited liability company incorporated under the laws of Nigeria and having its registered office in Lagos. By extraordinary resolutions passed at an extraordinary general meeting held on Dec. 12, 1952, it was resolved—(i) That the Nigerian Farmers and Commercial Bank, Ltd. cannot, by reason of its liabilities and other difficulties, continue its business and that it is advisable to wind-up the same and that the company be wound-up voluntarily accordingly. (ii) That Mr. John Adebayo, English accountant of No. 4, Coates Street, Ebute Metta, Nigeria, and Mr. Charles D. Gairdner, chartered accountant, of No. 23, Lawrence Lane, London, W.C.2, be and they are hereby appointed liquidators of the company to conduct the winding-up. Mr. Adebayo was appointed to act in respect of the assets of the company in Nigeria, and Mr. Gairdner in respect of the assets in the United Kingdom. At the statutory meeting of creditors held on Dec. 29, a Mr. Akintola Williams, chartered accountant, was appointed as joint liquidator in place of Mr. Gairdner. The proper procedure was for an application to be made to the court for the appointment of this person as joint liquidator, but as Mr. Williams subsequently declined to act, and as this matter does not enter into the appeal, their Lordships make no further reference to it. At the same meeting a further resolution was passed that

“Whereas it is the opinion of the majority of the creditors that the said bank should be reconstructed and that it should resume normal business and that a compromise be arrived at for the benefit of creditors: Be it resolved therefore that the aforesaid Nigerian Farmers and Commercial Bank, Ltd., in liquidation be reconstructed and that Mr. John Adebayo of 4, Coates Street, Ebute Metta, and Akintola Williams, chartered accountants, liquidators are hereby instructed to convene special meeting according to law for the purpose of discussing and approving the scheme of reconstruction and compromise”.

A protest was recorded by a Mr. A. M. Ferguson who represented a number of creditors who had forwarded bills for collection by the bank on the ground that the minute did not accord with the provisions of s. 181 (2) of the ordinance and was ultra vires and that the vote was not properly conducted in that creditors by number and value were not identified.

On Dec. 31, 1952, the appellant (hereafter referred to as the liquidator) filed a motion for an order that he might be at liberty to convene meetings of creditors for the purpose of discussing and approving a scheme or schemes of arrangement (reconstruction) and compromise to be drawn up, and that directions be given as to the method of convening the meeting and for any further order or orders.

Before this motion was disposed of the official receiver (the respondent in this appeal) presented a petition to the court praying that, for reasons set out therein, the bank should be wound-up by the court under s. 132 (2) of the Companies Ordinance, that the petitioner be appointed liquidator, and that Mr. Adebayo be ordered to hand over all books, papers and other documents in his possession relating to the affairs of the company, together with an account of his dealings with the affairs of the company since the date of his appointment. This petition was accompanied by an affidavit of the official receiver and various annexures including a letter dated Jan. 9, 1953, received by the official receiver from Mr. Ferguson. After sundry procedure the motion of the liquidator of Dec. 31, 1952, and the petition of the official receiver came up for further hearing on Feb. 4, 1953. In the meantime, the liquidator had filed a counter affidavit and had applied for subpoenas on thirty-six persons whom he wished to call as witnesses and filed a number of affidavits of creditors who were prepared to give evidence. At the hearing on Feb. 4, before GREGG, J., counsel for the liquidator asked for an adjournment to hear witnesses and stated that the whole purpose of the voluntary liquidation was reconstruction. He also stated that he wished Mr. Ferguson to be called. Counsel for the official receiver supported his petition and opposed an adjournment. GREGG, J., adjourned the petition to Feb. 6, stating that he would give his decision on whether evidence would be taken in this matter, or whether the official receiver's petition would be granted forthwith on that date.

A motion for the liquidator for leave to appeal against this order was made and refused on Feb. 6. On the same date the judge gave his decision on the adjourned petition. He stated in his judgment that there was no denial of three important averments made by the official receiver in his petition. These were—

- (i) That the directors of the company are Mr. Adeboyo Shobayo Olunuyiwa Coker and Mr. Tijani Afolabi Adeosun;
- (ii) That the issued capital of the company is £25,194 made up of five hundred preference shares and 24,694 ordinary shares;
- (iii) That Mr. Coker holds the whole of the five hundred issued preference shares and 24,455 of the 24,694 ordinary shares. This last averment means, he said, that the company was virtually a one-man company, and that the liquidator was the nominee of Mr. Coker who had complete control of the company. He added:

" On these facts which are in themselves sufficient, in my opinion, to justify a winding-up by the court, I see no reason to call evidence; and that being so I do not think it necessary to allow evidence to be called in relation to other matters . . . No fraud is alleged by the official receiver; but in my opinion it would be contrary to public interest and against the interest of creditors generally to allow a company to continue a voluntary winding-up under the circumstances mentioned ".

He, accordingly, ordered the company to be wound-up by the court.

Against this judgment an appeal was taken by the liquidator to the West African Court of Appeal. The judgment of the court was given on May 18, 1953, dismissing the appeal on the only point with which their Lordships are concerned, viz., the order for a compulsory winding-up. SIR STAFFORD FOSTER SUTTON, the president of the court, who delivered the judgment of the court, said that it was a well-settled principle that the court would not interfere with an exercise of discretion, as this was, by a lower court unless it had proceeded on a manifestly wrong ground. In his view, the grounds stated by the learned trial judge were sufficient to entitle him to exercise his discretion in favour of making a compulsory order. He referred to *Re Medical Battery Co. (1)*, as illustrating an order made by VAUGHAN WILLIAMS, J., on similar grounds. From this judgment the present appeal has been taken.

Their Lordships have arrived at the conclusion, looking to the procedure followed before the trial judge, that the judgments of the Court of Appeal and of the trial judge cannot stand. In their Lordships' opinion the liquidator

should have been allowed to lead the evidence that he desired to call, and, he having been refused that opportunity, it cannot be said that the learned trial judge was in a position properly to exercise a discretion to order a compulsory winding-up.

Section 132 (2) of the Companies Ordinance is as follows:

"Where a company is being wound-up voluntarily or subject to supervision, a petition may be presented by the official receiver attached to the court, as well as by any other person authorised in that behalf under the other provisions of this section, but the court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding-up or winding-up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories."

Reference should also be made to s. 140 which reads:

"The court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence."

In the light of these sections, and in the circumstances of the present case, it appears to their Lordships that the wishes of the creditors were relevant matter for consideration. It was said that the evidence was intended only to prove a desire by the creditors for reconstruction of the company. Even if this be so, it seems to their Lordships to be immaterial, as the creditors may still prefer reconstruction to be carried out under a voluntary winding-up. There may also be other matters arising out of the affidavit and counter affidavit on which the official receiver or the liquidator may wish to lead evidence, including the position of Mr. Ferguson. Their Lordships would leave this entirely open to the parties.

With regard to the ground of judgment on which both the trial judge and the Court of Appeal proceeded, their Lordships would point out that it does not necessarily follow that, because a company is controlled by one shareholder and a liquidator in a voluntary liquidation may be regarded as a nominee of that shareholder, a voluntary winding-up cannot be continued with due regard to the interests of the creditors. In *Re Medical Battery Co.* (1) there were circumstances clearly sufficient to disqualify the liquidator from acting as an independent party. The control of the company and of the debenture holders were in the hands of the managing director and his family, and the liquidator was also receiver for the debenture holders. In these circumstances, he was not in a position to act impartially in the interests of the unsecured creditors. Their Lordships do not find it necessary to enter more fully into this aspect of the present case, or to examine the other authorities cited on this point, as any question of prejudice to creditors will have to be considered anew in the light of all the evidence that may be made available at a new trial.

A question was raised whether the wishes of creditors should not be ascertained by meeting directed under s. 209 of the ordinance. That is not, in their Lordships' opinion, a matter on which they should give any direction. The question will, if raised, have to be considered by the judge who takes the re-trial.

In these circumstances, their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the orders of the Court of Appeal and of GREGG, J., and to order a re-trial of the petition. The respondent must pay the costs of this appeal and of the hearing in the West African Court of Appeal. The costs of the hearing before GREGG, J., shall abide the decision on the re-trial.

Appeal allowed.

Solicitors: *Burdells* (for the appellant); *Charles Russell & Co.* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

WALLBRIDGE AND ANOTHER v. DORSET COUNTY COUNCIL.

[CHANCERY DIVISION (Lloyd-Jacob, J.), April 5, 6, 7, 8, 9, 13, 1954.]

Children and Young Persons—Protection—“Foster child”—Public Health Act, 1936 (c. 49), s. 206 (3).

A The plaintiffs conducted an independent private boarding school. The fees which were paid to them did not cover the cost of providing clothing for the pupils, but clothing would be procured at the request and expense of a child's parent or guardian. Of the 102 full fee-paying pupils in residence in December, 1951, twenty-three were paid for by or on behalf of parents and seventy-nine by local authorities. Of the seventy-nine whose fees were paid by local authorities, nine were in the care of the local authority under the provisions of the Children Act, 1948, Part I, one was the subject of a probation order in which residence at the school was made a condition, and one was the subject of a “fit person” order under the Children and Young Persons Act, 1933, s. 62 (1). All the children, save those “in care” and the one entrusted to the local authority as a “fit person”, had homes and parents to which they returned at the conclusion of the school term, and the parents had surrendered none of their parental rights in respect of them.

B
C
D HELD: in view of the retention by the parents of their parental rights in respect of their children, none of the children (apart from those “in care” and the subject of a “fit person” order) was living apart from its parents and, therefore, none of them was a “foster child” within the Public Health Act, 1936, s. 206 (3); and in respect of the remaining children, the local authority, by virtue of s. 75 (4) of the Act of 1933 and s. 3 (1) of the Act of 1948 in each case had all the rights and powers of the child's parent or guardian, and maintained adequate supervision in term time, and, therefore, they, similarly, were not foster children within s. 206 (3).

E FOR THE PUBLIC HEALTH ACT, 1936, s. 206, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 1062.

F ACTION for, inter alia, damages for trespass, inducing breach of contract and injurious falsehood, and COUNTERCLAIM for a declaration (a) that each child received for reward in the plaintiffs' school whose parents did not reside on the school premises; alternatively, (b) that each child who was received for reward in the said school and who did not spend the school holidays with his parents or one of them; or, alternatively, (c) that each child in the said school in respect of whom a “fit person” order had been made and each child in the care of a local authority under the Children Act, 1948, was a “foster child” within the meaning of Part VII of the Public Health Act, 1936.

G The plaintiffs were the proprietors of an independent private school. The school was residential and the curriculum and organisation conformed so far as possible to normal standards, but individual care and tuition were given to children suffering from defects of speech, weakness of intellect or other disorders or disabilities, physical or emotional. All children attending the school received full-time instruction. The defendants were the welfare authority for the county of Dorset for the purposes of the provisions (inter alia) of Part VII of the Public Health Act, 1936, relating to child life protection. On the footing that children attending the school were “foster children” within s. 206 (3) of the Act of 1936, the defendants took various measures, including entry by their agents on the school premises, which had the result of reducing the number of children attending the school. The plaintiffs claimed (inter alia) damages, and the defendants counterclaimed as stated above.

H The plaintiffs' claim was settled, the defendants accepting that their agents had acted on a mistaken view of the facts and agreeing to pay a sum in damages

and the plaintiffs' costs. His LORDSHIP then heard argument on the counterclaim.

Molony and C. M. Hughes for the plaintiffs.
Russell, Q.C., and Fay for the defendants.

Cur. adv. vult.

Apr. 13. **LLOYD-JACOB, J.**, read the following judgment. By this action, the plaintiffs claimed relief against the defendants in respect of certain steps taken by officers of the county council in December, 1951, in relation to a school carried on by the plaintiffs jointly at South Lychett Manor, near Poole, under the name "Farney Close School". By their defence, the county council asserted a public duty as a justification, and counterclaimed for a declaration that certain of the children received by the plaintiffs at the school were covered by the provisions of the Public Health Act, 1936.

During the course of the case, it became manifest that allegations of improper treatment of such children, which the plaintiffs believed the defendant council to be asserting, might not be justified and that the allegations of bad faith on the part of certain county council officials, which the defendants believed the plaintiffs to be asserting, might not be unreasonably persisted in. With a commendable display of good sense and an appreciation of their responsibility, both parties applied themselves to the private disposal of the matters directly in issue between them. This was successfully accomplished, and I approved a settlement of the action on the terms agreed between the parties. There was left for argument the legal issue on the counterclaim, and to this I now turn.

Part VII of the Public Health Act, 1936, contains in s. 206 to s. 220 inclusive certain provisions as to child life protection which are intended to safeguard the welfare of young people up to (at present) the age of eighteen. This Act, as its long title indicates, consolidated, with amendments, previous enactments relating to public health, and the child life protection provisions derive from the following: Infant Life Protection Act, 1872; Infant Life Protection Act, 1897; Children Act, 1908; and Children and Young Persons Act, 1932. My attention has been directed to each of these statutes, and in the arguments addressed to me emphasis has been attached to certain changes in language and content which have accompanied the development of this branch of the law. Some of these will require consideration, but the first matter, to which I now turn, is the scope and effect of the Public Health Act, 1936, s. 206, which defines the obligation to which the counterclaim is in substance directed. The section provides:

"(1) A person who undertakes for reward the nursing and maintenance of a child under the age of nine years apart from his parents, or having no parents, shall give notice thereof to the welfare authority . . ."

There follow certain specific provisions which I treat myself as having read. Then there is a proviso, and the sub-section continues:

"For the purposes of this sub-section, an undertaking shall be deemed to be an undertaking for reward if there is any payment or gift of money or money's worth, or any promise to pay or give money or money's worth, irrespective of whether there is any intention of making profit."

Sub-section (2) is not directly material, and then sub-s. (3) reads:

"In the following provisions of this Part of this Act a child under the age of nine years in respect of whom a notice has been or ought to have been given under this section, or under sub-s. (2) of the next succeeding section, or under s. 1 of the Children Act, 1908, and who is still living apart from his parents, if any, with the person by whom the notice was, or ought to have been, given, is referred to as a 'foster child'."

It will be noted that the undertaking which occasions notice to the welfare authority is in respect of the nursing and maintenance of a child apart from his

parents, and the language of sub-s. (3) indicates that this means a child *living* apart from his parents. The nature of the separation so expressed is wider than physical absence. Physical absence, if sufficiently prolonged, might well justify an inference of intention to part, and equally occasional meetings might not justify an inference of an intention not to part, but an actual or inferred intention to deny to the child parental guidance and control, or, what amounts to the same thing, inability to provide it, must be associated with physical separation before the "apartness" on which the need for this type of protection is based can be created. Such parental guidance and control must of necessity be in part susceptible of delegation. In their personal capacity the parents cannot always be available to provide it and may often be unable effectively to discharge its obligations. In such cases the employment or engagement of nurses, tutors, doctors and surgeons, or other skilled persons, although such arrangement may involve the temporary surrender of direct control, cannot fairly be regarded as a denial of parental obligation. Here, again, attention must be had to the extent and duration of such delegation. If in sum it can fairly be regarded as tantamount to complete surrender of authority, or if by reason of its duration it results in the substitution of a mind independent of the parent in respect of material decisions for some indefinite period, it may be that an inference of an intention to part from the child could be drawn. But mere delegation of some part of the parental duty for a limited period cannot of itself provide a sufficient animus which, combined with the fact of absence from home, would constitute the status of *living apart*.

The section deals with an undertaking for the nursing and maintenance of the child, a requirement which is plainly not co-extensive with the full parental duty. Nursing and maintenance excludes, for instance, such matters as moral and religious training and preparation for trade or profession. The expression is concerned with the day-to-day requirements for the support of the physical being, and adds to these the responsibility for their ordering, although not, in my judgment, any necessity for personal intervention in the manner of their fulfilment.

In s. 2 of the Act of 1872 and s. 2 of the Act of 1897, the comparable expression used was "nursing or maintaining", the substitution of "and" for "or" being introduced in 1908, [in the Children Act, 1908, s. 1] when the age limit was, by s. 1 of the Act of 1908, raised from five to seven years. Some argument was addressed to me on this variation of language in relation to the contention that in the Act of 1936 "nursing" must be construed to mean "sick nursing". It is, I think, plain that, in relation to children of five and under, nursing and maintenance can fairly be regarded as equivalents, the maintenance of the child being conducted in the manner known to and sometimes performed by the child's nurse or "nanny". This would mean that nursing in the Acts of 1872 and 1897 would not be synonymous with sick nursing. The statutes of 1908, 1932 and 1936 apply to children from birth up to ages above five, and it may well be that in the higher age range the importance attached to nursing—in the sense of mothering—may be thought to have diminished and that the child might be expected to develop sufficient self-reliance to be able to dispense with it, at any rate, when in health. In my judgment, the word "nursing" in the phrase "nursing and maintenance" where it appears in s. 206 is not limited to sick nursing, although it includes it, and means doing whatever is necessary to make the maintenance effective. In this sense it will apply equally throughout the whole of the age range covered by the Act and the subsequent extensions of that range introduced since 1936.

It was further argued that an undertaking to board a child, if accompanied by or incidental to an undertaking to educate it, was outside the scope of the child life protection provisions. If it be assumed that an undertaking to board a child amounts to an undertaking to nurse and maintain it, the further obligation to educate it is additive and could not diminish the effect of the undertaking to

board, although it might set some limit to the period of it. Any such limitation of period would not exclude compliance with the statute, and the terms of s. 219 (2) clearly imply that a succession of periods of maintenance, even if each is of short duration, is contemplated as importing the obligations of the statute.

It was further argued that a voluntary arrangement entered into by proprietors of a boarding school with a parent to receive a child into their establishment cannot be within the Act because of the provisions of s. 212 and s. 220. Section 212 deals with the removal of the child from unsuitable premises or from the care of unsuitable persons, and gives power to a court of summary jurisdiction to order removal until the child "can be restored to his relatives", the word "relatives" being defined in s. 220 in language which excludes parents. An examination of the contemporaneous Public Health (London) Act, 1936, discloses that such exclusion of parents formed no part of the child life protection provisions in the metropolis, and its presence in the main statute may have derived from a failure to appreciate the distinction between the effect of the Children Act, 1908, s. 11 (2), from which its language appears to have been taken, and its effect in the Act of 1936. However this may be, it is not necessary to construe either of these sections to find the answer to this argument. If the legislature had intended to modify for all parts of the kingdom other than the London area the whole structure of the pre-1936 child life protection provisions by making an exception for arrangements voluntarily entered into by a parent, and this despite the fact that such arrangements were made with an unsuitable person or related to reception in unsuitable premises, a clear and specific provision to this effect would have appeared. To infer such an intention from the language used in relation to circumstances wherein the health and well-being of a child are thought to be in danger requires the attribution of such irresponsibility to the legislature as to make the argument wholly untenable, and I reject it.

One further argument falls to be considered. It was urged that the undertaking necessary to bring the Act into operation must cover the performance of every act requisite for the nursing and maintenance of the child, and in particular the supply of clothing. In my judgment, there is no such short cut to the determination of every case. If the person undertaking the care of the child chooses to arrange for the supply of clothing to come from a particular source, even though that source be the parent of the child, he is only thereby discharging a portion of his undertaking. If, on the other hand, the parent is retaining the care of the child, but desires to arrange for the child's clothes to be bought on his account by another, the mere fact that they are so bought does not transfer the responsibility for the caring. The fact of the matter is that the introduction of a provision relating to any isolated aspect of nursing and maintenance would, in all probability, if the rest of the circumstances indicated an intention to relinquish care of the child, be interpreted *de minimis* and treated as an unsuccessful attempt to evade the operation of the Act. Equally, an insistence by a school-master on the provision for and wearing by the pupils of school uniform would not of itself be regarded as ousting the direction and control of the parent, for it would be consistent with a willingness to exercise it in a manner conformable to the rules of the school.

The evidence established that the plaintiffs, as joint proprietors, carried on an educational establishment as an independent school at which they received boarders at a fee of 68 guineas a term. This fee did not include the cost of providing clothing for the pupils, but it was admitted by the plaintiffs that, with the permission of the parent or guardian and at his expense, the second-named plaintiff would procure clothes for the child if requested so to do.

The substance of the case can be determined by considering the 102 full fee-paying pupils in residence on Dec. 9, 1951, of whom twenty-three were paid for by or on behalf of parents and seventy-nine by local authorities. Of these seventy-nine, one was the subject of a probation order in which residence at the school was made a condition, nine were in the care of the local authority

under the provisions of the Children Act, 1948, Part I, and one was the subject of a "fit person" order under the Children and Young Persons Act, 1933, s. 62 (1). Under the latter Act, by s. 75 (4), the local authority has, while the order is in force, the same rights and powers and is subject to the same liabilities in respect of the child's maintenance as if it were the parent, and the child shall continue in its care notwithstanding any claim by a parent or any other person.

A Similarly, under the Children Act, 1948, s. 3 (1), all the rights and powers of the parent or guardian shall vest in the local authority. It is, therefore, plain that no real distinction can be drawn between the two main categories of children—that is, fees paid by parents and fees paid by local authorities—for in paying the fees the local authority was doing so as the alter ego of the parent, and in part discharge of the obligation imposed by the "fit person" order to undertake the care of the child. No evidence was called to establish any intention, whether on B the part of a parent or of a local authority, when entering into agreement with the plaintiffs, specifically to relinquish the care of any child, and the question of the application of the Public Health Act, 1936, falls to be determined on inference from the fact of sending the child to the school and payment of fees. Does this establish that the children so sent and paid for were "apart from their parents"? C Is a child, temporarily and intermittently transferred from its home to a boarding school, denied the parental guidance and control the absence of which it is the purpose of the child life protection provisions to seek to remedy? So far as concerns all the fee-paying pupils, other than the nine in the care of a local authority under the Act of 1948 and the one entrusted to a local authority as a "fit person", the answer seems plain enough. They all had homes and D parents to which they returned when the school term concluded, save in a few instances when parents had made special arrangements for the holiday periods. At any time a parent could visit the school to satisfy himself that such duties in respect of his child's upbringing as he had delegated to the school authorities were being capably and conscientiously discharged. If he were dissatisfied, nothing could prevent him from removing the child, for he had surrendered none of his parental rights.

E Nor are the ten others in any different case. The agreed correspondence shows, as one would have expected of a person entrusted with the care of a child, that the particular local authority responsible for sending the child to the school maintained adequate supervision during the school term. It is true that for convenience this supervision was entrusted to the children's officer of the F defendant authority, but in exercising it he was acting as and for the delegating authority.

In my judgment, none of these children can properly be regarded as being apart from its parents, and this is a sufficient reason for refusing to declare them to be foster children within the meaning of Part VII of the Public Health Act, 1936. It is not, therefore, necessary to decide whether the acceptance of these children by the plaintiffs at Farney Close School, admittedly for reward, amounts to or G includes undertaking their nursing and maintenance. It is clear that the physical requirements of these children were being met and that they were being nursed and maintained on premises in the possession and under the control of the plaintiffs by persons directly responsible to the plaintiffs. The point having been argued, it should suffice to say this, that, if the ultimate authority over such care of the children should not reside, as I have already held it does, in the actual or H notional parent, I cannot, as at present advised, see any other person on whose behalf the plaintiffs could be said to be performing the duties.

In the result, therefore, I must reject the contention on which the counter-claim is based, and I can make no declaration as prayed. *Counterclaim dismissed.*

Solicitors: *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the plaintiffs); *Walters & Hart*, agents for *C. P. Brutton*, clerk of the county council, Dorchester (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

SEMTEX, LTD. *v.* GLADSTONE.

[BIRMINGHAM ASSIZES (Finnemore, J.), April 5, 9, 1954.]

Master and Servant—Contract of service—Implied term—Indemnity against liability—Accident caused by servant's negligence—Damages paid by employer to third parties—Right of employer to recover amount from servant.

Tort—Joint tortfeasors—Contribution—Master's right to contribution by servant—Complete indemnity—Negligence of servant—No negligence on part of master or other servants—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c), s. 6 (2).

The defendant was required by his employers to drive some of his fellow workmen to and from their place of work in a motor car belonging to the employers. On Mar. 7, 1951, owing to the defendant's negligence, the car was involved in an accident in which one workman was killed and several others were injured. In an action against the employers and the defendant, damages amounting to over £9,360 were awarded to the injured workmen and the personal representative of the one who was killed. At the time of the accident there was in force in relation to the user of the car by the defendant an insurance policy which covered the requirements of the Road Traffic Act, 1930, s. 35 (1), and also, apparently, liability in respect of the death of or injury to persons in the car in the course of employment. In an action by the employers to recover from the defendant the whole amount of the damages which they had paid in respect of the accident,

HELD: (i) there was an implied term in the defendant's contract of service that the employers would carry out the obligations laid on them by s. 35 (1) of the Act of 1930: *Gregory v. Ford* ([1951] 1 All E.R. 121), followed; and this the employers had done, but a term that the defendant was to be indemnified against liability could not be implied, and, therefore, the employers' claim was not in breach of an implied term of the contract.

(ii) as the negligence which was the cause of the accident was entirely that of the servant, whether the matter was treated as a breach of contract of service or as a case of contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c) and (2), the employers were entitled to recover from the defendant the whole of the damages which they had paid in respect of the accident: *Ryan v. Fildes* ([1938] 3 All E.R. 517), applied; and it was immaterial (a) that the employers were suing, not for injuries caused to them personally, but in respect of damages which they had to pay to other persons injured by the defendant's negligence, and (b) whether either of the parties was insured in respect of the particular risk.

AS TO LIABILITY OF SERVANT FOR NEGLIGENCE, see HALSBURY, *Halsham* Edn., Vol. 22, p. 183, para. 307; and FOR CASES, see DIGEST, Vol. 34, p. 117, Nos. 884-887.

FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 602; and FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6 (1) (c) and s. 6 (2), see *ibid.*, Vol. 25, p. 360.

Cases referred to:

- (1) *Jones v. Manchester Corpn.*, [1952] 2 All E.R. 125; [1952] 2 Q.B. 852; 116 J.P. 412; 3rd Digest Supp.
- (2) *Harmer v. Cornelius*, (1858), 5 C.B.N.S. 236; 28 L.J.C.P. 85; 32 L.T.O.S. 62; 22 J.P. 724; 141 E.R. 94; 36 Digest, Replacement, 27, 113.
- (3) *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520; 88 L.J.K.B. 689; 120 L.T. 494; *affd.* H.L., [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; 36 Digest 201, 1061.
- (4) *Ryan v. Fildes*, [1938] 3 All E.R. 517; Digest Supp.
- (5) *Gregory v. Ford*, [1951] 1 All E.R. 121; 2nd Digest Supp.

- (6) *Tattersall v. Drysdale*, [1935] 2 K.B. 174; 104 L.J.K.B. 511; 153 L.T. 75; Digest Supp.
- (7) *Monk v. Warbey*, [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; Digest Supp.
- (8) *Wigham v. General Accident Fire & Life Assurance Corpn., Ltd.*, [1940] 1 All E.R. 514; [1940] 1 K.B. 643; 109 L.J.K.B. 413; 162 L.T. 299; *varied C.A.*, [1940] 3 All E.R. 190; [1940] 2 K.B. 226; 109 L.J.K.B. 740; 163 L.T. 366; *reversd. H.L.*, [1942] 2 All E.R. 319; [1943] A.C. 121; 111 L.J.K.B. 628; 167 L.T. 222; 2nd Digest Supp.
- (9) *Richards v. Cox*, [1942] 2 All E.R. 624; [1943] K.B. 139; 112 L.J.K.B. 135; 168 L.T. 313; 2nd Digest Supp.

ACTION.

The plaintiffs, Semtex, Ltd., were the employers of the defendant, John Gladstone. Owing to the negligence of the defendant while he was driving a motor car on behalf of the plaintiffs, another workman employed by the plaintiffs was killed and several others were injured. In an action against the plaintiffs and the defendant, the injured workmen and the personal representative of the deceased man were awarded damages amounting to over £9,360. The plaintiffs, having paid the damages, now sought to recover them from the defendant on the ground that they were incurred as a result of his negligence.

Marven Everett, Q.C., and *E. G. H. Beresford* for the plaintiffs.

Ryder Richardson, Q.C., and *A. E. James* for the defendant.

Cur. adv. vult.

Apr. 9. FINNEMORE, J.: This is an action brought by Semtex, Ltd., a subsidiary company of Dunlop Rubber Co., Ltd., against Mr. John Gladstone. The short facts are these. The defendant was employed by the plaintiffs, and was trained in the art of laying rubber floors. He progressed well and ultimately became a supervisor. As a supervisor it was his duty to go to work which was being done away from the plaintiffs' premises, and in March, 1951, he was supervising the laying of floors at a concern, Marks & Spencers, in Nottingham. The work was being done by the workmen from 7 p.m. until 7 a.m. The lodgings provided for the workmen turned out to be unsatisfactory and it was arranged that the defendant should drive these employees of the plaintiffs to and from Nottingham and Birmingham day by day. When he became a supervisor it was understood by him that he would have to drive a motor car, and the car which he drove was a shooting brake and was the property of the plaintiffs. Unfortunately, on Mar. 7, 1951, as the defendant was driving back a number of employees, he was involved in a serious accident in which one of the employees was killed and several others injured. The injured workmen and the personal representative of the one who was killed brought an action against the plaintiffs and the defendant, and recovered damages and costs which reached the figure of £9,360 odd. The present action is brought by the plaintiffs against the defendant on the ground that the accident was due to his negligence. They claim that, as they have had to pay this large sum of money to people injured as a result of his negligence, they are entitled to recover the amount from him, as he was the person whose negligence brought about the accident, the injuries and death, and caused them to have to pay the money. I take it to be clear so far that, in our law, a master can sue his servant for negligence. There is no special law which allows a servant to be negligent about his master's business and then to claim that he is exempt from an action by the master. There is authority for that, although it hardly needs authority.

The next question is whether the master can sue the servant if the servant has not directly injured the master, or his property, but has injured other people in such a way that the master is called on, as being responsible for the torts of the servant, to pay large sums of money. The principle, which I believe to be the

true principle, is summarised in SALMOND ON THE LAW OF TORTS, 11th ed., p. 321

"It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other. Thus, a master who has paid for the negligence of his servant should be able to sue that servant for indemnity. That this is generally so cannot be doubted, provided that the negligence of the employer himself or one of his other servants has not contributed to the damage."

This paragraph is a little different from the one which appeared in the 10th edition, at p. 78, and which was referred to by SINGLETON, L.J., ([1952] 2 All E.R. 130), in *Jones v. Manchester Corpn.* (1). If that is a proved expression of the law on this matter, then, so far, the plaintiffs would be clearly entitled to recover. The master here, the plaintiffs, has paid for the negligence of the servant, the present defendant, and no one suggests, or could suggest, that any negligence of the employer, or any other of his servants, has in any way contributed to this damage.

This matter was considered recently in *Jones v. Manchester Corpn.* (1). In that case the action was brought against the hospital board of the Ancoats Hospital in Manchester and the doctor who administered the anaesthetic which, unfortunately, resulted in the death of the person whose administratrix was bringing the action. That case shows plainly that, in a case where a master and his servant are jointly concerned in a tort, they can, under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, bring an action for contribution. HOBSON, L.J., put the matter on a rather different basis. He said that, in his view, the negligent servant was under an implied term in his contract of employment to exercise reasonable skill according to his calling. He cited ([1952] 2 All E.R. 134) a passage from the judgment of WILLES, J., in *Harmer v. Cornelius* (2), and then (*ibid.*, 135) a passage from the judgment of WARRINGTON, L.J., in *Widd-Blandell v. Stephens* (3). WARRINGTON, L.J., said ([1919] 1 K.B. 536):

"... it may well be that if a servant by his negligent act inflicts an injury on a third person who recovers damages therefor from the master, the latter may recover the amount from the servant in an action against him for breach of his duty. But in such a case the right of action against the master and his legal liability themselves result from the servant's negligent act, and but for that act would not have existed."

I confess, if I were free and it really mattered, I would prefer the way in which HOBSON, L.J., puts this kind of case, i.e., as a breach of the contract of service between the master and his servant, to some of the other ways in which it has been put. For some reason which I have never been quite able to understand, the master who is vicariously responsible for his servant is referred to, and, apparently, treated, as a joint tortfeasor. This point was elaborated by DUNNICK, L.J., in *Jones v. Manchester Corpn.* (1). I could never see why an employer, whose only liability is the vicarious liability of being responsible for what his servant does, should be called a joint tortfeasor, which should mean a person who took some part in the tort which is the subject of the action. However, I do not think that in this case it really matters, because it is clear that, if one has to regard the employer as a joint tortfeasor with the servant, who alone committed the tort, then by reason of the Act of 1935 he can claim contribution (s. 6 (1) (c)), and that contribution can be as much as one hundred per cent. (s. 6 (2)). This was illustrated by *Ryan v. Taites* (4), in which TESSERA, J., made an order for a one hundred per cent. contribution, although he drew attention to the fact that, under s. 6 (2) of the Act of 1935, the question of contribution from a joint tortfeasor was a matter in the discretion of the court in the circumstances of each case and that the court might order no contribution or might order a contribution up to one hundred per cent. It seems to me that, where the

A negligence concerned is entirely the negligence of the one party—in this case the servant—it would follow, if one applies the ordinary principles of justice, that the contribution should be one hundred per cent. Certainly, in my opinion, in this case, whether I treat it as a matter of breach of contract of service, as HODSON, L.J., put it in *Jones v. Manchester Corpn.* (1), or as a case of contribution, as it was put by DENNING, L.J., and, probably, by SINGLETON, L.J., I think that the result would be the same. In my view, the plaintiffs would be entitled to recover the whole of the damages which they have had to pay in this case owing to the negligence—and owing only to the negligence—of the defendant.

B What is the answer to that? If I understand the defence, putting it shortly, it is this. Owing to the Road Traffic Act, 1930, which introduced what we call "compulsory insurance" for vehicles on the road against damage being done to third parties, the whole system has been changed. Indeed, counsel for the defendant put it in these actual words, "The whole matter is now changed because of motor insurance." I propose to deal with that in more detail in a moment, but I want to say that I have come to the conclusion that it does not in any way change the law of this country. All that s. 35 (1) of the Road Traffic Act, 1930, did in regard to this matter was to say that it was an offence to drive a vehicle on the road, or to cause or permit it to be driven, without having in force a contract of insurance according to the requirements of the Act. I do not think that that in any way interferes with what I might describe as the general law existing between master and servant with regard to the control of a motor car.

C I notice that, in the original defence which was served in this case, all that was raised was (i) a denial of negligence by the defendant, and (ii) a general denial, without any reason given, that the plaintiffs were entitled to indemnity or contribution, costs or expenses. After that the matter was further considered and an amended defence was served, drawn, if I may say so, obviously by a pleader of considerable skill and ingenuity. It is with that amended defence that I now have to deal. Paragraph 1 has been amended to add: "The wages of the defendant were at all material times £365 per annum." That is interesting, but it seems to me a quite irrelevant piece of information. Obviously, however, some weight is attached to it because more than once counsel for the defendant pressed on me the consideration that this was an action by a subsidiary company of a great commercial concern against one of their employees earning £7 per week, and he drew what was intended to be a harrowing picture of this unfortunate man having his house—if he has one—sold over his head, being driven with his wife and children into the gutter, and forced into bankruptcy. Of course, it is obvious to anyone who uses his eyes in this court, apart from the evidence that was given, that, in the result, this is a contest between much more seasoned warriors than even Semtex, Ltd., or Mr. Gladstone. Behind the scenes are two well known insurance companies, and I think that the facts that the defendant is a man of small means and that, ex hypothesi, the insurance companies are people of large means are quite irrelevant. The rights of the plaintiffs do not depend on the ability or inability of the defendant to satisfy any lawful judgment that is given, nor does a judgment given depend in any way on the fact that one party, or both parties, or no party, has, or have, in the background an insurance company on which they can rely. The fact that people are insured in respect of this or that risk does not in the least alter the principles which the court has to apply in deciding what is the law.

H Paragraph 2 of the defence says:

"It was an implied term of the contract of employment between the plaintiffs and the defendant that the plaintiffs would effect and/or keep in force, a policy of insurance which would indemnify the plaintiffs and the defendant against liability which may be incurred by him in respect of the death of or bodily injury to, any person caused by or arising out of the use by him in the course of his employment of the shooting brake on the road."

I am not sure whether, if that be true, it would really make any difference, because, I think, this case still has to be decided apart from the question of insurance, except to the extent which I will deal with later on. I think that that paragraph, as pleaded, is wrong. I do not think that it can be any implied term of the contract of his employment that a particular policy of insurance to indemnify the driver must be in force. There is, I think, implied in a contract a term that the law would be observed and that the driver would not be called on to do an unlawful act: in other words, that the employer will have taken the steps which he is bound to take under s. 35 (1) of the Road Traffic Act, 1930. This is made plain in *Gregory v. Ford* (5). In that case BYRNE, J., held that s. 35 (1) of the Act of 1930 did not cast on the employer any duty in relation to his servant to insure against third-party risks a vehicle driven by the servant, but he did hold, secondly, that there was an implied term in the contract of service that the servant should not be required to do an unlawful act, and, accordingly, that there was an implied term of the servant's (i.e., the driver's) contract that his employers were to comply with the provisions of s. 35 (1). BYRNE, J., pointed out ([1951] 1 All E.R. 123) that it was necessary to consider the object of the statute, and he cited a passage from the judgment of GODDARD, J., in *Tattersall v. Drysdale* (6), where the learned judge said ([1935] 2 K.B. 181):

"[The Road Traffic Act, 1930,] was aimed at the protection of the public by providing that there should be a body of insurers behind every driver of a car."

BYRNE, J., then said ([1951] 1 All E.R. 123):

"With that observation I respectfully agree. *Monk v. Warbey* (7) is authority for the proposition that a person who is injured by the negligent driving of a motor car which is not the subject of insurance against third-party risks can sue the owner of the motor car for breach of statutory duty, but, so far as I am aware, there is no authority for the proposition that s. 35 (1) casts on the employer a statutory duty in relation to his servant, and, having regard to the object of the statute, I do not think that it does."

BYRNE, J., then pointed out that there was an implied term that the employers would comply with the provisions of the Road Traffic Act, and it is to be noted that he also found that the driver in that case—where there was, in fact, no policy in existence—was entitled to succeed on that implied term. BYRNE, J., added (*ibid.*, 124):

"A servant is, of course, liable at the suit of his master for damage which is the result of the servant's negligence, but in this case, although the third defendant [the servant] was negligent, it is owing to the breach of statutory duty by the first and second defendants [the employers] that the damages in respect of which they claim indemnity fall on them. For that reason, in my view, their claim fails."

Therefore, in the present case, it is, I think, wrong to say that one can imply in the defendant's contract of employment a term that he is to be indemnified against liability. But there is to be implied a term that the plaintiffs would carry out the obligations laid on them by s. 35 (1) of the Road Traffic Act, 1930. With para. 2, I have to couple up, I think, para. 8 of the amended defence which says that the plaintiffs' claim was contrary to and in breach of the said implied term of contract of employment between the plaintiffs and the defendant. If the contract was that the defendant was not to be under any liability and was to be protected in that sense, it might be so, but if the implied term is only the one with which BYRNE, J., deals, viz., to carry out the terms of the Road Traffic Act, it seems to me to be not so.

Paragraph 9 says:

"Further, or alternatively, the plaintiffs in breach of the said implied term failed to effect, or keep in force, a policy of insurance which indemnified the

defendant against liability in respect of the people in this case who brought their actions."

The answer to that is that, *prima facie*, they seem to have effected such a policy. Two contracts of insurance were put in evidence, both called for by the defendant. It appears that the plaintiffs had an employers' liability policy of the Midland Employers' Assurance, Ltd., which covered everybody under a contract of service or apprenticeship with them who might be injured, or fall ill, arising out of and in the course of their employment. Therefore, under that policy only the plaintiffs were insured against liability. Secondly, there was a contract of insurance with Cornhill Insurance Co., Ltd., which was a motor car policy. Under that policy the shooting brake which was concerned in this matter was covered. The policy contains the term that the insurers will indemnify any person while driving the insured car on the order, or with the permission, of the insured, provided that such person is not entitled to indemnity under any other policy and that the terms, exceptions and conditions of the policy shall apply to him as far as possible. It is issued in the names of Semtex, Ltd., and/or representatives. It is one of those contracts designed, I think, to cover the requirements of the Road Traffic Act, 1930. There is a primary insured, the policy-holder, and a secondary insured, i.e., the actual driver, and the insurers undertake to indemnify the driver provided that he was driving on the order, or with the permission, of the policy-holder, as the defendant was doing. What I fail to see at the moment is how that makes any difference to the legal position between master and servant. It may be a comforting thing for the defendant if the policy does, indeed, indemnify him, but I doubt if I have to decide whether or not it does. I do not think I do at the moment, except to say that, *prima facie*, there is in force such a policy of insurance as would satisfy the requirements of the Road Traffic Act, and that it was in force on Mar. 7, 1951.

The defendant put in evidence a letter, dated July 13, 1953, written to him by a firm of solicitors. They called his attention to the action then due for trial, and said:

"Meanwhile we have been giving consideration to the insurance position. In our opinion, our clients, Cornhill Insurance Co., Ltd., are not bound to indemnify you and, by arrangement with you, we have been acting for you in the action without prejudice to the insurance position. It appears, however, that insurance questions will arise because at present Semtex, Ltd., do not agree with the Cornhill."

They then pointed out, quite rightly, that, if questions of that sort were going to arise, it would be better for the defendant to be represented by solicitors. No hint is given in that letter on what ground Cornhill Insurance Co., Ltd., would disclaim liability to the driver. If, in due course, when the proper steps have been taken, it should turn out that the policy is a bad one, or ineffective for some reason, there might then be questions to be decided between the plaintiffs and the defendant, but at the moment the policy seems to me a complete contradiction of the defence put forward that the plaintiffs failed, in effect, to keep in force a policy of insurance which indemnifies the defendant against liability in respect of the death of one man and the injuries of the others. But, again, I say that subject to the duty of the plaintiffs, the employers, who, as I have already indicated, are, in my view, limited to their duty under the Road Traffic Act, 1930. One cannot imply in the contract of employment any other term than that. If a servant wants any term in addition to the one which is part of the public law of the land, it must be the subject of an express agreement.

I will come to the other points of the defence. Paragraph 10 is that the defendant is under no duty at common law to indemnify or to make contribution to the plaintiffs. I have already indicated my view. Whether the master must be treated as a joint tortfeasor and the case comes under the Law Reform (Married

Women and Tortfeasors) Act, 1935, or not, the defendant is, in my view, quite plainly liable at common law to his masters. If he is negligent and causes damage to them by his negligence, they are entitled to recover. It is said that the plaintiffs are in breach of "the said implied term" contrary to law and natural justice. I do not think that they are in breach of "the said implied term", whatever that term was. The defendant has his rights, whatever they are, under the contract of insurance because there is an express provision for indemnifying him and, indeed, the policy goes further than the requirements of the Road Traffic Act, 1930, because it appears to include liability for the death of or injury to people who were in the vehicle in the course of employment. By proviso (i) to s. 36 (1) (b) of the Act, this liability need not have been provided against. I do not know what the words "contrary to law and natural justice" mean, except that they suggest that there is no precise legal form into which the defence can be put. I hope the law of this country and natural justice will approximate always as closely as possible, but all claims and legal defences have to be grounded in law, and not according to somebody's idea of natural justice, not even that of the judge who may hear the case, and I do not think that anything is added by that paragraph of the defence. Nothing, as far as I am concerned, has come to light to suggest that there is any other kind of defence in either law or natural justice. The final plea is that, in any event, acting under s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, the court should, as it has power to do if that is the right way to put this case, exempt the defendant from liability to make any contribution. I cannot see any possible ground for exercising that power and I see every possible ground for doing the exact opposite. That an employee who is negligent and causes grave damage to his employers should be heard successfully to say that he should not make any contribution to the resulting damage is a proposition which does not, in the least, commend itself to me, and I do not see why it should be so. Justice, as we conceive justice in these courts, requires that the person who caused the damage is the person who must in law be called on to pay damages arising therefrom.

I want finally to refer to *Digby v. General Accident Fire & Life Assurance Corp., Ltd.* (8) which is extremely near the present case, not only in law, but even, if one may be so bold as to say so, in the idea of natural justice which the defence has been pressing on the court. It is a case which caused a great deal of litigation. The short facts were that Miss Merle Oberon, the well-known actress, was injured in her car while being driven by her chauffeur. The car collided with another car. She brought an action against her own chauffeur and the driver of the other car. The court held that both vehicles were to blame, which meant, in the blank statement of the law, that Miss Oberon was able to gain her judgment only against her own chauffeur. She did so, to the amount of £5,000. I have no report of the original trial, but it is plainly an authority for this, that an employer and owner of a car can sue the driver employed by him, for injuries caused to him (the owner) by the negligent driving of the car. The matter then went to arbitration because the driver claimed indemnity from the insurance company on a policy which, as far as I can see, appears to be indistinguishable from the Cornhill policy in the present case. The umpire, Mr. Maxwell Fyfe, K.C., decided that the driver was entitled to be indemnified. The matter then went to ATKINSON, J., who agreed. It went to the Court of Appeal, who, by a majority, disagreed. Finally, the matter went to the House of Lords, who, again by a majority, agreed with the original decision and held that under the policy taken out by his employer (the owner of the car) the driver was able to claim indemnity from the insurance company for the damages which he was liable to pay to the owner. It is true that the dispute in that case was on the question whether the policy holder should be considered as a third party for this purpose, and that question is irrelevant in the present case because I am not dealing with that matter. But *Digby's* case (8) illustrates strikingly that the owner

was able to sue her own chauffeur and driver and to recover damages, although there was in force a policy which she had taken out to cover what was required to be covered by the Road Traffic Act, 1930, and which, as the House of Lords subsequently held, gave protection to the driver himself. The only difference I can see between that case and this is that there the employer was suing the servant for injuries which his negligence had caused to her physically. In the present case the plaintiffs are claiming against the defendant, their servant, for damages which they have had to pay to people injured by his negligent driving, and as, in our law, a master is, I think, entitled to sue his servant for damages which he has been called on to pay to others, as well as for injuries directly caused to him, the principle is, in my opinion, the same. With the other part of the case I am not concerned, except that it serves to show that, in the absence of some point which has yet to be disclosed and argued, the defendant in the present case may be able to take considerable comfort in that the Cornhill policy may cover him, even against his own employers. This principle was illustrated again in *Richards v. Cor* (9), but I do not think that more need be said about that with regard to the present case. For these reasons I think that the plaintiffs are entitled to recover in the present action, and, accordingly, they will be entitled to the relief for which they ask.

Judgment for the plaintiffs.

Solicitors: *Buller, Jeffries & Kenshole*, Birmingham (for the plaintiffs); *Blewitt & Co.*, Birmingham (for the defendant).

[Reported by MISS GWYNEDD LEWIS, Barrister-at-Law.]

ADDISON v. BROWN.

[QUEEN'S BENCH DIVISION (Streatfeild, J.), April 12, 1954.]

Deed—Legality—Public policy—Divorce by foreign court—Covenant that deed should have effect notwithstanding terms of judgment.

The plaintiff and the defendant, who were wife and husband, the husband being an American citizen, were married in England in April, 1939, and there were three children of the marriage. Differences having arisen between the parties, the husband told the wife that he wished to divorce her in America. On December 3, 1947, before divorce proceedings were instituted, the parties entered into an agreement under seal whereby the husband agreed to pay to the wife \$20 per week maintenance (\$5 per week for her own maintenance and \$5 for each of the children). The agreement further provided that, in the event of either the husband or the wife obtaining a divorce in California, "the provisions of this agreement shall continue in full force and effect and shall be conclusive with respect to the husband's obligation to pay to the wife for her own use and purpose the sums hereinbefore provided by him to be paid. Neither the husband nor the wife will make application to any court in such proceeding, if any, for any different relief, but this agreement may be embodied in and made part of such judgment or decree. If any judgment of any court shall otherwise provide with respect to any of the matters in this agreement embraced, the provisions hereof shall control notwithstanding the terms of any such judgment". On Feb. 26, 1948, the courts of California pronounced an interlocutory judgment of divorce in favour of the husband and the maintenance agreement was embodied in the order of the court. This judgment was made absolute in March, 1949. In an action by the wife for arrears under the deed it was contended on behalf of the husband that the deed was void and contrary to public policy in that it purported to oust the jurisdiction of the court.

Held: although the deed would have been contrary to public policy, and, therefore, void, if it had purported to oust the jurisdiction of the

English courts, it was not contrary to public policy to allow the wife to sue on it merely because it purported to oust the jurisdiction of a foreign court.

Bennett v. Bennett ([1952] 1 All E.R. 413), distinguished.

AS TO CONTRACTS BETWEEN HUSBAND AND WIFE WHICH ARE CONTRARY TO PUBLIC POLICY, see HALSBURY, Hailsham Edn., Vol. 7, pp. 157, 158, paras. 222, 223; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 214-217, Nos. 1712-1727 and Digest Supps.

Case referred to:

(1) *Bennett v. Bennett*, [1951] 1 All E.R. 1088; [1951] 2 K.B. 572; 115 J.P. 355; *aff'd.*, C.A., [1952] 1 All E.R. 413; [1952] 1 K.B. 249; 3rd Digest Supp.

ACTION for arrears under a maintenance agreement.

In April, 1939, the plaintiff, Mrs. Olivia Josephine Addison, married, in England, the defendant, Mr. Stewart D. Brown, an American subject, domiciled in California. There were three children of the marriage, aged, at the time of the action, fourteen, thirteen and ten years. In May, 1940, the plaintiff and the defendant went to California. In 1945 the plaintiff returned to this country with the children. In 1946 the defendant followed, but not to live with his wife. Differences had arisen between them, and he informed her that he wished to divorce her in the United States of America. The defendant's American solicitors advised him that it was advisable that there should be a preliminary agreement as to property and the custody of the children before divorce proceedings were taken, and on Dec. 3, 1947, an agreement was executed under seal which contained the following terms:

"... the parties by this agreement and under these circumstances . . . desire to make proper and definite provisions for the maintenance and support of the wife and the maintenance support and education of the children of the marriage during the present marital status of the wife and thereafter in the event that the husband shall be granted a divorce from the wife . . . (3) The husband agrees to pay to the wife the sum of \$20 a week for the support and maintenance of the wife and for the support maintenance and education of the children of the marriage until the youngest of the said children shall attain the age of eighteen years. Nevertheless the said sum of \$20 a week shall be reduced from time to time by \$5 a week in respect of any child who shall be at boarding school during such period as such child is, in fact, boarding at the school . . . 7. In the event that either the husband or wife shall at any time institute or continue a proceeding for divorce or obtain a divorce in the State of California whether upon matters heretofore or hereafter arising the provisions of this agreement shall continue in full force and effect and shall be conclusive with respect to the husband's obligations to pay to the wife for her own use and purpose the sums hereinbefore provided by him to be paid. Neither the husband nor the wife will make application to any court in such proceeding, if any, for any different relief, but this agreement may be embodied in and made part of such judgment or decree. If any judgment of any court shall otherwise provide with respect to any of the matters in this agreement embraced, the provisions hereof shall control notwithstanding the terms of any such judgment."

On Feb. 26, 1948, the courts of California pronounced an interlocutory judgment of divorce in favour of the defendant and the order of the court continued in the following words:

"... The property settlement agreement bearing date Dec. 3, 1947, introduced in evidence upon the hearing in this cause . . . is hereby approved and the parties are directed to comply with the directive provisions of the said settlement agreement, which is herein incorporated and made a part hereof . . . provided, however, that the court hereby orders the

money payments provided to be made by the terms of the said agreement to be so made as alimony, subject, and without prejudice to the courts continuing jurisdiction thereof; and the court expressly reserves the right to modify, amend or add to the said agreement in so far as it provides for the care, custody and maintenance of the three minor children of the plaintiff and defendant."

A His LORDSHIP found on a true construction of the agreement that of the \$20 per week the wife was to be paid \$5 per week for herself and \$5 per week for the maintenance of each child. By accepting two lump sums of £50 in March and May, 1948, it was agreed that the wife had compromised the agreement in so far as it related to her own maintenance.

B From April to July, 1948, the defendant made irregular payments of varying amounts under the agreement. On Mar. 25, 1949, the Californian courts made absolute the judgment of divorce. In May, 1949, the plaintiff married a warrant officer in the British army. On July 18, 1949, the defendant's solicitors wrote to the plaintiff saying that, as he was about to re-marry, he was prepared to pay 25s. per week in respect of each child, and that, in view of the payment of £100 to the wife, she was not entitled to any further weekly payment for herself. At that time, before the de-valuation of the pound the 25s. per week per child was almost exactly the equivalent of the \$5 per week stipulated in the agreement. The wife acknowledged that letter on Aug. 8, 1949. In September, 1949, the defendant re-married, and on Sept. 20, 1949, the pound was de-valued. Until July, 1950, the defendant remitted the sum of £16 5s. monthly to the wife after which he ceased payment. After the pound was de-valued he did not increase the sum proportionately, and he contended that he did not think he was under any obligation to do so as his salary was paid in sterling.

C On Aug. 9, 1950, the plaintiff issued a writ claiming arrears of maintenance for herself and her children, and as from the date of de-valuation of the pound she claimed an increased sum. In January, 1952, she issued a second writ dropping the claim for her own maintenance and continuing the claim in respect of the children from the date of the previous writ, and in addition she claimed £35 12s. 6d. in respect of clothing bills and £19 7s. for medical expenses. The actions were consolidated and the claim amounted, taking into account the amounts the husband had paid, to £442 15s. 6d.

E It was contended on behalf of the husband that there had been an oral variation of the maintenance agreement whereby the wife would accept 25s. per week for each child in lieu of \$5 per week, and that the action was not maintainable in an English court as the agreement sued on was contrary to public policy.

F *Hollins* for the plaintiff.

Dehn for the defendant.

G STREATFEILD, J., stated the facts and continued: It is contended on behalf of the defendant that this action is not maintainable in the English courts because the agreement sued on is contrary to public policy, and, therefore, void, by reason of the decision in *Bennett v. Bennett* (1). It is not suggested that this action is not maintainable in the English courts on the ground that the agreement has been incorporated and has become merged in a foreign judgment. I express no opinion on that point.

H On the question whether the agreement is contrary to public policy, that is a matter of law of which I should be obliged to take note quite apart from the pleadings. *Bennett v. Bennett* (1) was decided by DEVLIN, J., and in the Court of Appeal DEVLIN, J.'s judgment was unanimously upheld. The circumstances of *Bennett v. Bennett* (1) were, however, entirely different. They were as follows. In August, 1948, the plaintiff, the wife, presented a petition for the dissolution of her marriage in which she asked for the custody of the two children of the marriage, alimony pendente lite, maintenance for the younger son, and maintenance and security for herself. Before the pronouncement of any decree, her

husband entered into an agreement under seal whereby he agreed to make financial provision for the plaintiff and the younger son in consideration for which the wife covenanted not to proceed with the prayers for maintenance, to consent to those prayers being dismissed, and not to present any further petition for maintenance. The registrar made a consent order in which these prayers were struck out. When the husband fell into arrear with the payments under the deed his wife sued him for the arrears. *DEVLIN, J.*, held—and, if I may respectfully say so, obviously rightly held—that the agreement sued on was unenforceable because it was contrary to public policy. The material judgment is that of *DENNING, L.J.*, and it is not without significance that he commences his judgment with these words ([1952] 1 All E.R. 420):

“In this case the only question to my mind is whether the wife can sue on the deed by action at law or whether her proper remedy is by application to the Divorce Court. I would not subscribe to a decision which deprived her of any remedy.”

The case proceeded on the ground that under the Supreme Court of Judicature (Consolidation) Act, 1925, by s. 190 (1),

“The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money . . .”,

that the Act contained various other provisions with regard to the maintenance of the wife, and that under s. 176 it was clear that the court for that purpose meant the Probate, Divorce and Admiralty Division of the High Court of Justice in England. *DENNING, L.J.*, in his judgment, said (*ibid.*, 422):

“An award of permanent maintenance on a divorce is peculiarly a matter for the Divorce Court, and the jurisdiction of that court in regard to it cannot be ousted by the private agreement of the parties. The reason lies in public policy.”

I would particularly draw the attention of the defendant to what *DENNING, L.J.*, said about the doctrine of public policy in the law of England:

“First, it is in the public interest that the wife and children of a divorced husband should not be left dependent on public assistance or on charity when he has the means to support them. They should, therefore, be able to come to the Divorce Court for maintenance, notwithstanding any agreement to the contrary . . . Secondly, when maintenance is awarded by the Divorce Court, it is not fixed irrevocably at a named figure. It can be varied thereafter, upwards or downwards, according to the circumstances prevailing at the time, and, if the husband is unable to pay and arrears accumulate, it is in the discretion of the Divorce Court whether to enforce payment of the arrears or not. These beneficent controls would be lost if the parties could, by agreement, without the intervention of the court, fix maintenance permanently at an unalterable figure. Any private agreement of the parties which purports to make maintenance a debt enforceable at law must of necessity impliedly oust the jurisdiction of the Divorce Court to fix it, vary it or discharge it, and it is, by reason of that implication, invalid, for the ouster goes to the whole consideration. There is no consideration moving from the wife except an implied promise to accept the named figure and not to ask for more, and that is invalid, because it impliedly takes away the jurisdiction of the court to give her more. If her promise does not bind her, then his should not bind him . . . Sometimes there may be an implied promise by her to prosecute the divorce proceedings, but that would be worse, for it would be collusion. In the present case, however, the ouster is not merely by implication. It is expressed in cl. 10 of the deed. That clause is invalid. It taints the whole, or substantially

the whole, consideration for the husband's promise to pay the annuities. His promise is, therefore, invalid."

A It was by reason of that passage from the judgment of DENNING, L.J., that I
said that, had this agreement been an English agreement, had these proceedings
been brought in the Divorce Division of the High Courts of Justice, undoubtedly
this agreement would have been unenforceable on the principle of *Bennett v.*
B *Bennett* (1). But, although it is contrary to public policy to oust the jurisdiction
of the English courts in such a case, I cannot think that public policy forbids
a plaintiff in the English courts from suing on an agreement on the ground
that that agreement purports to oust the jurisdiction of a foreign court. It
is submitted that it makes no difference that the court whose jurisdiction
the agreement purports to oust is an American court rather than an English
one. In my judgment, there is nothing in *Bennett v. Bennett* (1) which compels
me to hold that the ouster of the jurisdiction or the purported ouster of the
jurisdiction of a foreign court is contrary to the policy of the law of England.
I do not think it is. Even if it were, the American court has adopted this
agreement and preserved the right to alter or vary it as the case may be. I
do not think, therefore, that there is anything in this point that this agreement
C is contrary to public policy and is, therefore, void. It is not suggested
that the courts in England on any other ground have not jurisdiction to entertain
this action. This agreement, although it was executed before the American
consul and although it has been incorporated in a foreign judgment, neverthe-
less was one which at all material times was intended to be executed in this
country where the wife was resident. In my judgment, the first point taken on
D behalf of the defendant that this agreement is unenforceable fails.

[HIS LORDSHIP held on the facts that there was no implied variation of the
agreement as the result of the correspondence which passed between the parties
in July and August, and the plaintiff's conduct in accepting a figure of £16 5s.
monthly until July, 1950, just before she issued her writ, and he concluded:]
From those findings it follows that the plaintiff is entitled to enforce this agree-
E ment in the English courts at the rate of \$4 to the pound from Apr. 1, 1948,
until Sept. 15, 1949. After that date, there having been a de-valuation and the
agreement being expressed in dollars, she is entitled to payment at the rate of
\$5 a week, whatever that may entail.

Judgment for the plaintiff.

Solicitors: *Rowe & Maw* (for the plaintiff); *Randolph & Dean* (for the
defendant).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. BARR (TRADING AS HENRY & GALT).

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), March 29, 30, May 4, 1954.]

Income Tax—Deduction in computing profits—Wear and tear—Balancing charge—“Before the trade is permanently discontinued”—Sale of business as going concern—Business continued by purchaser—Balancing charge in respect of plant and fittings—Income Tax Act, 1945 (c. 32), s. 17 (1).

In July, 1946, B., who carried on business under the style “Henry & Galt”, sold the business to R. as a going concern, the purchase price including £4,000 allocated to the plant and fittings. B.’s interest in and connection with the trade of Henry & Galt ceased when the sale to R. took place, and B. retired from business and permanently discontinued trading, but the business of Henry & Galt was carried on by R. as if there had been no change. In respect of the £4,000 a balancing charge under the Income Tax Act, 1945, s. 17 (1), was assessed on B. for the year of assessment 1946-47.

HELD: the sale to R. took place before the trade was “permanently discontinued” within s. 17 (1) because the trade was continued by R., and, therefore, the assessment was properly made.

Inland Revenue v. West (1950 S.C. 516), distinguished.

Boarland v. Madras Electric Supply Corpn. ([1953] 2 All E.R. 467) and *Bramford’s Road Transport, Ltd. v. Evans* ([1953] 2 All E.R. 1308), approved.

FOR THE INCOME TAX ACT, 1945, s. 17 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 12, p. 629.

Cases referred to:

(1) *Inland Revenue v. West*, 1950 S.C. 516; 31 Tax Cas. 402; 2nd Digest Supp.

(2) *Boarland v. Madras Electric Supply Corpn.*, [1953] 2 All E.R. 467.

(3) *Bramford’s Road Transport, Ltd. v. Evans*, [1953] 2 All E.R. 1308.

(4) *Ferguson (Alexander) & Co., Ltd. v. Aikin*, (1898), 4 Tax Cas. 36; 28 Digest 40, g.

(5) *Bartlett v. Inland Revenue Comrs.*, [1914] 3 K.B. 686; 84 L.J.K.B. 106; 111 L.T. 852; 7 Tax Cas. 229; 28 Digest 110, 676.

(6) *Watson v. Lothian*, (1902), 4 Tax Cas. 441.

APPEAL by the Inland Revenue Commissioners from an interlocutor of the First Division of the Court of Session, as the Court of Exchequer in Scotland, dated Jan. 13, 1953, on a Case stated by the General Commissioners of Income Tax for the upper ward of Renfrew, dated July 3, 1952. The General Commissioners held that they were bound by *Inland Revenue v. West* (1950 S.C. 516), and that no balancing charge was exigible.

The Attorney-General (Sir Lionel Heald, Q.C.), *J. O. M. Hunter, Q.C.* (of the Scottish Bar), *Sir Reginald Halls* and *W. P. Grierson* (of the Scottish Bar) for the appellants.

R. P. Morison, Q.C., *Manuel Kissen* (both of the Scottish Bar), and *H. M. Allen* for the respondent.

The House took time for consideration.

May 4. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the only question arising on this appeal is whether, on the facts set out in the Case Stated, a liability to a “balancing charge” under s. 17 of the Income Tax Act, 1945, arose on the sale by the respondent of the plant and machinery used in the business formerly carried on by him under the style of “Henry & Galt”. The facts are fully set out in the Case Stated and I can summarise them, for the purposes of

my opinion, as follows. For many years the firm of Henry & Galt carried on business as iron founders at Paisley. The respondent (who was previously the manager of the concern) became a partner with Mr. James Galt on Apr. 1, 1928, and from the latter's death in 1945 carried on the business as sole proprietor until July, 1946. On July 15, 1946, the transfer of the business as a going concern to one Thomas Reid was completed. The purchase price was £14,000, which included £4,000 allocated to the plant and fittings. I now quote paras. 1 (5) and 1 (6) of the Case Stated:

"(5) The respondent's interest in and connection with the trade of Henry & Galt ceased when the sale thereof to Mr. Reid took place, and the respondent then retired from business and permanently discontinued trading. (6) After the sale the business was carried on and continued as if there had been no change."

I pause to say that I attach no significance to the change in wording from "trade" in para. 5 to "business" in para. 6, nor was any argument based on this at the hearing.

Section 17 of the Income Tax Act, 1945, so far as relevant for the present case, is in the following terms:

"(1) Subject to the provisions of this section, where, on or after the appointed day, any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under r. 6 of the Rules Applicable to Cases I and II of sched. D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—(a) the machinery or plant is sold, whether while still in use or not; or (b) the machinery or plant, whether still in use or not, ceases to belong to the person carrying on the trade by reason of the coming to an end of a foreign concession; or (c) the machinery or plant is destroyed; or (d) the machinery or plant is put out of use as being worn out or obsolete or otherwise useless or no longer required, and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as 'a balancing allowance' or 'a balancing charge') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs . . . Any reference in this sub-section to the permanent discontinuance of a trade does not include a reference to the happening of any event which, by virtue of any of the provisions of r. 11 of the Rules Applicable to Cases I and II of sched. D is to be treated as equivalent to the discontinuance of the trade."

It will be observed that a balancing charge is made in the case of machinery or plant only if three conditions are fulfilled, namely, (i) that an initial allowance or a deduction under r. 6 of the Rules Applicable to Cases I and II of sched. D has been made or allowed for any year of assessment to a person carrying on a trade; (ii) that one of the four events set out in the section has occurred; and (iii) that the event in question occurs before the trade is "permanently discontinued". My Lords, it is common ground that the first two of these conditions are fulfilled in the present case, but your Lordships have to determine whether the sale to Mr. Reid occurred before the trade was permanently discontinued, within the meaning of the section.

Before I go on to consider this question, I ought to quote s. 68 (4) and s. 70 of the Act of 1945. Section 68 (4) provides:

"Any reference in this Act to the setting up or permanent discontinuance of a trade includes, except where the contrary is expressly provided, a reference to the occurring of any event which, under any of the provisions of the Income Tax Acts, is to be treated as equivalent to the setting up or permanent discontinuance of a trade."

It is common ground that the concluding sentence of s. 17 (1) of the Act supplies an instance where "the contrary is expressly provided". Section 70 provides:

"This Act may be cited as the Income Tax Act, 1945, and shall be construed as one with the Income Tax Acts."

I shall refer later to r. 11 of the Rules Applicable to Cases I and II of sched. D, as this rule is referred to in s. 17 (1) of the Act of 1945 and is, in my view, of considerable importance in the case.

The respondent appealed against the assessment to income tax on him for the year of assessment 1946-47 so far as it included a balancing charge of £1,405. The commissioners expressed their decision in the Case Stated as follows:

"We, the commissioners who heard the appeal, held that we were bound by the decision of the Court of Session in the case of *Inland Revenue v. West (Girl Eileen)* (1), and that no 'balancing charge' was exigible in this case and the assessment in respect thereof was accordingly discharged."

They stated a question of law for the opinion of the court in the terms which I quoted in my opening words. In the First Division of the Court of Session LORD CARMONT referred to *Inland Revenue v. West* (1) and continued:

"It was held in that case that no balancing charge was exigible, and although the facts before us are different from those in *West's* case (1), the Lord Advocate for the appellants, in opening his appeal before us, said he could not maintain that the ratio of *West's* case (1) did not cover the present case. Accordingly, as the case cannot be argued on the footing that the decision in *West* (1) is distinguishable, the judgment of the court in that case applies in such circumstances as we have now before us, and there is no alternative open to us but to answer the question put, in the negative, and I so move your Lordships."

LORD RUSSELL and LORD KEITH agreed.

In *Inland Revenue v. West* (1), the Court of Session had to consider whether a balancing charge arose on the sale of certain fishing vessels, the relevant vessel for the present purpose being named the Girl Eileen. In my view, *West's* case (1) is distinguishable from the present case, for reasons which I shall state hereafter; but the Lord President (LORD COOPER) and LORD KEITH, in the course of their opinions, expressed views on the construction of s. 17 (1) of the Act of 1945 which, if they are correct, would be fatal to the claim of the appellants in the present case. For instance, LORD KEITH said (1950 S.C. 536):

"... it is clear, in my opinion, that s. 17 is looking, not to the continuance of the machinery or plant in trade but to the continuance of the owner of the machinery or plant in trade".

These views were not accepted by UPJOHN, J., in *Bourland v. Maitres Eclairage Supply Corpn.* (2), or by DANCKWERTS, J., in *Bramford's Road Transport, Ltd. v. Evans* (3). Each of these two learned judges felt free to differ from the Court of Session, in all the circumstances, for reasons which he expresses in his judgment.

My Lords, the question arising for decision, and the conflicting views on it, may be stated as follows. A business is sold as a going concern, with its plant. From the moment of its transfer to the purchaser, the seller permanently discontinues trading, but the business is "carried on and continued as if there had been no change"—to quote again the Case Stated. In these circumstances, (i) does the sale take place "before the trade is permanently discontinued" within the meaning of s. 17 (1) of the Act of 1945, because, after the sale, the trade is carried on by the purchaser, or (ii) is the trade "permanently discontinued" at the moment when the sale takes place, because the person who had carried on the trade up till that moment permanently discontinues trading as from that moment? UPJOHN, J., and DANCKWERTS, J., thought that the former was the

correct view, but I think it is clear that the First Division in *West's* case (1) took the latter view. If the former view is correct, the appeal succeeds; if the latter view is correct, it fails.

A It is in these circumstances that I apply myself to the task of construing the language of s. 17 of the Act of 1945. I start by observing that the section first refers to a "person carrying on a trade" to whom an initial allowance or deduction has been made in respect of certain machinery or plant, and then goes on to impose a balancing charge on that person if (inter alia) that machinery or plant is sold before the *trade* is permanently discontinued. So far, the language used seems to indicate that the legislature contemplates that a trade is not necessarily discontinued when the person carrying it on sells the business to someone else. B It contemplates that plant and machinery, while still in use, may be sold *before* the trade in which it is used has been permanently discontinued. This provision seems to me inconsistent with the view that a trade is at once "permanently discontinued", within the meaning of the section, if A.B. sells his business to C.D. One illustration of the difficulties arising from the acceptance of this view may be given at once. If it were accepted, the section could never apply in the common case where machinery and plant is sold together with the goodwill of the business in which it is used: for the "permanent discontinuance" and the sale would necessarily be simultaneous. C

D I think the true view is that the section regards the question whether the trade itself does, or does not, "continue" as being completely divorced from the ownership of the trade at any particular time. Moreover, I think this view is in accordance with the ordinary use of the word "discontinuance" as applied to a trade or business. If A.B. sells his business to C.D., and retires to a life of leisure, but C.D. carries on the business just as A.B. previously carried it on, I do not think it would occur to the ordinary person to say that the *business* had been discontinued. He would say: "A.B. has sold his business and it is being carried on by C.D." Similarly, if the owner of a business dies, having bequeathed his business to his son, and the son carries it on just as the father did, who would say that the *business* had been "permanently discontinued"? Further, it has for many years been a familiar conception in income tax law that a business can "continue" notwithstanding that one owner goes out and a new owner comes in: see, for instance, the Income Tax Act, 1918, r. 9 of the Rules Applicable to Cases I and II of sched. D. The idea that the same business can be carried on by one person as the "successor" of another is surely inconsistent with the view that a business is "permanently discontinued" when A.B. sells it to C.D. and C.D. carries on the business on the same lines. If this view were correct, C.D. would not be carrying on the same business as the successor of A.B.; he would be starting a new business in place of the business which had been permanently discontinued. Yet the idea of "succession" to a business appears throughout the income tax law, as well as being a familiar idea in everyday life. E

F For these reasons, even if the earlier part of s. 17 (1) stood alone, I should hold that the trade now under consideration was not "permanently discontinued" within the meaning of the section when the respondent sold it to Mr. Reid, because it was, in fact, "carried on and continued as if there had been no change", though under new ownership. If, however, there had been any ambiguity in the earlier part of the sub-section it would, in my opinion, be completely removed by the concluding sentence thereof, which it is convenient to quote again at this stage: G

H "Any reference in this sub-section to the permanent discontinuance of a trade does not include a reference to the happening of any event which, by virtue of any of the provisions of r. 11 of the Rules Applicable to Cases I and II of sched. D is to be treated as equivalent to the discontinuance of the trade."

In order to apprehend the effect of this sentence, it is necessary to read r. 11

there referred to. That rule is now to be found in the Finance Act, 1926, s. 32, as substituted by the Finance Act, 1930, s. 16, and the material portions of it are as follows:

"(1) If at any time after Apr. 5, 1928, a change occurs in a partnership of persons engaged in any trade, profession or vocation, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade, profession or vocation continued to be engaged therein, or a person who until that time was engaged in any trade, profession or vocation on his own account continues to be engaged in it, but as a partner in a partnership, the tax payable by the person or persons who carry on the trade, profession or vocation after that time shall, notwithstanding the change, be computed according to the profits or gains of the trade, profession or vocation during the period prescribed by the Income Tax Acts: Provided that, where all the persons who were engaged in the trade, profession or vocation both immediately before and immediately after the change require, by notice signed by all of them or, in the case of a deceased person, by his legal representatives, and sent to the surveyor within twelve months after the change took place, that the tax payable for all years of assessment shall be computed as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade, profession or vocation had been then set up or commenced, and that the tax so computed for any year shall be charged on and paid by such of them as would have been charged if such discontinuance and setting up or commencement had actually taken place, the tax shall be computed, charged, collected and paid accordingly. (2) If at any time after the said Apr. 5 any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued."

The vital words for the present purpose are, in the proviso,

"as if the trade . . . had been discontinued at the date of the change, and a new trade . . . had been then set up or commenced",

and in sub-s. (2) "as if it had then been discontinued". These phrases clearly indicate that, in the view of the legislature, there is no real "discontinuance" of a business, either when a change takes place in the personnel of the partnership by which it is carried on, or (still more important for the present purpose)

"if . . . any person succeeds to any trade, profession or vocation which until that time was carried on by another person."

Bearing in mind that the Act of 1945 is (by s. 70 thereof) to be "construed as one with the Income Tax Acts", I turn back to the concluding sentence of s. 17 (1) of that Act, already twice quoted. In effect that sentence says: "What we refer to in this section is a *real* discontinuance of the trade itself, and not such an event as a change in the ownership of the business, which under r. 11 may be treated as being equivalent to a real discontinuance." To my mind, my Lords, this concluding sentence makes it abundantly clear that, in the earlier part of the section, the words "permanently discontinued" have the meaning which I have already ascribed to them.

I add that the cases cited in your Lordships' House show that the courts in both England and Scotland, in considering whether a trade has been "permanently discontinued" have looked, not at a change of ownership, but at the

circumstances which arose after the change of ownership—was the trade carried on by the successor, or was it not : see, for instance, *Alexander Ferguson & Co., Ltd. v. Aikin* (4) per LORD McLAREN (4 Tax Cas. 40), and *Bartlett v. Inland Revenue Comrs.* (5), where SCRUTTON, J., said ([1914] 3 K.B. 693):

“ The trade was not discontinued in the year. The trade was sold to a company and continued during the whole year . . . ”

- A For all these reasons, I find myself unable to agree with the views expressed by the First Division of the Court of Session in *West's* case (1) as to the construction of s. 17 of the Act of 1945. I think, however, as I have already said, that that case is distinguishable on its facts from the present case and I see no reason to doubt the correctness of the actual decision. The Girl Eileen was owned by the respondents in that case in certain shares, and was engaged in fishing.
- B The respondents continued to employ the vessel in fishing from the port of Fraserburgh until Jan. 24, 1947, when they sold their shares in the vessel for £990. The purchasers continued to employ her in fishing from the port of Lerwick, but it does not appear that any goodwill of a business was sold to them; they merely bought a chattel, viz., the ship, and used her for the purpose for which she was built. It was sought to impose a balancing charge on the respondents under s. 17.
- C The decision of the Special Commissioners was in the following terms:

“ We, the commissioners who heard the appeal, were of opinion that a sale of plant did take place, but found that on the facts there was a simultaneous permanent discontinuance of trade. We accordingly discharged the assessment in respect of the balancing charge.”

- D This finding, coupled with the special facts of the case, fully justified, in my view, the decision at which the First Division arrived.

In the present case, however, I feel no doubt that, on the true construction of s. 17 of the Act of 1945 and in the events which have happened, a balancing charge was properly made on the appellants, and there is no dispute that the figure of £1,405 is correct, if any balancing charge is payable. I would allow the appeal and answer the question of law posed in the Case Stated in the affirmative.

- E My noble and learned friends, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE, who are unable to be present, have asked me to say that they concur in the opinion which I have just delivered.

- F LORD REID: My Lords, the relevant facts in this case are few and simple. In 1946 the respondent was carrying on an iron-founding business in Paisley under the firm name Henry & Galt. He sold the business for £14,000. The transfer of the business as a going concern was completed on July 15, 1946. The respondent then retired from business, but the business of Henry & Galt was carried on by the purchaser and continued as if there had been no change.
- G £4,000 of the purchase price was allocated to plant and fittings. In respect of that sum a balancing charge under the Income Tax Act, 1945, of £1,405 was assessed on the respondent for the year of assessment 1946-47. There is no dispute that, if any balancing charge is due by the respondent, the amount assessed is correct. The question is whether any balancing charge can be due by him in view of the fact that he ceased carrying on business when he sold the plant and fittings.

- H Section 17 (1) of the Act of 1945 provides (omitting those parts not material to this case)

“ . . . where . . . any of the following events occurs in the case of any machinery or plant . . . (a) the machinery or plant is sold, whether while still in use or not; . . . and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as ‘ a balancing allowance ’ or ‘ a balancing charge ’) shall, in the

circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs . . . Any reference in this sub-section to the permanent discontinuance of a trade does not include a reference to the happening of any event which, by virtue of any of the provisions of r. 11 of the Rules Applicable to Cases I and II of sched. D is to be treated as equivalent to the discontinuance of the trade."

The sole question in this case is whether, on July 15, 1946, "the trade" was permanently discontinued. If "the trade" means the trade of the respondent, then it was permanently discontinued, but if it means the business carried on under the firm name Henry & Galt, then it was not because it has been found as a fact that this business was carried on and continued as if there had been no change.

Section 62 of the Act of 1945 provides that Part II of the Act (which includes s. 17) shall be construed as one with the Income Tax Acts and it is necessary to go to the earlier Acts to see what is meant by discontinuance of a trade. Those Acts contain provisions dealing with cases where one person succeeds to a trade previously carried on by another, and there is no doubt that, in this case, the purchaser "succeeded" to the trade previously carried on by the respondent. On the question of what is meant by succession to a trade I need only refer to the opinion of the judges of the First Division in *Alexander Ferguson & Co., Ltd. v. Aikie* (4), and *Watson v. Lothian* (6). One would expect the Acts to be so drafted that succession and discontinuance of a trade would be mutually exclusive: if someone succeeds to a trade it is not discontinued, whereas if it is discontinued no one succeeds to it. That appears to have been the view of SCRUTTON, J., in *Bartlett v. Inland Revenue Comrs.* (5).

The last part of s. 17 (1) which I quoted refers to r. 11 of the Rules Applicable to Cases I and II of sched. D. The original r. 11 was replaced by s. 32 of the Finance Act, 1926, and para. (2) of the new rule is as follows:

"If at any time after the said Apr. 5 any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued".

That must mean that, although the person succeeding does not, in fact, set up a new trade, he is treated for certain purposes as if he had done so; and, although the trade to which he succeeded was not, in fact, discontinued, the person who formerly carried it on is to be treated for certain purposes as if it had been discontinued. In other words, when a person succeeds to a trade formerly carried on by another there is no actual discontinuance of the trade, but there is a notional discontinuance for the purposes of r. 11. The last part of s. 17 (1) of the Act of 1945 means that this notional discontinuance is not to be treated as a discontinuance for the purposes of s. 17. For the purposes of this section there must be an actual discontinuance and no succession to the trade by another person. In the present case, the purchaser did succeed to the trade and there was no discontinuance of it. So the sale of the plant occurred before there was any discontinuance of the trade and s. 17 applied so that the outstanding charge was properly assessed.

The First Division decided this case in favour of the respondent because it was covered by the ratio of their decision in *Inland Revenue v. West* (1), so it is necessary to examine that case. Four cases were heard together and the relevant case is that against William Read which was concerned with the timing

vessel *Girl Eileen*. This vessel had been owned by part owners each holding so many one-sixty-fourth shares. In 1947 all the owners sold their shares and balancing charges were assessed on them. The contention of the Inland Revenue before the Special Commissioners was that the trade was not discontinued because, after the sale, the vessel was still used for fishing by the new owners. It was not contended that the new owners had succeeded to the trade of the old owners and it is not clear on the facts whether that could have been maintained.

A The commissioners found that there had been a permanent discontinuance of the trade. Before the First Division the argument for the Crown as reported was that, so long as the plant was used in the trade, although not necessarily by the original owners, there was no discontinuance of the trade. The First Division held that the decision of the commissioners was correct and I think that they were right in rejecting the argument submitted for the Crown. The mere fact that
B plant after a sale is still used in the same kind of trading as before is not inconsistent with the trade of the seller having been discontinued. The purchaser may simply have bought the plant to use it in his own business and may not have succeeded to the seller's business. But that was not the ground of judgment. The Lord President (LORD COOPER) said (1950 S.C. 532):

C "... the scheme of the Act requires that a balancing charge should be recoverable only from persons still carrying on the business in question".

And LORD KEITH said (*ibid.*, 536):

"... it is clear, in my opinion, that s. 17 is looking, not to the continuance of the machinery or plant in trade, but to the continuance of the owner of the machinery or plant in trade".

D In this I think they went too far: in my opinion, what the Act requires is the continuance of the business in question. Under s. 22 the charge must be made on the seller in charging the profit or gains of his trade, but that can be done after he has ceased trading and it was done in this case. I am, therefore, of opinion that this appeal should be allowed.

E LORD COHEN: My Lords, I have had the opportunity of reading the opinion of the noble and learned Lord on the Woolsack. I agree with him that this appeal should be allowed for the reasons he gives.

Appeal allowed.

Solicitors: *Solicitor, Board of Inland Revenue, England*, agent for *Solicitor, Board of Inland Revenue, Scotland* (for the appellants); *Asher Fishman & Co.*, agents for *MacNair, Clyde & Ralston*, Paisley, and *Allan M'Dougall & Co.*, Edinburgh (for the respondent).

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law*.]

ARAB BANK, LTD. v. BARCLAYS BANK (DOMINION, COLONIAL AND OVERSEAS).

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen). March 15, 16, 17, 18, 22, 23, 24, April 1, May 4, 1954.]

Bank—War—Effect on credit balance—Payment to Custodian of "Absentee Property—Right of customer to recover from bank.

The appellants, the A. Bank, Ltd., were a company incorporated in Palestine in 1930, their head office being in Jerusalem until July 1, 1948, when it was moved to Amman, Jordan, where the appellants became registered on Nov. 7, 1949. The respondents, B. Bank, were a company incorporated in England with branches overseas. In 1939, pursuant to an application by the appellants to the respondents, which included a declaration by the appellants that they submitted themselves irrevocably to the jurisdiction of the courts at Jerusalem, the appellants opened a current account with the respondents' Jerusalem branch. On the termination of the British mandate in Palestine at midnight on May 14/15, 1948, war broke out between the State of Israel and the Arabs in Palestine, supported by the Arab States, including Transjordan, and a state of war existed thereafter at all material times notwithstanding that an armistice was concluded in 1949. The respondents' branch in Jerusalem was situated in that part of the city controlled by Israel, while the appellants' head office, until it was moved from Jerusalem on July 1, 1948, was in that part of the city controlled by the Arabs, and after the termination of the mandate the appellants did not have a branch in Israeli territory. By an ordinance enacted by the State of Israel on May 19, 1948, the law which existed in Palestine on May 14, 1948 (and which included the common law of England as regards trading with the enemy) was to remain in force in so far as there was nothing repugnant therein to the ordinance or to other laws which might be enacted by the State. By existing regulations, as amended by the State of Israel, it was illegal to make any payment to, or place any sum to the credit of, any person resident outside Israel. By the Emergency Regulations on the Property of Absentees, made by the State of Israel in December, 1948, and replaced in March, 1950, by the Absentee Property Law, any property of an absentee vested in the Custodian of Absentee Property; it was the duty of any person having in his possession any property of an absentee to deliver such property to the custodian, and, where the property was in the form of a debt or indebtedness to the absentee, to pay the same to the custodian; and it was an offence, punishable by fine or imprisonment, to pay the debt or indebtedness to anyone other than the custodian without his written consent. "Absentee" was defined as including any person who owned property in Israel and who was at any time after Nov. 22, 1947, in a part of Palestine to which the law of the State of Israel did not then apply, and the appellants were "absentees" within the meaning of the regulations. On Oct. 9, 1950, the appellants commenced an action in the High Court in England for payment of a sum of £582,934, being the sterling equivalent of the balance standing to the credit of their account with the respondents at the time of the termination of the mandate. On Jan. 24, 1951, the Israeli Custodian of Absentee Property requested the respondents' Jerusalem branch to deliver to him all the moneys which they held to the credit of the appellants' account, and on Feb. 8, 1951, the respondents paid to him the amount of the appellants' credit balance. It was contended by the appellants that their contract with the respondents was wholly abrogated by the outbreak of war, that the abrogation extended even to the credit balance, and that the cancellation of the credit balance gave rise to a right in the appellants to recover from the respondents in London, the respondents'

chief place of residence, a sum equal to the credit balance, as money had and received by the respondents for a consideration which had wholly failed.

HELD: the right to be paid a credit balance on a current account was an "accrued right" in the sense in which those words were used by LORD DUNEDIN in *Ertel Bieber & Co. v. Rio Tinto Co.* ([1918] A.C. 269), despite the need of a formal demand before action could be brought to recover the money, and, accordingly, the appellants' right to obtain payment of the sum standing to the credit of their current account at the respondents' branch in Jerusalem on May 14, 1948, was suspended, and not destroyed, by the outbreak of war between Israel and the Arabs; immediately after the outbreak of war that right was locally situate in the State of Israel, became subject to the legislation of that State, and was vested in the Israeli Custodian of Absentee Property; and, therefore, the credit balance was rightly paid to the custodian by the respondents, and the appellants' claim failed.

Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag ([1946] 1 All E.R. 36), applied.

Decision of COURT OF APPEAL ([1953] 2 All E.R. 263), affirmed.

AS TO SUPERVENING ILLEGALITY DUE TO WAR, see HALSBURY, Hailsham Edn., Vol. 7, p. 218, para. 297; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 440, 441, Nos. 3351-3356.

Cases referred to:

- (1) *Ertel Bieber & Co. v. Rio Tinto Co., Dynamit Act. v. Same, Vereinigte Königs und Laurahütte Act. v. Same*, [1918] A.C. 260; 87 L.J.K.B. 531; 118 L.T. 181; 2 Digest 176, 408.
- (2) *Robson v. Premier Oil & Pipe Line Co., Ltd.*, [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 2 Digest 169, 379.
- (3) *Halsey v. Lowenfeld*, [1916] 2 K.B. 707; 85 L.J.K.B. 1498; 115 L.T. 617; 2 Digest 157, 272.
- (4) *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] 1 All E.R. 36; [1946] A.C. 219; 115 L.J.Ch. 58; 174 L.T. 49; 12 Digest, Replacement, 436, 3334.
- (5) *Esposito v. Bowden*, (1857), 7 E. & B. 763; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 119 E.R. 1430; 2 Digest 163, 332.
- (6) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 21 Digest 639, 2188.
- (7) *Rogers v. Whiteley*, [1892] A.C. 118; 61 L.J.Q.B. 512; 66 L.T. 303; 21 Digest 627, 2121.
- (8) *Plunkett v. Barclays Bank, Ltd.*, [1936] 1 All E.R. 653; [1936] 2 K.B. 107; 105 L.J.K.B. 379; 154 L.T. 465; Digest Supp.
- (9) *Swiss Bank Corpn. v. Bochnische Industrial Bank*, [1923] 1 K.B. 673; 92 L.J.K.B. 600; 128 L.T. 809; 21 Digest 637, 2170.
- (10) *Richardson v. Richardson*, [1927] P. 228; 96 L.J.P. 125; 137 L.T. 492; Digest Supp.
- (11) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; 12 Digest, Replacement, 448, 3383.

APPEAL by the plaintiffs, Arab Bank, Ltd., from an order of the Court of Appeal (SINGLETON, JENKINS and MORRIS, L.J.J.), dated May 21, 1953, and reported [1953] 2 All E.R. 263, affirming an order of PARKER, J., dated Nov. 11, 1952. The facts are set out in the opinion of LORD MORTON OF HENRYTON.

Sir Andrew Clark, Q.C., *Maurice Lyell* and *Nasir* for the appellants.

Sir Hartley Shawcross, Q.C., *Winn* and *I. S. Warren* for the respondents.

The House took time for consideration.

Apr. 1. Their Lordships dismissed the appeal, and on May 4 the following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the appellants seek to be paid by the respondents a sum of £582,931 3s., being the equivalent in sterling of £P582,931-146. The latter sum was standing to the credit of the appellants on May 14, 1948, in their current account at the respondents' branch at Allenby Square, Jerusalem. The British mandate over Palestine ended at midnight on May 14/15, 1948. Immediately on the determination of the mandate, by a declaration of independence and a proclamation made thereunder, the Provisional Council of State and the Provisional Government of the State of Israel were constituted and, although there was no formal declaration of war, war, in fact, broke out at once between the State of Israel, on the one hand, and the Arabs in Palestine and certain States who supported them, on the other hand. By legislation which will be described hereafter, the State of Israel vested in an official called "the Custodian of the Property of Absentees" the property in the State of Israel of "absentees", which term included, in general, any person owning property in Israel who, on or after Nov. 29, 1947, had gone outside Israel. It is not now disputed that the appellants are absentees, within the meaning of that term as used in the legislation just mentioned. On Feb. 8, 1951, in response to a request by the custodian to deliver to him all the moneys which they held in the account of the appellants, the respondents paid to the custodian the sum of £P582,931-146 and say that they are not now liable to pay either this sum or its equivalent in sterling to the appellants. The claim of the appellants has already been rejected by PARKER, J., and by the Court of Appeal.

The facts leading up to the appellants' claim are as follows. The appellants were incorporated in Palestine in May, 1930, and their registered office was in Jerusalem. From 1937 onwards their registered office and head office was a building called the Anaboussie Building just outside the Old City of Jerusalem close to the Jaffa Gate. They had a number of branches within and without Palestine. The respondents are an English company with their registered office and principal place of business in England. They had a local head office in Jerusalem, and a branch at Allenby Square, Jerusalem, which was only a short distance from the Anaboussie Building. On Feb. 14, 1939, the appellants opened a current account with the respondents at the Allenby Square branch. By the documents under which that account was opened, the appellants submitted themselves irrevocably to the jurisdiction of the courts at Jerusalem.

Prior to midnight on May 14/15, 1948, Palestine was mandated territory administered by a High Commissioner. The adjoining territory of Transjordan had originally been a British Protectorate, administered by a High Commissioner, but in 1946 Transjordan was recognised as an independent State under the rule of King Abdallah. Palestine and Transjordan had the same currency and were treated as a single currency area for the purposes of exchange control. In January, 1948, His Majesty's government announced that the mandate would end at midnight on May 14/15 and from the time of that announcement until the end of the mandate, disturbances, which had already begun, rapidly increased. By Feb. 27, 1948, conditions had deteriorated, and the respondents made arrangements for the removal of their local head office in Jerusalem to Cyprus. By Apr. 28, 1948, the position was more acute. Some branches of banks in Palestine had been forced to close for a few days at a time. The Arab population tended to move within the walls of the Old City of Jerusalem or further afield, while the Jews remained outside the Old City. The Allenby Square branch of the respondents' bank was on the edge of the Jewish part, divided from the Arab part of the Old City by a strip of land which ultimately became a no-man's land. It became clear to everyone that, when the mandate ended, active hostilities would break out and that the Allenby Square branch might be in

the area of the fighting. On May 13, 1948, the respondents closed their Allenby Square branch and on the morning of May 14, i.e., before the mandate ended, it was occupied by certain irregular Jewish forces. On the afternoon of May 15 the building was taken over by the regular Israeli forces. Thereafter the building remained at all times under the control of Israel, and the branch was not re-opened until July, 1950. The appellants' head office, which had been at the Anaboussie Building, was moved to the Morcos Building within the walls of the Old City before the termination of the mandate. It was closed for about fifteen days and thereafter continued to function until June 1, 1948, when it moved to Amman, and the appellants became registered in Amman on Nov. 7, 1949. From the end of the mandate the appellants had no branch operating or in existence in Israeli territory.

The events which took place on the determination of the mandate have already been stated. A state of war still existed at all material times though there was, on two occasions, a cease-fire, and on Apr. 3, 1949, an armistice was signed. The appellants' office in the Morcos Building was on the Arab side of the no-man's land dividing the Israeli and Arab occupied territory under the terms of the armistice, while the respondents' Allenby Square branch was on the Israeli side. On Apr. 27, 1950, de jure recognition was accorded by His Majesty's government to Israel, but a reservation was made in that no more than de facto recognition was accorded in respect of Israeli sovereignty over that part of Jerusalem occupied by Israel. In April, 1951, His Majesty's government accorded de jure recognition to the Hashemite kingdom of Jordan which included that part of Palestine occupied and controlled by the Arabs, but His Majesty's government made a similar reservation in respect of that part of Jerusalem occupied and controlled by the Arabs.

Meanwhile, the State of Israel had passed certain legislation, to which I have already briefly referred. On May 19, 1948, it passed a Law and Administration Ordinance, No. 1 of 5708 (1948), having effect from May 14, 1948. By art. 11 of that ordinance, it was provided that the law which existed in Palestine on May 14, 1948, should remain in force, in so far as there was nothing therein repugnant to the ordinance or to other laws which might be enacted by the State. Since the law which existed in Palestine on May 14, 1948, embraced the common law of England in regard to trading or communicating with the enemy, it became illegal for anyone in Israel to have intercourse with anyone in enemy territory. Further, by that ordinance the Defence (Finance) Regulations in force in Palestine were continued, subject to the provisions that the power of the High Commissioner thereunder was vested in the provisional government and that the word "Israel" was substituted for "Palestine", wherever it appeared in those regulations. By reg. 40 of the Defence (Finance) Regulations, 1941, as amended, which were in force in Palestine prior to the cessation of the mandate, it was provided as follows:

"Subject to any exemptions which may be granted by order of the High Commissioner, no person shall, except with permission granted by, or on behalf of the High Commissioner (a) draw, issue or negotiate any bill of exchange or promissory note, acknowledge any debt, or make any payment, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of a person who is resident outside Palestine and Transjordan; or (b) make any payment to, or place any sum to the credit of, any such person."

As a result of the ordinance, therefore, it became unlawful, except with the permission of the Israeli government, for anyone in Israel to make a payment to a person resident outside Palestine, unless that person was resident in Transjordan. The omission to delete the reference to Transjordan was rectified by a regulation, published on July 14, 1948, and having retrospective effect to July 4, 1948, by which the word Transjordan was deleted from reg. 40.

By further regulations published on Dec. 12, 1948, and entitled *Emergency Regulations on the Property of Absentees*, the property of absentees was vested in the custodian. Under the regulations property was defined as meaning movable or immovable property, funds, a right in property, express or implied, and a trade name. There was an elaborate definition of "absentee", which included, in general, any person who owned property in Israel, and who, on or after Nov. 29, 1947, had gone outside Israel. By reg. 5, every property of an absentee was vested in a Custodian of the Property of Absentees from the day of the publication of his appointment. By reg. 7 it was provided that where such property was in the form of a debt or an indebtedness due to the absentee, the person indebted should pay the sum to the custodian. By reg. 38, contravention of the regulations was made an offence. PARKER, J., found that the appellants were "absentees" within the meaning of the Israeli legislation relating to the property of absentees, and this finding is not disputed by the appellants. The history which I have just set out reproduces, in substance, a portion of the judgment of SINGLETON, L.J., to whom I express my gratitude.

After the termination of the mandate correspondence passed between the appellants and the respondents' local head office in Cyprus, in which the appellants claimed payment of their balance from the Allenby Square account by its transfer to their account with the Midland Bank, Ltd., in London. The respondents refused to make the transfer on the grounds set out in a letter, dated Nov. 24, 1948, from their general manager to the appellants' general manager in the following terms:

"An account at our Allenby Square branch constituted a debt from our Allenby Square branch which is legally payable only at or by transfer from that branch. The Jewish [sic] authorities who are in de facto control of the area in which our branch is situated will not permit transfer or payment of balances outside territory occupied by them, without their prior authority. Being therefore constrained by reason of force majeure we are unable without such prior authority to pay your balance as requested by you."

An offer was made to approach the Israeli authorities, but nothing came of this, and the writ herein was issued on Oct. 9, 1950. As I have already stated, on Feb. 8, 1951, the respondents paid to the custodian the balance amounting to £P582,931.146.

The claim of the appellants, as presented before PARKER, J., was put on two main grounds: (i) that before the termination of the British mandate the appellants had demanded payment of the balance standing to the credit of their current account at the respondents' Allenby Square branch; that the respondents had refused or failed to pay in accordance with that demand; and that, in consequence, the appellants had, as from the date of such refusal, a right of action against the respondents for the sterling equivalent of the said balance. Such right of action was not properly situate within the State of Israel; and, (ii) that, alternatively, if there had been no such demand and refusal, the contract of banker and customer on current account, which had previously subsisted between the respondents acting through their branch at Allenby Square, Jerusalem, and the appellants, was frustrated by the war which, immediately on the termination of the British mandate, broke out between the newly created State of Israel and the neighbouring Arab States, and that there then arose a simple debt payable without demand by the respondents to the appellants, which was not properly within the State of Israel.

PARKER, J., found as a fact that no effective demand for the payment of the whole of the balance of their current account at the Allenby Square branch was ever made by the appellants, and that, in consequence, the appellants' first ground of claim had not been made out. The appellants have not sought to challenge this finding of fact, either in the Court of Appeal or in your Lordships' House. Consequently, this appeal falls to be determined on the footing that

immediately before the determination of the mandate and the outbreak of war, the contract between the appellants and the respondents, under which the appellants' current account was kept at the respondents' Allenby Square branch, was a subsisting contract, of which there had been no breach or repudiation by the respondents. Further, it is beyond dispute that, immediately prior to that moment, the appellants were entitled to be paid by the respondents, at their Allenby Square branch, the amount of the balance standing to the credit of the appellants' current account on making a demand to that branch for such payment.

A Counsel for the appellants contended that, on the outbreak of war, the contract between the appellants and the respondents was wholly destroyed, and with it was destroyed the right of the appellants to payment of their credit balance in accordance with that contract. Thereupon there arose, by operation of law, a new right in the appellants to have the amount of their credit balance repaid to them as money had and received by the respondents for a consideration which had wholly failed. This new right, being wholly independent of the contract between the parties, was free from the two limitations imposed on the current account, viz., that the respondents were only bound to repay it (i) after demand made, and (ii) at the Allenby Square branch. The sum of £P582,931·146 became a "simple debt" owing from the respondents to the appellants; that debt was locally situate at the "administrative centre" of the respondents (i.e., London); and the appellants were entitled to claim repayment in London. As a matter of procedure, the courts in England would not order repayment in foreign currency, and the appellants were, therefore, entitled to payment of the equivalent sum in pounds sterling which they had claimed by their writ. Counsel submitted in the alternative, if I understood him aright, that, if any part of the pre-existing rights and obligations between the parties survived the outbreak of war, it was a debt shorn of all the incidents which attached to it immediately prior to the outbreak of war, including the restrictions that the debt was only payable at the Allenby Square branch and after demand made. My Lords, I think I fully understand and appreciate counsel's first argument, and I shall deal with it hereafter, but I say at once that I can see no foundation whatever for his alternative argument. The right of the appellants immediately before the outbreak of war has already been stated, and is beyond dispute. I can well understand the argument that this right was wholly destroyed on the outbreak of war, but I can see no reason why a right to be paid a sum in Palestine on demand, if it survived the outbreak of war, should be changed into a right to be paid the same sum in some other place, without demand. Nor was any authority cited to your Lordships which gave any support to this argument.

F With regard to counsel's first argument, it is to be noted that that argument fails in limine if the appellants' right to be paid the credit balance survived the outbreak of war and was a right to be paid at the Allenby Square branch. In that event, there could be no doubt that that right vested in the custodian and the credit balance was rightly paid to him by the respondents. Before I consider this argument further, I shall refer to two authorities on which PARKER, J., and the Court of Appeal strongly relied.

G LORD DUNEDIN in *Ertel Bieber & Co. v. Rio Tinto Co.* (1), stated the common law of England as to trading with the enemy as follows ([1918] A.C. 267):

H "My Lords, the proposition of law on which the judgment of the courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject to the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial'. As to this I agree with the judgment of the Court of Appeal in the case of

Robson v. Premier Oil & Pipe Line Co., Ltd. (2), where PICKFORD, L.J., delivering the judgment of the court, LORD COZENS-HARDY, M.R., himself and WARRINGTON, L.J., said ([1915] 2 Ch. 136): 'The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction'. That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt".

LORD DENEDIN went on to point out that there are certain exceptions to the general rule. He said (*ibid.*, 269):

"There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey v. Esenfeld* (3). In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy as that has been laid down in decided cases".

The law of Israel on this subject is, admittedly, the same as the common law of England. No authority was cited which decided whether a credit balance on current account payable on demand is, or is not, an accrued right within the meaning of the exception, but I agree with the courts below in thinking that strong support for the view that it is such a right is to be found in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (4). The facts in that case are as follows. By a contract made in February, 1936, a German company agreed to purchase from a Swedish bank reichsmarks to the value of £84,000, payment therefor to be postponed for eight years, and an English company, a subsidiary of the German company, as sureties, guaranteed the payment of £50,400, agreeing to pay the bank this sum by half-yearly instalments over a period of eight years, at the same time acquiring the right to an assignment of the bank's right against the German company, whose liability to pay £84,000 was to be discharged in the event of the £50,400 being paid. By a further contract, dated Apr. 16, 1936, entered into with the Swedish bank, the English company again guaranteed the debt and undertook to pay the instalments. It was provided that the guarantee and agreement therein contained were made in accordance with the laws of England. By another document of the same date the English company created a security for the performance of its contract. A number of instalments had been paid before the outbreak of war with Germany. It was held by LORD THANKERTON, LORD PORTER and LORD GODDARD (LORD RUSSELL OF KILLOWEN and LORD MACMILLAN dissenting) that, on the true construction of the documents, the respondent bank having fully performed their obligations to the German company before the outbreak of war, nothing remained to be done under the contract, which was one between an English company and a neutral, but to discharge an accrued debt by instalments. Accordingly, since war does not abrogate or discharge a debt incurred before the declaration, the obligation to pay and the right to receive were only suspended. LORD THANKERTON said ([1946] 1 All E.R. 41):

"I am inclined to agree with SIR ARNOLD MCNAIR's suggestion (*Legal Effects of War* (1944), 2nd ed., at p. 93), that the distinction between "executed" and "executory contracts" may not be very helpful in the construction, and that it may be safer to say that the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy

any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war. In this view, I proceed to consider what is included in the phrase 'a liquidated sum of money, which will be treated as a debt'. The appellants' counsel admitted that a debt payable by instalments would be so included, and that provision for discount on anticipation of the instalment dates would not alter the position, nor would express provision for the acknowledgment in writing of each sum paid affect the matter. In my opinion the fact that the creditor held security for the payment of the debt, which would fall to be restored to the debtor on payment of the debt, would make no difference even though the security had been absolutely assigned to the creditor, and would require re-transfer to the debtor. In my opinion, the present case only raises one further point, viz., the fact that the appellants were bound as principals to the respondents to discharge the debt in respect of which the German company were the original principal debtors, and were, therefore, entitled under the April contract on payment to the respondents of each instalment, to an assignment by the latter of a like sterling amount of their claim against the German company. My Lords, I cannot think that this makes any difference to the position. The appellants, under the April contract, were bound to discharge the whole debt within a period which would terminate before the elapse of the eight years, when the liability of the German company to make any payment towards the debt would first arise; in other words, the appellants were bound to acquire the debt, and their being placed by assignment in the shoes of the respondents is merely incidental to the discharge of the debt owed to the respondents, and is not different in substance from the case of the return of securities to which I have already referred. It is important to make clear that the principle of abrogation does not involve destruction of the contract so far as already performed. That which is abrogated is the further performance of the contract, as from the outbreak of war; or, as LORD DUNEDIN expresses it in the passage already quoted [from the *Ertel Bieber* case (1) ([1918] A.C. 269)], the continued existence of the contractual relationship is prohibited . . . It seems clear to me that this reservation included matters involving intercourse with the enemy, but, as LORD DUNEDIN points out, the right of action is postponed. It seems equally clear it might involve substantial economic benefit to the enemy. The declaration of SIMONDS, J., contains no such reservation, and the result, in my opinion, is to confiscate the right of debt, which had arisen to the respondents on the delivery of the Reichsmarks on Apr. 28, 1936. I am not aware of any precedent for such confiscation, and it is clearly not justified under the decision of this House in the *Ertel Bieber* case (1). Indeed, it is inconsistent with it. I may add that in *Esposito v. Bowden* (5) the performance of the contract had not commenced prior to the outbreak of war."

LORD RUSSELL OF KILLOWEN, who dissented, but to this extent agreed with the majority, said (*ibid.*, 45):

"Thus a contract which is completely executed on one side, and under which nothing remains to be performed except payment to be made by the other of a liquidated sum whether already due, or debitum in praesenti solvendum in futuro, is unaffected by the outbreak of war. The payment cannot in fact take place between enemies in war time; so long as the war lasts the payment is suspended. Nor is enemy property confiscated at common law by the outbreak of war, and consequently contractual rights and obligations incidental to the ownership of property are not put an end to at common law by the outbreak of war. The enforcement of them during the war may be impossible, but they will survive the war."

LORD GODDARD said (*ibid.*, 57):

"It is beyond question that if the result of performance of a contract would be beneficial to the enemy or detrimental to this country the further performance is forbidden and the contract abrogated, though again rights, such as debts, accrued before the war are unaffected. This is illustrated by the order in the *Ertel Bâcher* case (1) made by the Court of Appeal and affirmed in this House and which your Lordships have seen in the printed book. Now one of the reasons why a suspensory clause to operate in the event of war in a contract for the sale of goods to an enemy will not save the performance of the contract from abrogation as illegal is that to ensure to an enemy a supply of goods or raw material after the war is or may be to enhance his resources during the war. If this consideration were taken to its full logical extent it might be said to apply to debts, as it would certainly be of some benefit to an enemy to have an English debt remaining due to him even though it is not payable until the end of the war. He might be able to raise money from neutrals upon an assignment of his rights which could be enforced at the conclusion of the war. But this doctrine never has been applied to debts arising out of previous contracts, and I am not prepared now for the first time to apply it and to hold that accrued causes of action are destroyed and not suspended because otherwise an enemy might obtain a discount or some other benefit by reason of the continued existence of the obligation."

My Lords, I have quoted these passages in full because I think they supply a conclusive answer to the argument of counsel for the appellants. He began by referring to *Jouchinson v. Swiss Bank Corpn.* (6), in which the Court of Appeal held that, where money is standing to the credit of a customer on current account with a banker, the making of an actual demand is a condition precedent to the bringing of an action to recover such money, in the absence of any such agreement to the contrary. It followed, said counsel, that the appellants had no right of action at the moment when war broke out; their rights were purely contractual rights and the contract was abrogated wholly by the outbreak of war. A right which did not carry with it an existing cause of action was not an "accrued" right within the meaning of LORD DUNEDIN'S observations in the *Ertel Bâcher* case (1). My Lords, in my view, this argument is inconsistent with the decision of this House in the *Schering* case (4) and with the reasoning on which that decision is based. In the *Schering* case (4) there was no existing right of action to recover the remaining instalments, for these instalments had not yet become payable; yet this House held that the right to receive these instalments when they fell due was a right which survived the outbreak of war. Having regard to this decision, I do not think that the right which was vested in the appellants at the outbreak of war can be held to have been destroyed merely because no action could be brought to recover the credit balance without a previous demand. I am content, without elaborating the matter further in words of my own, to adopt the reasoning of JENKINS, L.J., when he said, speaking of the *Schering* case (4) ([1953] 2 All E.R. 283):

"If, as was recognised in the *Schering* case (4), a debt contracted before the outbreak of war, but made payable by instalments on dates occurring after such outbreak, is not abrogated by such outbreak but merely suspended as regards enforcement, and this notwithstanding the right of the debtor to an acknowledgment, and transfer of a security, on the payment of each instalment, I fail to see why it should be held that a debt contracted before the outbreak of war should be cancelled merely because it is payable on demand. By parity of reasoning, a credit balance kept by an enemy with a bank in this country on terms that it was to be payable against production of a passbook or deposit receipt would be cancelled by the outbreak of war. Once the exception of accrued rights is accepted, and once the basis of it, viz.,

that the law in its concern to prevent benefit to enemies does not go to the length of confiscating enemy property, is recognised, I see no reason in principle or common sense why a debt, for the recovery of which some formality, such as a demand for payment or the production of some indicia of title, is made requisite, should on that ground be excluded from the benefit of the exception. This would, indeed, be nothing more or less than the very confiscation of proprietary rights which the law declines to countenance."

A My Lords, I do not attempt the task of formulating an exhaustive description of the rights which do, and the rights which do not, survive the outbreak of war; but I am quite satisfied that the right to be paid a credit balance on a current account is a right which survives. It is a right which the creditor can assign or bequeath by his will; it passes on his intestacy and it is, in my opinion, an "accrued right" in the sense in which these words were used by LORD DUNEDIN in the *Ertel Bieber* case (1). It was, therefore, suspended, and not destroyed, by the outbreak of war, and immediately after the outbreak of war it was locally situate in the newly created State of Israel. Thus, it became subject to the legislation of that State, and was vested in the custodian, and the credit balance was rightly paid to the custodian by the respondents. There was a difference of opinion in the court below whether the necessity for a demand survived the outbreak of war. I incline to the view that it did, but I do not regard a decision on this question as being necessary for the decision of this case. The question whether the appellants will, or will not, ultimately recover the large sum already paid by the respondents to the custodian is one which will be answered by Israeli legislation, or by the arrangements made between the State of Israel and the Arab countries when a treaty of peace is signed: but they cannot recover that sum from the respondents. It was for those reasons that I formed the view that the appeal should be dismissed.

LORD REID: My Lords, before May 15, 1948, Jerusalem was part of the territory governed under the British mandate for Palestine. The respondents, who are a British bank, had a branch office at Allenby Square in Jerusalem and the appellants, a bank whose head office is now situated in the territory of the Hashemite kingdom of Jordan, were then carrying on business at the Morecos Building within the Old City. Under an agreement of 1939, the appellants had a current account with the respondents at their Allenby Square branch, and on May 14, 1948, there was a credit balance on that account in favour of the appellants of £P582,931. The British mandate came to an end at midnight May 14/15, 1948. The new State of Israel was then set up and immediately war broke out between that State and the Arab States including the Hashemite kingdom. Allenby Square was in territory occupied by Israeli forces, but the appellants' place of business was in territory occupied by forces of the Hashemite kingdom.

It is admitted that, on all questions relevant to the decision of this case, there is no difference between the law of England, the law of Palestine, and the law of Israel which superseded the law of Palestine in the territory occupied by the Israeli forces. So it is necessary to determine what, under English law, is the effect of the outbreak of war on a current account kept by a bank in this country for a customer resident in enemy territory. The general principle is not in dispute. With certain exceptions, the outbreak of war prevents the further performance of contracts between persons in this country and persons in enemy territory. It is not merely that an enemy cannot sue during the war, and that trading and intercourse with the enemy during the war are illegal. Many kinds of contractual rights are totally abrogated by the outbreak of war and do not revive on its termination. On the other hand, there are other kinds of contractual rights which are not abrogated: they cannot be enforced during the war, but war merely suspends the right to enforce them and they remain and

can be enforced after the war. As LORD DUNEDIN said in *Erdel Bieber & Co. v. Rio Tinto Co.* (1) ([1918] A.C. 269):

"There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the commitments of rights of property, which even so far as executory are not abrogated."

The first question in this case is whether the appellants' right to obtain payment of the sum at their credit on their current account was totally abrogated by the outbreak of war, or whether that right was merely suspended. For a reason which will appear later, the appellants say that their right was totally abrogated, but the respondents say that it was merely suspended: the appellants say that their right was not an "accrued right", the respondents say that it was. In *Erdel Bieber & Co. (1)* it was not necessary to consider precisely the scope of the exception of accrued rights from abrogation. It appears to be an extension of the principle that rights of property are not destroyed or confiscated on the outbreak of war. A right to payment of money due under a contract is not, strictly speaking, a right of property—the creditor has no property in the debtor's money before it is paid to him—but if, before the outbreak of war, the creditor had an immediate and unqualified right to sue the debtor for money due under a contract, then it is not disputed that such a right is suspended but is not abrogated. The creditor in such a case has not only an accrued right, but an accrued right of action. But the appellants' right in this case fell short of that, and I must now consider first what was the appellants' right immediately before the outbreak of war.

In *Joachimson v. Swiss Bank Corpn.* (6) the firm, N. Joachimson, had a current account with the defendant bank. On Aug. 1, 1914, the firm was dissolved by the death of one of the partners and on that date a balance of £2,321 was standing to the credit of the firm. Later, one of the partners raised an action in the firm name to recover that sum, but for some reason he gave an undertaking that the only causes of action relied on arose on or before Aug. 1, 1914. His action failed because, although the customer's account was then in credit, the customer had then no cause of action against the bank. The case decides, in my judgment rightly, that a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank. Generally, it is the duty of a debtor to seek out his creditor and tender the amount of his debt, but there is nothing to prevent parties from agreeing, if they wish, that that shall not be the duty of the debtor, and it was held that a contract of current account necessarily implies an agreement that that shall not be the bank's duty: otherwise the whole object of the contract would be frustrated. The balance at the customer's credit is only payable at the branch where the current account is kept, and so the customer must go there or send his instructions there before he can get his money.

At one stage of this case, the appellants maintained that they had made a demand for payment before the outbreak of war, but they do not now maintain that, and, therefore, the position is that, at the outbreak of war, they had no cause of action against the respondents. But, in my judgment, that does not mean that there was no debt owing to them by the respondents. The sum at their credit was immediately payable to them. It is true that it was only payable in a particular place, and to get the money they had to go there and ask for it, but the case is, in my opinion, quite different from a case where one party still had to perform some service or fulfil some obligation under the contract in order to earn the money. In such a case, further performance of such contractual obligation being prevented by frustration, that party can never do what is necessary to earn the money and so can never acquire a right to have it paid to

him: nothing was owing to him when the war broke out, so there is no "accrued right" to suspend.

But the sum at the credit of a customer on current account has always been regarded as a debt due by the bank to the customer. In *Rogers v. Whiteley* (7) the respondent was a banker, a judgment debtor had a credit on current account with him, and a garnishee order attached "all debts owing or accruing due" from him to the judgment debtor. There was no suggestion that the word "debts" in R.S.C., Ord. 65, r. 1, is used in any special sense and LORD HALSBURY, L.C., said ([1892] A.C. 121) that the order attached

"all debts, that is to say all money which Mr. Whiteley [the respondent] could be called upon to pay away . . ."

In *Plunkett v. Barclays Bank, Ltd.* (8) DU PARCQ, J., said ([1936] 1 All E.R. 659):

"I find it impossible to say that money paid into a client account kept with a bank in the name of a solicitor is not a debt owing from the banker to the solicitor. It cannot be denied that the relation of debtor and creditor subsists between the bank and the solicitor. The solicitor may at any time draw a cheque upon the account and the bank must honour it."

In *Swiss Bank Corpn. v. Boehmische Industriale Bank* (9) SCRUTTON, L.J., said ([1923] 1 K.B. 681):

"Does this debt of £9,000 arise in this country? It is a sum held by a banker, who is resident in this country, for his customer and not payable until it is demanded in this country. In my view that is a debt arising in this country and situate in this country."

And ATKIN, L.J. (ibid., 684), referred to that debt as "property". In *Richardson v. Richardson* (10) HILL, J., cited several cases where judges of great authority have referred to sums due on current account as "debts" or "property".

It was argued that, although that may have been the view generally held before *Joachimson's* case (6), that decision shows that all that the customer of a bank really has is a right to create a debt by performing a condition of the contract of current account, i.e., making a demand for payment. But eminent judges who do not use inaccurate language have, since that case, continued habitually to refer to sums due on current account as debts although no demand for payment has been made. Indeed, I think that in *Joachimson's* case (6), ATKIN, L.J., recognised that there is a debt before any demand for payment is made, for he said ([1921] 3 K.B. 131):

"It was suggested in argument that the effect of our decision will be to alter the facilities given to an execution creditor to attach his debtor's bank account in garnishee proceedings. This appears to be a mistake. The provisions of Ord. 65 apply to debts owing or accruing from the garnishee, and this expression includes debts to which the judgment debtor is entitled although they are not presently payable . . ."

There is no suggestion of any anomaly in treating a sum at credit on current account as a debt for the purpose of garnishee proceedings, and I do not see the point of the last part of the passage which I have just quoted, unless ATKIN, L.J., regarded such a sum as, in fact, a debt to which the judgment debtor is entitled but which is not presently payable. It is clear that the existence of a debt does not depend on there being a present right to sue for it. *Debitum in praesenti, solvendum in futuro* is a familiar concept and a demand for payment is, in my view, merely that which makes the debt *solvendum*.

In *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (4) a debt was payable by instalments, and when war broke out some of the instalments were not yet payable. The right to payment of these instalments was held not to have been abrogated in spite of certain specialities in the case. The view of the majority

of the House with regard to the contract was ([1946] 1 All E.R. 39 per LORD THANKERTON) that

"... all that remained was the payment of the price, and the only provisions remaining operative related to the payment of the debt due in respect of the price, and the relative safeguards for its payment."

The preservation of debts from abrogation is to some extent anomalous, and I agree with what LORD GODDARD said (*ibid.*, 57):

"Now one of the reasons why a suspensory clause to operate in the event of war in a contract for the sale of goods to an enemy will not save the performance of the contract from abrogation as illegal is that to ensure to an enemy a supply of goods or raw material after the war is or may be to enhance his resources during the war. If this consideration were taken to its full logical extent it might be said to apply to debts, as it would certainly be of some benefit to an enemy to have an English debt remaining due to him even though it is not payable until the end of the war. He might be able to raise money from neutrals upon an assignment of his rights which could be enforced at the conclusion of the war. But this doctrine never has been applied to debts arising out of previous contracts, and I am not prepared now for the first time to apply it and to hold that accrued causes of action are destroyed and not suspended because otherwise an enemy might obtain a discount or some other benefit by reason of the continued existence of the obligation."

But I think that LORD GODDARD went too far in referring to "accrued causes of action": in the *Schering* case (4) there can have been no accrued cause of action at the outbreak of war because the instalments in question had not then become payable.

Accordingly, I am of opinion that on May 15, 1948, there was a debt of £P582,931 due by the respondents to the appellants, and that it was a debt situated in Jerusalem where alone it was payable. Further performance of the contract of current account was prevented by the outbreak of war so that no further banking services could be performed by the respondents for the appellants, but the debt fell within the class of accrued rights and was not abrogated. The respondents have paid the amount of the debt to the Custodian of Absentee Property in Israel, and, if this was a debt situated in Israel after May 15, they were bound to make that payment and the appellants cannot recover anything in this action. To succeed, the appellants would have somehow to establish that any debt owing to them was not, after May 15, situated in Israel, because it is only in that case that the respondents would have been wrong in making payment to the custodian in Israel.

The appellants' main contention is that their rights under the contract were wholly abrogated, because they follow that up by maintaining that in place of those rights there sprung up a new right to the same sum which was not situated in Israel, and they base this contention on the authority of *Fidessa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* (11). But if their original right to the money was not abrogated, the possibility of there being this new right does not arise and I shall say nothing about it. Alternatively, on the footing that their original rights were not totally abrogated, they contend that the original debt was only situated in Jerusalem because of the terms of the contract, and, once those terms had been abrogated, the debt ceased to be situated there and became due as an ordinary debt in England where the respondents have their principal place of business. That would be a startling result. In times when transfer of money from one country to another is restricted it may be of great importance to a debtor that his debt should only be payable at the place stipulated. What survived the outbreak of war was the original debt, and the original debt was a debt payable at the respondents' branch in Jerusalem on

demand there. The right to demand and to sue for that debt was suspended, but I do not see how that suspension could alter the nature of the debt. For the reasons which I have stated, I agree that this appeal should be dismissed.

LORD TUCKER: My Lords, the law with regard to the effect on contracts of frustration due to war is based on public policy. It requires that, as to future performance, the contract is considered as abrogated, but that, in so far as certain accrued rights are concerned, they are to be preserved and kept in A
suspense. No attempt has ever been made to give an exact definition of these rights or to compile a comprehensive list of them. It is clear, however, from the *Ertel Bieber* case (1) and the *Schering* case (4), that they include accrued causes of action for debt and certain concomitant rights in respect of property, but it is also clear from the latter case that, so far as liquidated sums of money are B
concerned, they are not confined to cases where a cause of action has actually accrued at the date of frustration, but include instalments payable in the future. How does public policy require the special relationship existing between banker and customer in respect of the balance standing to the customer's credit on current account to be treated? It is true that this relationship requires a formal demand by the customer before his rights crystallise into a cause of action, but C
what is there in the requirements of public policy that necessitates a distinction being drawn between the case where the customer has made formal demand a moment before the outbreak of war and one where he has not gone through this formality? In both cases there is standing to his credit a sum of money which, before war, was, for all practical purposes, as valuable to him as if it were cash in his own safe, and in each case the outbreak of war makes payment illegal. In one case is there to be suspension and in the other confiscation? Or is the law, D
in order to escape from this dilemma, to devise some novel equitable remedy to avoid the consequences of the application of its own arbitrary rule? I say "novel" remedy because, in my view, it is impossible to say, in such a case, that there has been a total failure of consideration.

My Lords, I consider that the answer to these questions is to be found, not E
by a minute examination of the precise language used by noble Lords in previous cases in dealing with different facts, but rather by endeavouring to discover the broad general principles of public policy on which those decisions were based and then applying them to the special creditor and debtor relationship existing between banker and customer. So judged, I can find no valid distinction from the point of view of public policy between the one kind of obligation and the other. Private international law does not sanction the confiscation of enemy debts or F
property, and to recognise for present purposes a distinction between a current account balance which has been the subject of a formal demand and one which has not would be to sanction a very thinly disguised form of confiscation. On these broad lines I formed the view that the appeal should be dismissed.

Before parting with this case I would, however, desire to say that I reserve G
for future consideration the question whether the necessity for demand before action in respect of sums standing to the credit of a customer's current account during the currency of the account, as decided in *Joachimson v. Swiss Bank Corpn.* (6), applies equally in all circumstances to the balance after the account has been closed and thereby ceased to be current. In the present case, as the outbreak of war was the event which closed the account, I think the situation must be viewed as at the moment before war broke out when the account was H
still current.

LORD ASQUITH OF BISHOPSTONE: My Lords, I agree with the opinion just delivered by my noble and learned friend, LORD MORTON OF HENRYTON.

The entire case for the appellants would seem to rest on the assumption that the "accrued rights" which, admittedly, survive the frustration of a contract are limited (apart from rights of property) to "accrued causes of action". This

assumption is, on the decision of this House in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (4), unfounded. The right to the sum represented by the credit balance on current account outstanding at the outbreak of war was, in my view, a

“right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war”

within the formula adopted by LORD THANKERTON from SIR ARNOLD McNAIR'S *LEGAL EFFECTS OF WAR*, 2nd ed., p. 93. and applied by this House in the *Schering* case (4).

LORD COHEN: My Lords, it is common ground between the parties that (i) had the appellants demanded the balance standing to their credit with the Allenby Square branch of the respondents immediately before the outbreak of war, the resultant debt would have been locally situate in Palestine; (ii) the contract of current account made between the parties on Feb. 14, 1939, was frustrated by the outbreak of war, at least in the sense that the further performance by the respondents of their obligation to render banking services to the appellants was prohibited by the law of Israel as contrary to public policy; (iii) if, notwithstanding frustration, the respondents remained bound to pay to the appellants at the Allenby Square branch the amount of the credit balance due to the appellants, that obligation was a chose in action locally situate in Israel and became vested in the Custodian of Absentee Property under the Absentee Property Regulations which were superseded by the Absentee Property Law, 1950.

The appellants, however, contend that all rights and liabilities of the parties under the current account contract were completely ended by the outbreak of war between Israel and Transjordan, and that the only liability of the respondents was in quasi-contract arising from a total failure of the consideration for the retention by the respondents of the amount of the credit balance. This failure, said counsel for the appellants, gave rise to a claim for money had and received and such a claim was necessarily situate in London as being the chief administrative centre of the respondents. In the alternative, counsel submitted that the liability under the original contract was only locally situate in Palestine, because that was the country where demand had to be made, that on the outbreak of war it became illegal to make a demand at Allenby Square since that would have involved the appellants in intercourse with an enemy and that, accordingly, the debt, shorn of all frills, shifted to London.

My Lords, your attention was directed to a number of cases. It will be sufficient for my purpose to refer to only two of them, namely, *Ertel Bieber & Co. v. Rio Tinto Co.* (1), and *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (4). In the former case, the contracts in question were for the sale of cupreous ore by an English company to three German companies by instalments extending over a number of years. Each of the contracts contained a suspensory clause providing that if, owing to strikes, war or any other cause over which the sellers had no control, they should be prevented from shipping or delivering the ore, the obligation to ship and deliver should be suspended as therein mentioned. At the date of the outbreak of war between England and Germany some of the contracts had been partially executed, the others were wholly executory. In your Lordships' House it was not argued that under English law, apart from the suspensory clause, the contracts would not be abrogated, but it was submitted that they were saved by the suspensory clause. This House rejected this submission and affirmed the decision of the courts below. LORD DUNEDIN, while recognising the general principle that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is not permissible, said ([1918] A.C. 269):

“There is indeed no such general proposition as that a state of war

avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey v. Esdaile* (3)."

A LORD SUMNER says (*ibid.*, 289):

"The whole contract so far as it is mutually executory is dissolved. Again, the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace is not an argument in favour of substituting suspension by agreement for discharge by operation of law."

B LORD DUNEDIN and LORD SUMNER both recognise that there may be accrued rights which are suspended, notwithstanding the abrogation of the contract which gave rise to those rights, but counsel for the appellants, relying, in particular, on the language of LORD SUMNER, submits that suspension only takes place if the accrued right is an accrued cause of action at the date of the outbreak of war.

C My Lords, the decision in the second case to which I have referred is, I think, fatal to this contention. In *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (4) the appellants had guaranteed the repayment of part of a debt incurred by a German company to the respondents before the outbreak of war, undertaking to pay the sum so guaranteed by half-yearly instalments over a period of eight years. Some of the instalments remained unpaid at the outbreak of war and the question was whether the appellants' obligation in respect thereof was abrogated or suspended. Your Lordships' House by a majority held that, at the outbreak of war, nothing remained to be done under the contract but to discharge an accrued debt by instalments, and that the obligation to pay and the right to recover were only suspended. It is to be observed that none of the instalments in question were due at the outbreak of war and, accordingly, that it could not be said that there was an accrued cause of action. LORD THANKERTON, one of the majority, in the course of his judgment cited passages from the judgments of LORD DUNEDIN and LORD SUMNER in the *Ertel Bieber* case (1), and, after expressing the opinion that there was no valid distinction between the case of a contract between a British subject and an enemy subject and the case of a contract between a British subject and a neutral subject, continued ([1946] 1 All E.R. 41):

E "I am inclined to agree with SIR ARNOLD McNAIR's suggestion (*LEGAL EFFECTS OF WAR* (1944), 2nd ed., at p. 93), that the distinction between 'executed' and 'executory contracts' may not be very helpful in this connection, and that it may be safer to say that the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war. In this view, I proceed to consider what is included in the phrase 'a liquidated sum of money, which will be treated as a debt.' The appellants' counsel admitted that a debt payable by instalments would be so included, and that provision for discount on anticipation of the instalment dates would not alter the position, nor would express provision for the acknowledgment in writing of each sum paid affect the matter."

H Counsel for the appellants in the present case submitted that the *Schering* case (4) was not an authority for the proposition that the right to future instalments of a debt was only suspended, since that point had been conceded, not argued. I am unable to accept that view of the case. Their Lordships were dealing with

a question of public policy and the case must, I think, be treated as a decision of this House that the right to such instalments is only suspended. Counsel then argued that, be that as it may, there is a vital distinction between a debt payable on demand and a debt payable by instalments on fixed dates, since the necessity for demand involves intercourse between enemies. My Lords, I am unable to recognise the validity of this distinction. It is well settled by authority that the basic relationship between banker and customer is that of debtor and creditor. The appellants' right was a right to a liquidated sum, the amount of which was ascertained and the consideration for which had been fully given by the appellants. Their right was, I think, clearly an accrued right in the sense in which that term was used by LORD DUNEDIN in the *Ertel Bieber* case (1).

I agree with JENKINS, L.J., that the necessity for demand survives the abrogation of the further performance of the contract but should probably be regarded as surviving, not by virtue of the contract itself, but as a characteristic in the nature of a restriction on its recovery inherent in the debt contracted as a result of the past operation of the contract. Had I taken the alternative view favoured by SINGLETON, L.J., that the necessity for demand disappeared with the contract, I should have agreed with him that, none the less, the right was an accrued right and that that right was locally situate in Palestine. Counsel for the appellants argued that, once it became unnecessary for his client to make a demand at the Allenby branch, it was the duty of the respondents to seek him wherever he might be, and that, accordingly, the debt, like any other debt, was situate at the chief administrative centre of the respondents, i.e., London. This argument is, I think, fallacious. It was of the essence of the original contract that the debt should be payable at the Allenby Square branch and that Palestine law should govern the obligations of the parties. So long as the appellants have to found their claim on the contract, it must, I think, be regarded as a right situate down to the outbreak of war in Palestine and thereafter in Israel.

In view of the conclusion which I have reached that the right of the appellants to the balance to their credit at the Allenby Square branch was only suspended and not abrogated, it becomes unnecessary for me to consider at length the alternative argument of counsel for the appellants based on quasi-contract. I would, however, observe that there does not appear to me to have been a total failure of consideration. The consideration for the respondents' right at any given moment to retain the balance to the credit of the appellants was, I think, not only their promise to render banking services in the future, but also the services which they had already rendered in collecting the items which went to compose the credit balance. It was for those reasons that I formed the view that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Stonham & Sons* (for the appellants); *Durrant Cooper & Hambling* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

CHILDS v. BLACKER. SAME v. GIBSON.

[COURT OF APPEAL (Lord Goddard, C.J., Denning and Jenkins, L.J.J.), April 6, 1954.]

Costs—Counterclaim—Claim admitted before trial—Tender by defendant—Claim and counterclaim both successful—Lesser sum found to be due to plaintiff—Defendant's right to costs of action.

The tenant of a flat owing rent, but claiming damages for the landlord's breach of a covenant to supply services, in a communication to the landlord admitted owing the rent and set out the damages she claimed and enclosed a cheque for the balance. The landlord's solicitors returned the cheque and also a banker's order sent subsequently for the same amount. In an action for the rent and a counterclaim for damages fought solely on the counterclaim, the tenant was awarded more than she had claimed for damages in her communication to the landlord and the balance found to be due to the landlord was less than she had tendered. The judge made an order for costs in the action in favour of the landlord and for costs on the counterclaim in favour of the tenant, purporting to follow *Chell Engineering, Ltd. v. Unit Tool & Engineering Co., Ltd.* ([1950] 1 All E.R. 378).

HELD: the proper order was that the tenant should have the costs of the action, and as the judge had failed to exercise a true discretion through considering himself bound by a decision which was inapplicable, his decision would be varied accordingly.

Chell Engineering, Ltd. v. Unit Tool & Engineering Co., Ltd. ([1950] 1 All E.R. 378), not applied.

AS TO THE DISCRETION OF THE JUDGE IN AWARDING COSTS, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 96-98, paras. 181-185, and *ibid.*, Vol. 8, pp. 347-350, paras. 736-740; and FOR CASES, see DIGEST, Practice, pp. 851-858, Nos. 3969-4036, and Vol. 13, pp. 518, 519, Nos. 677-695.

Cases referred to:

- (1) *N.V. Amsterdamsche Lucifersfabrieken v. H. & H. Trading Agencies, Ltd.*, [1940] 1 All E.R. 587; 2nd Digest Supp.
- (2) *Chell Engineering, Ltd. v. Unit Tool & Engineering Co., Ltd.*, [1950] 1 All E.R. 378; 2nd Digest Supp.

APPEAL by the defendant in the first action against an order of His Honour JUDGE GORDON CLARK, in Guildford County Court, dated Nov. 24, 1953, by which he gave judgment for the plaintiff on his claim with costs and judgment for the defendant on her counterclaim with costs, and APPEALS by the plaintiff in both actions (judgment being given to the same effect in the second) against orders of the judge allowing an application for a review of taxation by the defendant in the first case and dismissing a similar application by the plaintiff in the second case and holding that the registrar should proceed on the principle laid down in *N.V. Amsterdamsche Lucifersfabrieken v. H. & H. Trading Agencies, Ltd.* (1), that, after the admission of his claim, the plaintiff was not entitled to incur any costs relating to the claim except those of setting down. The defendant in the first action had tendered payment of a sum in excess of that ultimately found to be due to the plaintiff, but in her pleadings, while admitting that a balance was due to the plaintiff in respect of the items claimed, she denied that the balance was the sum alleged, and, by reason of the matters subsequently set out in the pleadings, including the counterclaim for damages, she denied that the plaintiff was entitled to the sum claimed or any sum. The defendant in the second action admitted the claim of the plaintiff, but counterclaimed for damages. The actions were commenced by specially indorsed writ in the High Court and were remitted to Guildford County Council by consent.

Goodenday for the plaintiff.

I. Percival for the defendants.

LORD GODDARD, C.J.: These two appeals have been argued practically together. The plaintiff is the same in both actions, but he is the respondent against the first defendant and the appellant against the second. He is the landlord of two flats, let to the two defendants on the terms that they paid not only a rent but also for certain services. The plaintiff was held to have broken his contract by not supplying the services or all the services which he had undertaken to render, and the defendants claimed that they were not liable to pay the full amount of rent due because they had a claim for damages for the failure to supply these services.

[His Lordship referred to the second appeal, held that the position was exactly that in *N.V. Nederlandsche Lucifersfabrieken v. H. & H. Trading Agencies, Ltd.* (1), and that the registrar and the county court judge had rightly held that they must follow that case, which was binding also on the Court of Appeal, and that, as the judge had exercised his discretion on grounds which were in the material before him, there was no reason to interfere with his decision. He continued:] The other case raises a different point. The defendant had the same complaint with regard to her flat. Her rent was £115 and the charge for services £143 7s. 8d., and she owed approximately £94 2s. Making the best estimate she could of the damage she claimed, she sent the plaintiff a cheque for £66 14s. 3d. and showed how she made it up. Thus, she admitted the amount due and claimed to set off against it the damage which she had suffered, and the balance, £66 14s. 3d. was sent to the plaintiff. The plaintiff returned it. The defendant's solicitors thereupon obtained a banker's order for the same sum, so that there could be no question as to its being good or that the money would be available. That was returned with a somewhat curt letter from the plaintiff's solicitors, saying that the matter had gone on quite long enough and they were going to issue a writ. They did issue a writ, and, the parties agreeing to be bound by the findings of the learned judge in the other defendant's case, the first defendant became entitled to judgment for something. She showed damage to the extent of £42, with the result that the plaintiff only recovered from her £52 2s., which was less than the £66 that she had already offered.

It is said that, owing to a fault in pleading or some such technical question, the plaintiff ought to have the whole of the costs of this case. But the only question fought was the question of the counterclaim for breach of contract, as it in fact was whether one calls it counterclaim or set-off, the defendant maintaining that there was a breach of covenant because the plaintiff had not performed his services. It is then said that, although the plaintiff has recovered less than the sum that had twice been offered to him, he should have substantially the whole of the costs of the proceedings, because, if he gets the costs on the claim and the defendant the costs of the counterclaim, the general costs of the action will go to him. The learned judge made that order, with the result that the defendant, who had been successful in the matter which was litigated, might have been left to pay very substantial sums of money to the plaintiff for his costs, and her costs.

The learned judge said that he made the order because he considered that the case was governed by the decision of this court in *Chell Engineering, Ltd. v. Unit Tool & Engineering Co., Ltd.* (2). In my opinion, the learned judge went wrong in that respect. That case dealt only with an entirely different matter, the application of the County Courts Act, 1934, which deals with whether the plaintiff can recover High Court or county court costs where the sum recovered is under a certain amount. Therefore, if the learned judge based the exercise of his discretion on that case, he was obviously exercising it on a wrong ground. He says:

"I hold case covered by *Chell Engineering, Ltd. v. Unit Tool & Engineering Co., Ltd.* (2)."

And from another note:

"In this, as in all similar cases where both sides succeed to some extent."

difficult in the extreme to adjust the costs. I do not see any essential distinction between this and the case of *Chell* (2). *Chell* (2) did flow from a different situation. Procedure which ought to be followed except in exceptional circumstances. Safest course, even if does not produce an ideal result."

A The learned judge, therefore, thought that the *Chell* case (2) laid down the procedure which was to be followed except in exceptional circumstances. With all respect to him, *Chell* (2) did nothing of the sort. I think it would be a reproach to the law if in these circumstances the plaintiff were entitled to recover substantially all the costs of this action, because in fact he could have had his money without bringing any action at all. Instead of accepting the cheque or banker's draft, he issued a writ; and after the case had been litigated at very considerable expense, £50 or £60, he recovered less than he had been offered before the writ was issued. In those circumstances it seems to me only fair that the defendant should have the costs of the action, and I think that is the order which the learned judge in the exercise of his judicial discretion should have made. This case may draw the attention once more of county court judges to what DENNING, L.J., said in *Chell's* case (2) ([1950] 1 All E.R. 383):

C " . . . that in most of these cases it is desirable that a judge should consider whether a special order should be made as to costs because the issues are often very much interlocked, and the usual order of 'judgment for plaintiff on claim with costs and for defendant on counterclaim with costs' does not always give a just result."

D It is very easy in these cases to say that the plaintiff or the defendant is to have his costs less, perhaps, some small proportion. In this particular case, as we are satisfied that the learned judge did not exercise a true discretion because he thought he was bound by a case by which he was not in fact bound, we can make what, we think, is the proper order, namely, that the defendant should have the costs of the action.

E DENNING, L.J.: I agree.

JENKINS, L.J.: I also agree.

Defendant's appeal in first appeal allowed and order of county court judge varied. Plaintiff's cross-appeal dismissed. Plaintiff's appeal in second case dismissed.

Solicitors: *Barton & Hanning* (for the plaintiff); *Clyde & Co.* (for the defendant in the first appeal); *Strong & Co.* (for the defendant in the second appeal).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re MITCHELL (*deceased*), HATTON AND ANOTHER v. JONES
AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), April 30, 1954.]

Will—Gift “for such . . . persons . . . who would have been entitled . . . under Part IV of the Administration of Estates Act, 1925” —Right of Crown to succeed as a “person” or by prerogative right—Administration of Estates Act, 1925 (c. 23), s. 46 (1) (vi).

Crown—Rights on intestacy—Gift by will “for such . . . persons . . . who would have been entitled . . . under Part IV of the Administration of Estates Act, 1925”—Right of Crown to succeed as a “person” or by prerogative right.

By his will dated July 25, 1935, the testator gave his residuary estate to his trustees on trust to pay the income to his wife for life and from and after her death to provide for certain annuities and subject thereto in trust for such persons as his wife should by will or codicil appoint and in default of appointment “in trust for such person or persons who would have been entitled thereto under Part IV of the Administration of Estates Act, 1925, at the death of my said wife had she died possessed thereof intestate without having been married . . .” On Dec. 19, 1939, the testator died and on May 14, 1949, the widow died intestate without having exercised the power of appointment given to her by the will. On Dec. 12, 1949, letters of administration to her estate were granted to her mother. On a summons to determine the trusts on which the residuary estate of the testator was to be held, the court found on the evidence that the widow was an illegitimate child. It being conceded that the Crown was a “person” within s. 46 (1) of the Act of 1925,

HELD: the Crown took by succession directly under the provisions of the Administration of Estates Act, 1925, s. 46 (1) (vi), and not by any prerogative right to ownerless property under which, but for the statute (which was expressed by s. 57 (1) to be binding on the Crown) it would otherwise have taken, the words *bona vacantia* in the sub-paragraph being merely descriptive, and, therefore, the widow’s mother being, on the plain terms of the will, excluded, the residuary estate of the testator should be held, as from the death of the testator’s widow, on trust for the Crown.

FOR THE ADMINISTRATION OF ESTATES ACT, 1925, s. 46 (1) (vi), see HALSBURY’S STATUTES, Second Edn., Vol. 9, p. 752.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Sydney Gallott Mitchell, and in the events which had happened, the residuary estate of the said testator ought to be held, as from the death of the widow of the testator and subject to the annuities bequeathed by the said will, (a) on trust for the first defendant, Anne Jones, the mother of the testator’s widow, or (b) on trust for the Treasury Solicitor, or (c) whether the same devolved as on the intestacy of the testator.

By his will dated July 25, 1935, the testator, Sydney Gallott Mitchell, after appointing the first plaintiff, George Hatton, and Hugh Chadwick, to be executors and trustees thereof, and after bequeathing various specific and pecuniary legacies, directed that his trustees should hold the residuary estate, subject to the administration trusts as therein set out, on trust, in the event which happened of his leaving no issue surviving him, to pay the income thereof to his wife, Gwen Mitchell, during her life and from and after her death on trust to provide for certain annuities therein mentioned and subject thereto

“ . . . in trust for such person or persons for such estates or estate interests or interest and subject to such powers and provisions as my said wife Gwen shall from time to time by will or codicil appoint and in default

of and subject to any such appointment in trust for such person or persons who would have been entitled thereto under Part IV of the Administration of Estates Act, 1925, at the death of my said wife had she died possessed thereof intestate without having been married such persons to take (and if more than one) in the shares and manner in which they would have taken under the said Part of the said Act ”.

A The testator died on Dec. 19, 1939, and left surviving him his widow, Gwen, but no issue, and his widow never exercised the power of appointment given to her by the will. She died on May 14, 1949, intestate, and letters of administration to her estate were granted on Dec. 12, 1949, to the first defendant, Anne Jones, the mother of Gwen Mitchell. From the birth certificate of Gwen Mitchell it appeared that her father was not known. The testator left surviving him no parent or any issue of any parent save only the second defendant, Joseph B Gillott Mitchell, who was a brother of the testator, and, accordingly, the persons entitled to such part of his estate as to which he died intestate were Gwen Mitchell and Joseph Gillott Mitchell.

Hugh Chattock died on Feb. 10, 1951, and by deed of appointment made on Nov. 12, 1953, the first plaintiff appointed Roland David Wynton Evans to be a trustee of the testator's will jointly with himself.

C *Wilberforce, Q.C.*, for the trustees of the will, the plaintiffs.
The first defendant did not appear.
E. I. Goulding for the second defendant.
Denys B. Buckley for the Treasury Solicitor.

D **WYNN-PARRY, J.:** I have already intimated during the course of the argument that, on the evidence, I propose to proceed on the basis that Gwen Mitchell, the widow of the testator, was illegitimate, and, therefore, the right (if any) of her mother, Anne Jones, the first defendant, must arise under the Legitimacy Act, 1926. In view of the language of the will, however, it is, in my judgment, quite clear that that Act can have no application. The relevant words in the will are, in the disposition of the residuary estate in the events which E have happened, as follows:

“ . . . in trust for such person or persons for such estates or estate interests or interest and subject to such powers and provisions as my said wife Gwen shall from time to time by will or codicil appoint and in default of and subject to any such appointment in trust for such person or persons who would have been entitled thereto under Part IV of the F Administration of Estates Act, 1925, at the death of my said wife had she died possessed thereof intestate without having been married such persons to take (and if more than one) in the shares and manner in which they would have taken under the said Part of the said Act ”.

G In my view, those words disclose a clear formula admitting of no element of ambiguity, and they amount to this, that the residuary estate is to go to the person or persons who would have been entitled if the relevant provisions of the Administration of Estates Act, 1925, s. 46 (1), had been written out in full in the will. On that view, it is clear that the first defendant, Anne Jones, can take no interest in the residuary estate. That leaves the question as between the next of kin, on the one hand, and the Crown, on the other hand.

H It is conceded that, on the authorities which bind this court, the Crown is within the word “ person ” as used in s. 46 (1), but the point is made by counsel on behalf of the second defendant, who is a brother and next of kin of the testator, that on the true view of s. 46 (1) the Crown does not take under the section but by its prerogative right to property, *bona vacantia*, where there is no owner. As counsel for the Treasury Solicitor pointed out in his argument, s. 46 falls under Part IV, headed: “ Distribution of Residuary Estate ”, and is preceded by s. 45, by sub-s. (1) (d) of which the right of the Crown to take by escheat is

abolished. Section 46 from its form appears to me to be designed to set out in sub-s. (1) a complete and exhaustive code as to how the residuary estate of an intestate is to be distributed. There are six paragraphs to sub-s. (1), and they deal with the nearest relations in the first place, and, as they progress, with more and more remote relations. At the end appears para. (vi) which provides:

"In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as *bona vacantia*, and in lieu of any right to escheat."

Those words "as *bona vacantia*" appear to me to be merely descriptive and fit in with the scheme of the sub-section, which is only to bring the Crown in at the very end of what I have described as a complete and exhaustive code. By s. 57 (1) it is expressly provided that the Crown is to be bound by the Act. Where, therefore, I find a sub-section setting out a complete and exhaustive code, I think the true view must be that the Crown takes directly under the statutory provision in s. 46 (1) (vi), and not by any prerogative right under which, but for the statute to which the Crown submits, it would otherwise have taken.

Therefore, for these reasons, I propose to answer question 1 of the summons by declaring that, in the events which have happened, the residuary estate of the testator ought to be held as from the death of his widow, and subject to the annuities bequeathed by his will, on trust for the Treasury Solicitor. The order will have a provision authorising the trustees to distribute on the basis that the testator's widow was not legitimate.

Declaration accordingly.

Solicitors: *Bird & Bird*, agents for *Sydney Mitchell, Chattock & Hatton*, Birmingham (for the plaintiffs and the second defendant); *Treasury Solicitor*.

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

MORTON v. MORTON.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), March 31, April 1, 1954.]

Husband and Wife—Maintenance—Application to High Court—Separation agreement—Covenant by husband for periodical payments—Consolidation of existence, terms and effect of agreement—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

In considering whether an order under the Matrimonial Causes Act, 1950, s. 23 (1), for the maintenance of a wife should be made it is of the utmost importance that the court should not overlook the existence and terms of an agreement between the wife and the husband for the payment of maintenance to her, even though that agreement was made some years previously. The court should bear in mind that the agreement is binding on the husband though it does not prevent the wife making an application under s. 23 (1). It is, further to be remembered that the wife, who has obtained a measure of certainty under the agreement, may be in a much better position than she would have been if she had not had the agreement, e.g., if the husband's means decrease and he finds it difficult to pay what he has undertaken to pay, he is still bound by the agreement.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 84, 85, Nos. 631-636.

Cases referred to:

(1) *Morton v. Morton*, [1942] 1 All E.R. 273; 111 L.J.P. 33; 166 L.T. 164; 106 J.P. 139; 27 Digest, Replacement, 706, 6750.

- (2) *Tulip v. Tulip*, [1951] 1 All E.R. 563; [1951] P. 223; *reversd.* C.A., [1951] 2 All E.R. 91; [1951] P. 378; 27 Digest, Replacement, 85, 635.
- (3) *Dowell v. Dowell*, [1952] 2 All E.R. 141; 116 J.P. 350; 3rd Digest Supp.

APPEAL by the wife from an order of His Honour JUDGE GERWYN THOMAS, sitting as special commissioner in divorce at Cardiff, dated Nov. 25, 1953, dismissing the wife's application for maintenance under the Matrimonial Causes Act, 1950, s. 23 (1).

Wallis-Jones for the wife.

D. P. Rowland for the husband.

SINGLETON, L.J.: Section 23 (1) of the Matrimonial Causes Act, 1950, which replaces s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, provides:

"Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation."

The power given by that sub-section is in addition to any rights which the wife may have to apply to a court of summary jurisdiction for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949.

The history, as given to us by counsel for the wife, is as follows. The wife is now sixty years of age, the husband sixty-two. He was, until recently, a collier earning considerable wages, and wages which were higher in the year 1953 than they had been before. The parties were married in 1913. There were two children, a girl born in 1914, and a son born in 1919. Both children are still alive, both are married, and the wife lives with her married daughter. In 1930 the wife instituted proceedings against the husband, as the result of which the following agreement (bearing a sixpenny stamp) was made and dated Aug. 19, 1930:

"Morton against Morton. Heads of Agreement. In consideration of [the wife] . . . withdrawing summons for maintenance against [the husband] . . . the said [wife] and [husband] hereby mutually agree to enter into separation deed containing the following clauses: (i) Husband to pay wife £1 a week and boy 10s. a week the first payment to be made on Saturday next. (ii) While unemployed husband to pay wife for herself and boy amount of dependants' benefit only. (iii) Husband to deliver to wife her goods and furniture (iv) Wife to have custody of boy with right of access by husband. (v) Usual clause that no proceedings be taken while terms of agreement kept. (vi) Mutual *dum casta* clause. (vii) Husband to contribute £3 3s. to wife's costs."

No further agreement followed, but under the terms of that document the husband paid £1 a week to his wife regularly, and it is not said that he ever fell into arrears. In 1933 the son of the marriage started working, and the father ceased paying the 10s. a week in respect of him. On Sept. 9, 1941, the wife took proceedings against the husband in the magistrate's court, and an order was made by Mr. J. BOWEN DAVIES, K.C., the stipendiary magistrate, that the husband should pay the sum of £1 10s. a week to the wife. The husband appealed to the Divisional Court, and on Jan. 14, 1942, his appeal was heard by LORD MERRIMAN, P., and HODSON, J.: *Morton v. Morton* (1). It was held that the heads of agreement were a binding contract, and not a contract to make a contract. It was further held that the existence of the contract was not

necessarily a bar to the making of a subsequent order, and, according to the headnote ([1942] 1 All E.R. 273), it was further held that

"... as its terms had been faithfully carried out, the husband could not be said to be guilty of an offence of wilful neglect to maintain and there was no ground on which the magistrate could make an order."

It may be that the latter part of that which I have read goes too far in view of the decision of this court in *Tulip v. Tulip* (2), to which I shall refer. The result was that the Divisional Court discharged the order made by the learned stipendiary magistrate. In October, 1951, the wife again applied to the stipendiary magistrate for an order on the ground of wilful neglect to maintain her, and on the ground of desertion. How there could be desertion, in view of the terms of that agreement, I fail to see. On Nov. 13, 1951, the stipendiary magistrate dismissed the summons, and there was no appeal from that decision. On Apr. 19, 1952, the wife's solicitors wrote to the husband:

"We have been instructed by your wife to write to you regarding the amount of £1 a week which she receives from you under the terms of an agreement entered into as long ago as Aug. 19, 1930, when proceedings under the Summary Jurisdiction [(Separation and Maintenance) Acts, 1895 to 1925], instigated by her, were compromised and as a result she then withdrew the summons for maintenance. In view of present day conditions you will surely appreciate that this sum is quite inadequate to maintain your wife and we hope to learn from you that you are prepared to increase the weekly sum by a substantial amount. Please let us hear from you at an early date."

To which the husband's solicitors replied on Apr. 26, 1952:

"[The husband] has called to see us today upon your letter addressed to him on Apr. 19. We would refer you to our letter of Nov. 29, 1951. Before the fresh proceedings between the parties came to a hearing in the Merthyr magistrate's court in November, 1951, negotiations were conducted between [the wife's] then solicitor and ourselves with a view to a new agreement being entered into out of court. Those negotiations were carried on strictly without prejudice to [the husband's] position under the existing agreement and although it was stated on his behalf that he was prepared to consider making an increase in the weekly maintenance provided by the existing agreement [the wife's] terms were so unreasonable having regard to her husband's circumstances that he had no alternative but to allow the case to come on for hearing with the result [that the wife's complaint was dismissed]. Since he failed to reach an agreement with his wife then he feels that it is useless making another attempt to reach a reasonable agreement with her and he has therefore instructed us to say that he will defend any proceedings which she may be advised to take against him in the matter."

On May 9, 1952, the wife issued an application under s. 23 (1) of the Matrimonial Causes Act, 1950, claiming that her husband

"... has wilfully neglected to provide reasonable maintenance for her and prays that he be ordered to make to her such payments for her maintenance as may be just."

The application was referred to the registrar. Counsel appeared for both parties and requested reports of means of the wife and of the husband on various dates. The financial position of the parties was, therefore, ascertained at each time for which counsel had asked as follows:

As to [wife]. On Apr. 26, 1952, she had no income, but was in receipt of 20s. per week from the [husband] and national assistance of 22s. per week up to June 16, 1952, when it was raised to 27s. per week, but subsequently

A reduced (some weeks before Mar. 26, 1953) to 23s. 6d. per week until Mar. 26, 1953, on which date she became entitled to retirement pension of 24s. per week. Therefore: At Apr. 26, 1952, and May 9, 1952, no income, but receipts were 42s. per week. At June 26, 1952 and Aug. 20, 1952, no income but receipts were 47s. per week. From Oct. 25, 1952, to Mar. 26, 1953, no income, but receipts were 47s. reduced to 43s. 6d. per week. From Mar. 26, 1953, to Apr. 18, 1953, her income was 24s. plus receipt of 20s., a total of 44s. per week. The rent of her house is £1 5s. 3d. per week, electricity charges are 4s. or 5s. per week, and gas 6s. per week, one half of which is paid by her daughter. [Wife's] outgoings, therefore, were at all material dates constant at 18s. 7½d. per week. [Wife] has her daughter (working) with her husband (working) and two daughters (one working) living with her occupying four-fifths of the house, but paying only half the outgoings. A rental of 40s. per week would not be unreasonable for the accommodation used. [Wife] looks after the house for herself and daughter's family and services rendered could be valued at 20s. per week."

B From the latter part of the report on the wife's position it will be seen that she could have been in a better position than she was financially if her daughter and her daughter's husband had paid a reasonable amount for the accommodation they had at her house. They were paying very little. At the date of the report the daughter's husband had gone, but prior to the time of his leaving the daughter, he had been working as a collier and had been contributing £7 a week to the house, from which it may be said that the income of the household was considerable—although that may not be an element for consideration. As to the husband, the report says that at all material dates he had a varying wage plus a constant income. He had some house property from which there was a balance of rent in his favour, after paying rates, of 4s. a week. On Apr. 26, 1952, his gross wages were £14 11s. 11d., but by May 3, 1952, he was sick and not working, and he did not work again until June 26, 1952. During that time he was drawing sickness benefit. He returned to work as a collier for a short time, and I should imagine he was not fit for it, because on Oct. 22, 1952, he took other work, and his gross wages from Oct. 25, 1952, to Apr. 18, 1953, were £9 15s. 11d. a week.

E It appeared to me at an early stage in the argument that the question before the learned commissioner was one of fact, and it appeared, when the judgment of the commissioner was read, that he so treated it. In his judgment he set out the facts, and said:

F "The wife, under the appropriate sub-section of the Act, applies to the court for maintenance from her husband on the ground of his wilful neglect to provide reasonable maintenance. The figures (which are, in fact, agreed) before me, or the fundamental figures, are that the husband earns £8 7s. 6d. a week as a workman, plus 17s. 9d. a week income which he derives from one or two cottages, making a total of £9 5s. 3d. a week. I think it is clear from the cases quoted to me, namely, *Morton v. Morton* (1), *Tulip v. Tulip* (2) and *Dowell v. Dowell* (3), that [the agreement of 1930] does not preclude the court from going into this question as to whether there is wilful neglect to provide reasonable maintenance. Accordingly, I permitted the application to be heard, the registrar's report to be put in before me, and evidence to be called by either party. I think I am entitled to, and should, look at the agreement and the terms of the agreement as representing what was fair and reasonable in 1930, at any rate, and I treat it as of evidential value as to what was fair at that time as constituted by the free will of both parties: £1 per week. If I understand the law, what I have to consider at the present moment, in view of the change of circumstances, and having regard to all the circumstances, is whether the husband has wilfully neglected to provide reasonable maintenance, having regard to the fact of what his earnings were, and as to what her receipts are."

Counsel for the wife, in his submission to this court, argued there that the learned commissioner took too narrow a view of the position, and that his duty was to consider not only what the earnings were at a particular date, but to consider what they had been before that time as well. I think, when one looks at the whole of the judgment, the learned commissioner did that in fact. The judgment continues:

"I have already spoken as to his earnings and income, and it remains for me to say what the agreed receipts of the wife are at the present time: £1 a week from the husband and 24s. as permanent pension, so that her total receipts are £2 4s. That is not a high figure in all conscience, but more than double what she thought was fair in 1930 when his wages were about half, roughly, what he is earning today. His wages have gone up by a little over half, and her receipts are up by more than half. I do not know by how much the cost of living has gone up but I take judicial notice of the fact that the cost of living undoubtedly has gone up since 1930. With £2 4s. a week coming in to her from two sources, she is living in a house with a daughter and a grand-daughter, and they are paying the expenses of the house between them. She says that her daughter pays half the rent (the rent being £1 5s. 3d.) and half the gas, and, I think she said, half the light. She is only charging half in spite of the fact that there are three bedrooms in the house, of which she occupies one, and two are let. It is a difficult case. I do not think, having regard to all the circumstances—the earnings and income of the husband, and the receipts of the wife—that he is in breach of his statutory duty. I am not satisfied, accordingly, that he has wilfully neglected to provide reasonable maintenance for his wife."

As LORD MERRIMAN, P., pointed out in *Morton v. Morton* (1) wilful neglect to provide reasonable maintenance imports some element of matrimonial misconduct. The commissioner did not find proof of that on the facts of the present case. He applied his mind to the decision of this court in *Tulip v. Tulip* (2). In that case a husband and wife in June, 1932, entered into a deed of separation, the husband covenanting (if certain stipulations were observed) to pay such sum as after the deduction of income tax would amount to and leave the net yearly sum of £156. Those payments were regularly made. The wife covenanted to support and maintain herself out of that provision and out of her separate estate, or otherwise. In December, 1949, the wife asked the husband to increase the amount payable under the deed of separation. This request was refused, and thereupon she took out a summons in the High Court for increased maintenance, alleging that her husband had wilfully neglected to provide reasonable maintenance for her. She, further, asked the court to order the husband to secure such payments as might be ordered. In his affidavit the husband referred to the deed and to the discharge of his liabilities under it, and said that he relied on the deed and on his wife's covenants in it "whether by way of estoppel or otherwise". It was conceded that since the date of the deed the husband's financial position had materially improved, while that of the wife, who was suffering from spinal arthritis, had deteriorated. BARNARD, J., held ([1951] 1 All E.R. 563), refusing the wife's application, that, despite the change in the respective positions of the parties, the husband, who had faithfully carried out the terms of the deed, could not be held guilty of wilful neglect to maintain, which imported some element of matrimonial misconduct. The wife appealed to this court, and it was held by a majority (Lord ASQUITH OF BISHOPSTONE and BURKETT, L.J.) that the existence of the deed did not preclude the wife from applying to the court under s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, and that the court had jurisdiction to determine whether at the time of that application the husband was providing maintenance for the wife which was reasonable in the circumstances. HARMAN, J., who was the other member of the court, took a different view. He said that a husband who merely declined to pay a greater sum than that

stipulated in a deed was not guilty of wilful neglect to maintain within the meaning of s. 5 (1) of the Act, and that ([1951] 2 All E.R. 99):

“ . . . the existence of a binding deed, the terms of which have been faithfully observed, is conclusive evidence that the husband has discharged his obligations.”

We in this court are bound by the decision in *Tulip v. Tulip* (2). I have said already that the learned commissioner followed the decision in that case. I think it is right that I should refer to the judgment of the majority, which was given by BIRKETT, L.J. The learned lord justice, having referred to several of the authorities, including *Morton v. Morton* (1), said ([1951] 2 All E.R. 96):

“ It is clear from a consideration of that case, and, indeed, all the cases cited to us, that the existence of a deed is no bar to the wife's application under s. 5 of the Act of 1949. Indeed, all the discussion in the cases on the evidential value of the deed would be quite irrelevant if this were not so. The real question, therefore, in the present appeal is whether BARNARD, J., was right in saying, as I think it is plain that he did say from the passage cited by counsel for the wife, that because there was a deed of separation in existence providing for maintenance and that provision had been faithfully observed by the husband, it was impossible to say that he had been guilty of wilful neglect to provide reasonable maintenance, and that, as no matrimonial offence had, therefore, been committed, the wife's application must be dismissed. I am of opinion that, in so deciding, BARNARD, J., was wrong. With great respect to him, he seems to have ignored several essential matters. He seems to have decided that a sum for maintenance, agreed to in 1932, was unalterable so long as the husband continued to pay it and was willing to go on paying it. The real question for his determination was not that, but whether at the time the application was made to him the husband had wilfully neglected to provide reasonable maintenance. That must mean reasonable at the time of the application, in the light of all the circumstances then existing . . . I think that BARNARD, J., never considered, or if he did consider, never decided, the two essential elements in the wife's application (a) whether the husband was neglecting to provide reasonable maintenance for his wife, and (b) whether his neglect was wilful. I think it is plain why he never considered or decided these points. His judgment was based on the view that where a deed was in existence providing for maintenance and the provision for maintenance had been faithfully observed there could be no matrimonial offence of ‘ wilfully neglecting to provide reasonable maintenance ’, however much the circumstances had changed. In a word, he said that, once a sum for maintenance had been fixed by mutual agreement and embodied in a separation agreement, it must be considered to be reasonable maintenance for all time. In my view, this way of deciding the application was wrong . . . ”

Thus, the decision of the court was that, though the husband and the wife had entered into an agreement as to what payment should be made by him to her when they had separated, and the provision for maintenance had been faithfully observed, s. 23 (1) of the Act of 1950 (or s. 5 (1) of the Act of 1949) gave the wife a right to come to court and to say: “ My husband has been guilty of wilful neglect to provide reasonable maintenance for me, though I recognise that I entered into an agreement with him which I thought would bind me at the time it was made and that he has kept his side of the bargain.”

The decision is far-reaching, and it may be that the effect of the sub-section may well cause a husband to say: “ Why should I enter into an agreement ? If I do, and I fall out of work, or if my means become less, I am bound by the terms of the agreement, but why should I, or any other husband, enter into an agreement if the other party is not going to be bound by it ? ” Thus, it may be

thought that the effect of what is now s. 23 (1) of the Act of 1950, takes away something from the sanctity of an agreement between husband and wife.

It is right that I should say that BIRKETT, L.J., towards the end of his judgment in *Tulip v. Tulip* (2) added this (*ibid.*, 98):

"I refrain from expressing any view of the merits of the application. It may be, in such a case as this, that the court might find it difficult to exercise its jurisdiction in favour of the wife, having regard to all the circumstances of the case, but with that we are not concerned."

That is something which should be remembered before an order under s. 23 (1) of the Act of 1950 is made. If there is an agreement between husband and wife, even though it be made some years ago, it is the duty of one who has to consider an application under s. 23 (1) to remember that there is such an agreement, to consider its terms, and to bear in mind that that agreement is binding on the husband, even if it does not prevent the wife from making an application under s. 23 (1). It is, further, to be remembered that the wife, who has obtained a measure of certainty under the terms of the agreement, may be in a very much better position than she would have been if she had not had the agreement. If a time comes when the husband has less means and he finds it difficult to pay the amount which he has undertaken to pay, he is still bound by the agreement.

It follows from what I have said that I regard it of the utmost importance that the existence and the terms of an agreement should not be overlooked in considering whether an order should be made under this sub-section. The courts ought not lightly to upset, or to go behind, the terms of an agreement freely entered into between the parties, even though, under a decision of this court, the court is clothed with power, by s. 23 (1), to make an order in a proper case in which it is shown that the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife. In the present case the application was made notwithstanding the letters of Apr. 19 and 26, 1952, from the terms of which it would appear that the husband had been ready to make an increased offer and that it was difficult to establish "wilful neglect to provide reasonable maintenance." After the issue of the wife's application, there was further correspondence which came to light during the argument. There is a letter from the wife's solicitors, dated Sept. 16, 1952:

"Dear Sirs, *Morton v. Morton*. [The wife] does not accept [the husband's] offer of £2 10s. per week and prefers to take the judge's award."

That offer is two and a half times the amount which the wife had agreed to accept under the terms of the agreement of 1930. How in those circumstances it can be said that the husband is guilty of wilful neglect to provide reasonable maintenance for his wife I do not know. The wife has had the benefit of the agreement of 1930 for more than twenty years. Her husband was ready and willing, in September, 1952, to increase the amount to £2 10s. a week to avoid continued litigation. On Feb. 9, 1954, a civil aid certificate was granted to the wife to enable her to prosecute this appeal. The Legal Aid and Advice Act, 1949, was intended to help litigants who could not bear the expense of litigation. The present case at least shows what a hardship it may work on the other side. One has heard it said in recent years that it is hard on the successful defendant in any action against him which is supported by the legal aid fund, since he has little chance of getting any costs from anyone. That is a loss which, in some cases, falls on an insurance company. In this class of case the costs of the litigation, so far as the successful husband is concerned, fall on him, and it is a considerable burden. I am satisfied that the learned commissioner had to decide a question of fact. He decided that there was no proof of wilful neglect to provide reasonable maintenance within the terms of s. 23 (1). In my opinion, this appeal must be dismissed.

JENKINS, L.J.: I agree.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Rhys Roberts & Co.*, agents for *C. James Hardwicke & Co.*, Cardiff (for the wife); *Cunliffe & Ayr*, agents for *Taliesin Griffiths & Son*, Merthyr Tydfil (for the husband).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

GOODINSON v. GOODINSON.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), April 27, 28, 1954.]

B *Husband and Wife—Maintenance—Agreement—Enforceability—Covenant by wife not to sue providing payments punctually made—Consideration—Covenants by wife to maintain herself and child and to have custody of child.*

C By the terms of an agreement, dated July 21, 1950, and made between the husband and wife (which contained no provision that the parties should live separately), it was agreed that the husband should pay to the wife a weekly sum for the support and maintenance of herself and of the child of the marriage. By cl. 5 the wife covenanted "... not so long as the husband shall punctually make the weekly payments ... [to] commence or prosecute any matrimonial proceedings against the husband but upon the failure of the husband to make the said payments ... the wife shall be at full liberty at her election to pursue all and every remedy in this regard ... as if this agreement had not been made". Clause 3 provided that out of the weekly payments the wife would maintain herself and the child and indemnify the husband against all debts incurred by her, and by cl. 4: "The wife shall have the custody and control of the said child until the age of sixteen years ...". On a claim by the wife for arrears of maintenance,

E HELD: the covenant by the wife not to sue was restricted to proceedings in respect of maintenance only and did not apply to matrimonial proceedings of every kind and, while it could not be enforced and must be regarded as eliminated from the agreement, it did not invalidate the whole agreement: the undertakings by the wife contained in cl. 3 and cl. 4 constituted ample consideration to support the husband's promise to pay maintenance; and, therefore, the wife was entitled to recover the arrears of maintenance.

F AS TO MAINTENANCE, see HALSBURY, *Hailsham Edn.*, Vol. 10, p. 838, para. 1340; and FOR CASES, see DIGEST, *Replacement Vol.* 27, pp. 705-708, Nos. 6729-6762.

Cases referred to:

- G** (1) *Bennett v. Bennett*, [1952] 1 All E.R. 413; [1952] 1 K.B. 249; 3rd Digest Supp.
(2) *Tulip v. Tulip*, [1951] 2 All E.R. 91; [1951] P. 378; 2nd Digest Supp.
(3) *Morton v. Morton*, [1942] 1 All E.R. 273; 111 L.J.P. 33; 166 L.T. 164; 106 J.P. 139; 2nd Digest Supp.
(4) *Dowell v. Dowell*, [1952] 2 All E.R. 141; 116 J.P. 350; 3rd Digest Supp.
(5) *Hyman v. Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; Digest Supp.

H APPEAL by the husband from an order of His Honour Judge WRANGHAM at Stamford County Court dated Jan. 25, 1954, whereby he gave judgment for the wife on a claim by her for arrears of maintenance payable under an agreement made between her and the husband and dated July 21, 1950.

T. H. K. Berry for the husband.

G. D. Lane for the wife.

SOMERVELL, L.J.: The plaintiff, who is the wife of the defendant, sued for arrears of maintenance under an agreement which was entered into between the parties on July 21, 1950. The arrears were admitted by the husband whose defence was that his wife was in desertion. That defence has not reached this court. The defence which has been submitted to us is that the agreement is illegal and, therefore, cannot be enforced. The agreement which was made on July 21, 1950, between the husband and the wife provides:

"Whereas the husband without admitting any legal liability to maintain the wife has agreed to pay a weekly sum of £2 for the maintenance and support of the wife and the child of the husband and wife. Now it is hereby agreed as follows: (1) The husband will pay to the wife for her support and maintenance the sum of £1 a week and for the support and maintenance of the child of the husband and wife, namely, David Goodinson, born on July 9, 1938, the sum of £1 a week until he shall attain the age of sixteen years, the first payment of £2 to be made on Aug. 7 next and subsequent payments to be made by the husband so as to be received by the wife on Monday in each week. (2) The said sum for the maintenance of the wife shall be paid by the husband during their joint lives so long as the wife shall lead a chaste life. (3) The wife will out of the said weekly sums or otherwise support and maintain herself and the said child and will indemnify the husband against all debts to be incurred by her and against all liability whatsoever in respect of the said child and will not in any way at any time hereafter pledge the husband's credit. (4) The wife shall have the custody and control of the said child until the age of sixteen years, subject to the husband having access to and communication with the said child at all reasonable times to be mutually agreed upon. (5) The wife shall not so long as the husband shall punctually make the weekly payments agreed to be made herein commence or prosecute any matrimonial proceedings against the husband but upon the failure of the husband to make the said payments as and when the said become due the wife shall be at full liberty at her election to pursue all and every remedy in this regard either by enforcements of the provisions hereof or as if this agreement had not been made".

In *Bennett v. Bennett* (1) it was pointed out that there are two kinds of illegality of differing effect. The first is where the illegality is criminal or contra bonos mores, and in those cases, which I will not attempt to enumerate or further classify, such a provision, if an ingredient in a contract, will invalidate the whole although it may contain many other provisions. There is a second kind of illegality which has no such taint, and the other terms in the contract stand if the illegal portion can be severed, the illegal portion being a provision which the court on grounds of public policy will not enforce. The simplest and most common example of the latter class of illegality is a contract for the sale of a business which contains a provision restricting the vendor from competing in or engaging in trade for a certain period or within a certain area. There are many cases in the books where, without in any way impugning the contract of sale, some provision restricting competition has been regarded as in restraint of trade and contrary to public policy. There are also many cases where not only the main contract of sale but part of the clause restricting competition also has been allowed to stand.

That being the position, it is argued, in the first place, that cl. 5 of this agreement, on its true construction, is an agreement not to take matrimonial proceedings of any kind, whatever matrimonial offence may be committed by the husband, and that such an agreement would be contra bonos mores and would invalidate the whole. It is unnecessary to decide what would be the result if that had been the construction of the clause because, in my view, agreeing with the learned judge, I do not think that is its true construction. I think when the clause is read as a whole the undertaking not to prosecute any matrimonial

proceedings so long as the sum is paid is restricted, as the learned judge held, to matrimonial proceedings in respect of the matters dealt with in the agreement. The learned judge put it in this way:

“In my judgment, the clause should be read in a limited sense as a covenant only against taking matrimonial proceedings in respect of maintenance”.

A He relied, quite rightly, on the words “in this regard” in the latter part of the clause. That point, therefore, goes.

B Next it is said that cl. 5 is unenforceable because there is no sufficient consideration to support the covenant to pay, and the unenforceability of that clause brings the whole agreement down. In *Tulip v. Tulip* (2) a similar clause came before this court. The agreement there provided, as this agreement does

C not, for the parties living separately. It provided for a sum to be paid for maintenance, and there was a clause as to the provision that the wife was to make out of that sum. There was in that deed no clause in which the wife undertook not to take proceedings, although, of course, even without such a clause, apart from any question of public policy and enforceability, the deed would have

D been a good answer if the wife had sought by legal proceedings to claim a larger sum. It would be like any other compromise of a claim. BIRKETT, L.J., who delivered the first judgment, referred ([1951] 2 All E.R. 92) to the provisions of s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949,* which conferred power on the High Court to order a husband who had been guilty of wilful neglect to provide reasonable maintenance for his wife and children to pay any sum which it thought just, and, if it thought fit, also to direct that that amount should be secured. It was held, HARMAN, J., dissenting, that the existence of

E the deed did not preclude the wife from applying under s. 5 (1) of the Act of 1949. Circumstances, of course, might change, and, although the deed, on the face of it, was a final settlement, it was held not to be a bar to an application such as the wife sought to make in that case. The deed did not contain an undertaking

F not to take proceedings, but this court considered and adopted the principle of *Morton v. Morton* (3), a decision of the Divisional Court consisting of LORD MERRIMAN, P., and HODSON, J. In that case a wife had taken out a summons, the matter was compromised in heads of agreement, and no deed was drawn up, but the heads of agreement remained and were acted on. The relevant heads of agreement will be found set out in *Tulip v. Tulip* (2) ([1951] 2 All E.R. 95).

G They were not dissimilar to the provisions here. The wife was to have the custody of the son with the right of access by the husband. Then there was what is described as the “usual clause” that no proceedings should be taken while the terms of the agreement were kept. It was the effect of that clause which fell to be considered in *Morton v. Morton* (3). The Divisional Court, in a decision approved by this court, held that the existence of the contract was not necessarily

H a bar to the making of a subsequent order. After *Tulip v. Tulip* (2) had been decided *Dowell v. Dowell* (4) came before the Divisional Court. *Tulip v. Tulip* (2) was applied, and, if I may say so with respect, rightly applied, to a case where the agreement contained an undertaking by the wife, as in the present case, not to sue. Not only was it not suggested in those cases that the agreement was unenforceable as against the husband and invalid as a whole, but in *Morton v. Morton* (3), the judgments in which were obviously carefully considered by this court in *Tulip v. Tulip* (2), LORD MERRIMAN, P., said ([1942] 1 All E.R. 275):

“I am prepared to hold that there is no question about the enforceability of this contract, and that, if the question had arisen at the time, a court could very well have compelled the execution of a deed in that sense.”

What he clearly means is enforceability, not quoad the undertaking not to

* See now Matrimonial Causes Act, 1950, s. 23.

take proceedings, but quoad the main provision and the evaluation of the sum to be paid.

Of course, if one is dealing with a clause of this kind in a separation deed, it may be plain that the separation is an important ingredient which remains notwithstanding the disregard of an undertaking not to sue quoad the quantum of maintenance. But in the present case it is not a separation agreement. It is sought on behalf of the husband to invoke the principle that, if the only consideration moving from one side is a covenant which the law holds to be unenforceable, then there is nothing to support the undertaking on the other side in respect of which the unenforceable covenant purported to be a consideration. Reliance is placed on the application of that principle in *Bennett v. Bennett* (1). That was a special case in somewhat unusual circumstances, and, so far as this part of it is concerned, it turns on the actual provisions of the agreement and equally on the circumstances in which, and the time at which, the agreement was entered into. The wife in that case had instituted divorce proceedings and there was on the file a petition for maintenance; the jurisdiction of the court was being invoked. The purpose of the agreement was to settle that matter without either the sanction or approval of the court, and for that purpose, of course, it was the primary consideration on the part of the wife that she should withdraw and delete from her petition her claim for maintenance. The special circumstances, I think, are emphasised by an observation of mine when I said ([1952] 1 All E.R. 419):

“ . . . any application to delete, amend, or dismiss a claim for maintenance on the ground that the husband had made provision should be left to be dealt with by the judge at the hearing, and, if made to a registrar before the hearing, should be adjourned ”.

It was in those circumstances, and having regard to the terms of the agreement in that case, that we held that the unenforceable agreement was the main, although not the sole, consideration for the husband's agreement as to quantum.

Here, I think, there is ample consideration to support this agreement apart from the covenant not to sue and to enable it to be enforced as against the husband in the way in which the wife seeks to do in these proceedings. First of all, cl. 3 under which she agreed to support and maintain herself and the child and

“ indemnify the husband against all debts to be incurred by her and against all liability whatsoever in respect of the said child and will not in any way at any time hereafter pledge the husband's credit ”

is, of course, co-extensive with the sum to be paid, subject to the time for which the agreement will subsist. Speaking for myself, although I think the point was not taken below, I should have thought the undertaking by the wife to have the custody and control of the child and bring it up until it was sixteen years old in the terms of cl. 4 was also a consideration. Then, when one comes to the matter which is more directly related to cl. 5, it is this. This is an agreement by the wife as to these sums as at that date and in the circumstances then existing. If she had chosen to take proceedings, say, in the following month, it would not have been a complete shield, but it would have been of great importance, as the passages to which I have referred point out, on the husband's side in asking the court to reject her application. It would have been the strongest possible evidence unless relevant circumstances had changed. For these reasons, therefore, I think there is ample consideration to support this agreement, read as one has to read it in the light of the decision in *Tully v. Tully* (2).

I would like to add this. Counsel on behalf of the husband submitted that, if one looked at *Hymon v. Hymon* (5), and, in particular, at Lord SHAW OF DUNDEE's speech ([1929] A.C. 614), that speech was authority for submitting that there was no difference between the principles applicable to separation and maintenance agreements and the principles applicable to divorce proceedings.

A He did not succeed in convincing me that there was anything in LORD SHAW'S speech which led to that conclusion. That was not the issue to which their Lordships were directing their minds, and once divorce proceedings have started various considerations arise which are pointed to in both judgments in *Bennett v. Bennett* (1) and which do not exist when, as here, unfortunate differences between husband and wife arise leading, presumably, to a de facto separation under which, instead of running a joint household, the husband agrees to pay certain sums to the wife. It is obvious that, if that amount can be settled by the parties with the help, perhaps, of legal advisers or others, without resort to the court, it is a very desirable thing which everybody would wish to encourage. One hopes that, the decision in *Tulip v. Tulip* (2) having become generally known, it will be realised by both sides that such an agreement, although desirable and useful to both sides, cannot be in a form which purports to preclude the wife from applying to the court at a later date. The learned judge, as I have said, decided for the wife on substantially the same grounds as I have indicated, but in view of the argument which was addressed to us I have approached the matter de novo and stated my conclusions in my own way. I would dismiss the appeal.

C **BIRKETT, L.J.:** I am entirely of the same opinion. The main points in this case were most clearly presented by learned counsel, and the judgment to which we have just listened deals so fully and so comprehensively with all the relevant facts and the relevant law that I am content solely to express my agreement and to add nothing further for myself.

D **ROMER, L.J.:** I also agree. Having regard to the very exhaustive way in which my Lord has dealt with this case there is little, indeed, that I can add. On the first point which counsel for the husband submitted, namely, that cl. 5 was invalid because of the promise by the wife not to prosecute any matrimonial proceedings, it seems to me quite clear, for the reasons which my Lord has given, that those proceedings were intended to be limited to proceedings relating to maintenance. On that construction of cl. 5 the wife was promising not to make any application for an increase in maintenance so long as the husband continued to make the agreed payments. This is not a promise which the law will recognise or enforce, as the cases to which my Lord has referred, *Morton v. Morton* (3), *Tulip v. Tulip* (2), and *Dowell v. Dowell* (4), show. In that sense, but only in that sense, the promise must be regarded as illegal. It cannot, in my judgment, have in itself the effect for which counsel contended, namely, of vitiating and nullifying the whole agreement so that the wife would be precluded from suing on any of its other provisions. The illegality of the promise is not of the criminal or quasi-criminal character to which my Lord has referred.

G During the discussion I suggested as an illustration a case where a husband and wife entered into a separation deed which provided for the maintenance of the wife and the child and all the usual matters with which deeds of that character deal, and contained a clause, isolated from the rest of the agreement, providing that the custody of the child of the marriage should be entrusted to one of the parents and that the other parent should be precluded at any time thereafter from applying to the court in the matter of custody or access. Such a provision would be wholly nugatory and ineffective as seeking to oust the jurisdiction of the court in a matter in which the court has always exercised a very jealous prerogative, namely, the welfare and custody of infants, but I think it would be impossible to suggest that, because of the quality of that particular provision, the whole of the deed would be void for illegality. The clause would be unenforceable, but it would not avoid the agreement as a whole. In this case cl. 5 cannot be enforced and must be regarded as being eliminated from the agreement, but the wife can still sue under cl. 1 subject only to the question of consideration.

H With regard to that, it seems to me that, if cl. 3 were absent from the agreement so that the only consideration for the husband's promise to pay maintenance

was the wife's promise not to go to the court, then cl. 1 and 2 would not be enforceable against the husband because the consideration moving from him to the wife would be wholly defeated. But cl. 3 carries here an indemnity from the wife and other promises by her all of which are presumably, and, indeed, manifestly, of value to the husband; otherwise, they would not have been introduced into the agreement. Nor, in my opinion, can the wife's promise under cl. 3 be regarded as being unimportant and as being merely subordinate to the main object of the agreement. On the contrary, I think it represents one of the principal elements of the bargain between husband and wife, that bargain being that the husband must pay certain sums in maintenance and the wife in return would agree that those sums were to be accepted by her as being reasonable at the time and she would indemnify the husband against the specified liabilities. That, I think, was the substantial contract between the parties and one which survives without difficulty the elimination of the extra, but unenforceable, promise which the husband obtained from the wife under the final clause of the agreement. In my opinion, accordingly, in those circumstances it is unnecessary to say anything about the further point on which reliance was placed, namely, that there was forbearance by the wife at the request of the husband not to apply to the court for maintenance and that that element itself would prevent her from suing on cl. 1. It is not necessary, I think, to deal with that question and I prefer to express no conclusion on it. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *J. Hunt*, Peterborough (for the husband); *Solway C. Elphick*, agent for *Kelham & Sons*, Stamford (for the wife).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

MACRAE v. SWINDELLS (TRADING AS WEST VIEW GARAGE CO.).

[CHESTER WINTER ASSIZES (Barry, J.), February 25, 1954.]

Damages—Mitigation—Damage to plaintiff's motor car—Car lent by defendant to plaintiff in mitigation of damage—Car destroyed by plaintiff—Plaintiff obliged to hire another car—Recovery from defendant of cost of hire.

On Dec. 27, 1951, the defendant agreed with the plaintiff to repair a leak in the petrol tank of the plaintiff's Standard motor car. Owing to an admitted breach of contract or negligence on the defendant's part, the Standard car was damaged by fire in the defendant's garage, and the defendant lent to the plaintiff a Morris car for use while the Standard car was being repaired. On Feb. 6, 1952, the Morris car, owing to the negligence of the plaintiff's servant or agent, was destroyed in an accident, and in October, 1953, the defendant recovered from the plaintiff damages based on its value. As a result of the loss of the Morris car the plaintiff was compelled to hire another car until Apr. 9, 1952, when the Standard car was returned to him by the defendant. The cost of the hire of the other car from Feb. 9, to Apr. 9, 1952, amounted to £80 18s. On a claim by the plaintiff for that sum as damages for the negligence or breach of contract of the defendant in regard to the Standard car,

Held: The plaintiff was bound to mitigate his damage by accepting the loan of the Morris car, but, in the absence of an offer by the plaintiff of another car for the defendant's use, no question of mitigation arose after the loss of the Morris car (for which the defendant had been compensated in the action in October, 1953); the hire by the plaintiff of another car was necessitated by the defendant's original negligent act or breach of contract; and, therefore, the plaintiff was entitled to succeed.

AS TO REMOTENESS OF DAMAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 103-109, paras. 130-136; and FOR CASES, see DIGEST, Vol. 17, pp. 93-120, Nos. 101-289.

ACTION for damages.

A On Dec. 27, 1951, the defendant, a garage proprietor, agreed to repair a leak in the petrol tank of the plaintiff's Standard motor car. The plaintiff delivered his car to the defendant, and, on the same day, the car was damaged by fire in the garage. The defendant lent a Morris car to the plaintiff while the Standard car was being repaired, but on Feb. 6, 1952, this car, while being driven by the servant or agent of the plaintiff, was destroyed in an accident. On Feb. 9, 1952, the plaintiff hired another car until Apr. 9, 1952, when his own car was delivered to him by the defendant, the damage having been repaired. On May 16, 1952, proceedings were instituted against the plaintiff by the defendant in respect of the loss of the Morris car, and on Oct. 23, 1953, judgment was entered against the plaintiff for damages amounting to the value of that car as on Feb. 6, 1952, less its salvage value. In the present action the plaintiff claimed £80 18s., the amount paid by him for the hire of a car from Feb. 9, 1952, to Apr. 9, 1952. The defendant admitted that the damage to the plaintiff's Standard motor car on Dec. 27, 1951, was caused by his (the defendant's) breach of contract or negligence, but he denied that the damage suffered between Feb. 9, 1952, to Apr. 9, 1952, flowed from that breach of contract or act of negligence.

Lind-Smith for the plaintiff.

Hooson for the defendant.

D **BARRY, J.**, stated the facts and continued: The defendant contends that the damage in respect of which the plaintiff claims arises from the plaintiff's own negligence in destroying, through his agent, the Morris car which was lent to him by the defendant and would, admittedly, have been available to him until his own Standard car had been repaired had it not been for the accident on Feb. 6, 1952. I do not think that the defendant's contention can prevail. There was an admitted breach of contract or act of negligence on Dec. 27, 1951. E As a result of that breach or act of negligence the plaintiff lost the use of his Standard motor car until such time as that car could be repaired. In fact, it was not repaired until Apr. 9, 1952. *Prima facie*, therefore, the plaintiff was entitled to recover by way of damages appropriate compensation for the loss of the use of his Standard motor car between Dec. 27, 1951, and Apr. 9, 1952. The plaintiff was, however, under an obligation to act reasonably and to take such steps as F might be reasonable to mitigate the damage which he otherwise would suffer. On the assumption that the Morris car was adequate for the plaintiff's purposes, I have no doubt that, when the defendant decided to make that motor car available to the plaintiff, the plaintiff was under an obligation to use it so as to mitigate the damage which otherwise he would suffer as a result of his inability to use his own car. He did use the Morris car so long as it was available for use, G but it ceased to be available for use on Feb. 6, 1952, owing to the negligence of the plaintiff's servant or agent. The plaintiff, in the action brought against him by the defendant, has compensated the defendant to the full for the negligent act of his agent in reducing the Morris car to a total wreck. No other car was offered by the defendant to the plaintiff to take its place. In those circumstances, no question of mitigation of damage after that date can arise. The H plaintiff required a car for the purposes of his profession and was compelled, owing to the original negligent act or the original breach of contract committed by the defendant, to hire another car. The fact that the Morris ceased to be available on Feb. 6, 1952, as a result of a negligent act on the part of the plaintiff's servant or agent seems to me to be wholly immaterial. From the moment that act occurred, the plaintiff became liable to pay to the defendant the total value of the Morris motor car and that seems to me to put an end to his liabilities in respect of that act of negligence.

It seems to me immaterial whether the Morris car was destroyed owing to an act of negligence for which the plaintiff was in law responsible or whether it fell to pieces of its own volition owing to its extreme old age. It was no longer available after Feb. 6. The defendant could, had he so desired, have bought another car at that date and supplied it to the plaintiff for use while the plaintiff's Standard car was being repaired, but he did not do so. He did not offer the plaintiff any means of mitigating the damage. The plaintiff, as he was bound to do, hired another car, and, in my judgment, he is entitled to recover by way of damages the cost of that hire.

Judgment for plaintiff.

Solicitors: *Mason & Moore Dutton*, Chester (for the plaintiff); *Lamb, Goldsmith & Howard*, Liverpool (for the defendant).

[Reported by SEYS LLEWELLYN, Esq., Barrister-at-Law.]

R. v. MCCARTHY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hallett and Pearson, J.J.), April 12, May 3, 1954.]

Criminal Law—Murder—Provocation—Drunkenness—Test of behaviour of reasonable, sober man.

Unless a man is in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead him to attack another in a manner which no reasonable, sober man would do cannot be pleaded as provocation reducing the crime from murder to manslaughter if death results.

AS TO DRUNKENNESS AS AFFECTING TEST FOR PROVOCATION, see HALSBURY, *Hailsham Edn.*, Vol. 9, p. 439, para. 754; and FOR CASES, see DIGEST, Vol. 14, pp. 64-67, Nos. 297-314.

Cases referred to:

- (1) *R. v. Thomas*, (1837), 7 C. & P. 817; 173 E.R. 356; 14 Digest 67, 319.
- (2) *R. v. Monkhouse*, (1849), 4 Cox, C.C. 55; 14 J.P. 115; 14 Digest 66, 317.
- (3) *Public Prosecutions Director v. Beard*, [1920] A.C. 479; sub nom. *R. v. Beard*, 89 L.J.K.B. 437; 122 L.T. 625; 84 J.P. 129; 14 Digest 65, 306.
- (4) *R. v. Stopford*, (1870), 11 Cox, C.C. 643; 15 Digest 822, 8977.
- (5) *R. v. Hopper*, [1915] 2 K.B. 431; 84 L.J.K.B. 1371; 113 L.T. 381; 79 J.P. 335; 14 Digest 298, 3146.
- (6) *Mancini v. Public Prosecutions Director*, [1941] 3 All E.R. 272; [1942] A.C. 1; 111 L.J.K.B. 84; 165 L.T. 353; 2nd Digest Supp.
- (7) *Hodges v. Public Prosecutions Director*, [1946] 2 All E.R. 124; [1946] A.C. 588; 115 L.J.K.B. 417; 175 L.T. 327; 2nd Digest Supp.
- (8) *R. v. Lesbini*, [1914] 3 K.B. 1116; 84 L.J.K.B. 1102; 112 L.T. 175; 14 Digest 61, 272.

APPEAL against conviction.

The appellant, Michael Dennis McCarthy, was convicted on Mar. 15, 1954, before HAYLES, J., at Carmarthen assizes of the murder of Sidney Rees and was sentenced to death.

Elwyn Jones, Q.C., and *A. T. Davies* for the appellant.

H. Edmund Davies, Q.C., and *Prosser* for the Crown.

Cur. adv. vult.

MAY 3. LORD GODDARD, C.J., read the following judgment of the court: The appellant was convicted at the last assizes for the county of Carmarthen before HAYLES, J., for the murder of Sidney Rees and now appeals on the certificate of the learned judge given in order that this court might consider whether the direction he gave to the jury was correct, namely, that they were not entitled to consider the fact that the appellant was the worse for drink at the time found

that he was), and, consequently, might be more excitable and liable to lose his self-control if provoked, and, whether the accused was the worse for drink or not, the test to be applied was whether a reasonable person, in consequence of the provocation received, could be driven through transport of passion and loss of self-control to the degree and method and continuance of violence which produced the death.

A The facts can be stated quite shortly. On the night in question the appellant, who had, undoubtedly, had a considerable amount of drink, got off a bus in which he had been riding and in which the dead man was also a passenger and went some little way with him. He turned up a side road, the surface of which was rough and stony, and on that road Rees was found by a neighbour lying dead. His skull was fractured in three or four places and his face badly injured, and the case for the prosecution was that the appellant had knocked Rees down and afterwards beaten his face or head on the surface of the road thereby causing shocking injuries. When the appellant was interviewed by the police as the man who was known to have been last in the company of Rees he asserted that he had seen a car coming fast down the road, obviously intending to suggest that it was that car which knocked Rees down and killed him. He afterwards altered the story, and in his defence stated that he had gone up the side road to relieve himself, that Rees had there got hold of his penis, and, on being pushed away, invited the appellant to commit sodomy with him. This, he said, so provoked him that he went raging and hit him, after which his memory was vague, but he did admit that he remembered catching hold of the dead man's ears and bumping his head on the ground. It is only fair to the memory of the deceased man to say that there was nothing to support this allegation other than the appellant's own evidence, and the learned trial judge has informed this court that, having regard to the respective size and build of the two men, the story was at least improbable. The medical evidence was clear that the injuries from which the deceased man died could not have been caused by a single blow, but must have been caused by repeated acts of violence. The learned judge directed the jury that, if they were of opinion that the assault and the invitation to which we have referred were made, those were acts which could in law constitute provocation, and the jury then had to consider whether in all the circumstances of the case they constituted provocation sufficient to reduce the crime from murder to manslaughter. He then went on to give the jury the direction already mentioned in respect of which he granted the certificate.

F Now, in this case it might be enough to say that, considering the learned judge clearly left to the jury that, whether the appellant was drunk or sober, the assault and invitation were of a nature which could amount to provocation in law, the only question for the jury was whether the violence used by the appellant as a result of the provocation could possibly be excusable, as it is undoubted law that the violence used must have some reasonable relation to the provocation. While this provocation would, no doubt, have excused (when we say "excused" G we mean enough to reduce the killing to manslaughter) a blow, perhaps more than one, it could not have justified the infliction of such injuries as three or four fractures of the skull and the beating of the man's head on a stony road. But as the question of how far drunkenness may be taken into account in considering whether the offence can be reduced from murder to manslaughter not infrequently arises and has been treated in some of the text-books as a matter H on which the law is not clear, we propose to consider whether the direction given by the learned judge accurately stated the law.

For reasons that will appear later in this judgment we do not think it is necessary nowadays to consider in detail many of the older cases bearing on the subject. One case often referred to is *R. v. Thomas* (1) where PARKE, B., in summing-up to the jury, said (7 C. & P. 820):

... drunkenness may be taken into consideration in cases where what

the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober."

But earlier in his charge he had said (*ibid.*, 819):

"Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows: then you could not attribute that act to the passion of anger, and the offence would be murder".

In *R. v. Monkhouse* (2) COLERIDGE, J., said to a jury (4 Cox, C.C. 56):

"... it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention".

That case, however, was not approved by the House of Lords in *Public Prosecutions Director v. Beard* (3). Commenting on that case LORD BIRKENHEAD, L.C., said ([1920] A.C. 498):

"... the appropriate question seemed to be whether the prisoner was so intoxicated as to be entirely incapable of forming the intent charged, that is, the intent to murder. The words 'unless the intoxication was such as to prevent his restraining himself from committing the act in question' are not to be found in any other judicial direction and cannot in my view be explained unless they were unscientifically used with the object of indicating the defence of insanity."

He then quoted with approval *R. v. Stopford* (4) where BRETT, J., said (11 Cox, C.C. 643):

"If he was merely so drunk as to put himself in a passion, drunkenness would be no excuse..."

In *Beard's* case (3) the House of Lords considered all the cases on the subject of drunkenness being regarded as an element which would reduce the crime of murder to manslaughter and stated their conclusions under three heads, the third of which seems to be applicable here—that evidence falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. Reliance is sometimes placed on *R. v. Hopper* (5) where the real point decided by the court was that the defence of manslaughter should have been left to the jury, but, in delivering the judgment of the court, LORD READING, C.J., did say ([1915] 2 K.B. 435):

"... it has also to be borne in mind, although upon this not much reliance can be placed, that there had been much drinking, and the fact that there had been a fight all tended to make the appellant lose control of himself at the critical moment when he fired the rifle."

But at the present day we have the assistance, not only of *Beard's* case (3), but of two other decisions of the House of Lords, namely, *Manning v. Public Prosecutions Director* (6), and *Holmes v. Public Prosecutions Director* (7). In *Manning* (6) VISCOUNT SIMON, L.C., in stating the opinion of the House, said ([1941] 3 All E.R. 277):

"The test to be applied is that of the effect of the provocation upon a reasonable man, as was laid down by the Court of Criminal Appeal in *R. v. Leach* (8), so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (i) to

consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (ii) to take into account the instrument with which the homicide was effected, for to retort in the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be reduced to manslaughter."

A In *Holmes' case* (7) LORD SIMON said ([1946] 2 All E.R. 126):

B "The distinction, therefore, is between asking: 'Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?' (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury: 'Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did?' . . ."

C We see no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication. It may be that an excitable, pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely on his excitable state of mind if the violence used is beyond that which a reasonable, or, as we may perhaps say, an average, person would use to repel an act which can in law be regarded as provocation. No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the collective good sense of the jury, and what, no doubt, would govern their opinion would be the nature of the retaliation used by the provoked person. If a man who is provoked retaliates with a blow from his fist on another grown man a jury may well consider—and probably would—that there was nothing excessive in the retaliation even though the blow might cause the man to fall and fracture his skull, for the provocation might well merit a blow with the fist. It would be quite another thing, however, if the person provoked not only struck the man, but continued to rain blows on him or to beat his head on the ground as happened in this case and as the accused apparently did in the case of *Thomas* (1) to which we have referred. In view of the three decisions of the House of Lords to which we have referred, it is, in our opinion, now settled that apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results. For these reasons we are of opinion that the direction given by the learned judge was correct, and it is for these reasons that we have dismissed the appeal.

Appeal dismissed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Director of Public Prosecutions (for the Crown).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

RONBAR ENTERPRISES, LTD. v. GREEN.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ., and Harman, J.), April 28, 1954.]

Trade—Covenant in restraint of trade—Partnership—Outgoing partner “not . . . directly or indirectly [to] carry on or be engaged or interested in any business similar to or competing with the business of the partnership.”

Publication of weekly newspaper dealing with sport and entertainment.

Purchase by one partner of other partner's share—Contract of service with competing newspaper—Severability of covenant.

In November, 1951, the plaintiff company was formed to enter into partnership with the defendant in his business of publishing a weekly newspaper known as the “Weekly Sporting Review and Show Business”. The company paid to the defendant £10,000 for a forty per cent. interest in the business, and, by a partnership agreement, dated Dec. 5, 1951, the defendant was appointed managing editor of the newspaper at a salary of £1,000. Under the terms of the agreement either partner had, in certain events, the right to determine the partnership and to purchase the other partner's share, and, by cl. 21, “. . . the partner whose share is purchased shall not for five years from such date [the date of determination or dissolution of the partnership] directly or indirectly carry on or be engaged or interested in any business similar to or competing with the business of the partnership”. The plaintiff company having become entitled to determine the partnership under the provisions of the agreement, £7,000 was agreed as the price to be paid for the defendant's share in the business. After leaving the business, the defendant was employed by another company to write articles for a periodical called “Sport and Show News”, which was also published in London and was similar, in character and make-up, to the “Weekly Sporting Review and Show Business”. On an application by the plaintiff company for an injunction to restrain the defendant, until after judgment in an action between the parties, from committing a breach of the restrictive covenant contained in cl. 21,

HELD: (i) the words “carry on or be engaged or interested in any business similar to or competing with the business of the partnership” were apt to include a case where the party subject to the restriction took employment in a business of either of the kinds mentioned at a salary or wages, as well as a case in which he embarked on such a business on his own account or in a partnership; and, notwithstanding that, previously, the defendant had been a principal, the covenant was not too wide merely because it would extend to cases of salaried employment, or employment at a wage, in a business of either of the kinds mentioned.

(ii) being unlimited in point of area, the covenant was unreasonably wide unless it was possible to sever it by segregating the words “similar to or” and treating the covenant as two distinct restrictions with respect to two distinct kinds of business, viz., a business similar to that of the partnership and a business competing with that of the partnership; in the case of a covenant between vendor and purchaser, where reasonable restrictive provisions as regards competition were necessary, not only in the interests of the purchaser to preserve the value of what he had bought, but also in those of the seller so as to enable him to realise a satisfactory price, such a severance was allowable: *Gibbs v. Goldman* ([1914] 2 Ch. 603), applied, *Attwood v. Lamont* ([1920] 3 K.B. 571), distinguished, if the words “similar to or” were struck out, and the area to which the covenant applied was limited to that covered by the words “competing with the business of the partnership”, which was the only way in which, in practice, the area could be limited, the covenant was not wider than was reasonably necessary for the protection of the plaintiff company; and, therefore, the company was entitled to an injunction to restrain the defendant until after judgment by

the action from directly or indirectly carrying on or being engaged or interested in any business competing with the business formerly carried on by the company and the defendant in partnership.

AS TO REASONABLENESS OF CONTRACT IN RESTRAINT OF TRADE, see HALSBURY, Hailsham Edn., Vol. 32, pp. 403-418, paras. 675-698; and FOR CASES, see DIGEST, Vol. 43, pp. 21-24, Nos. 135-147.

A Cases referred to:

(1) *Goldsohl v. Goldman*, [1914] 2 Ch. 603; 84 L.J.Ch. 63; 112 L.T. 21; *affd.* C.A., [1915] 1 Ch. 292; 84 L.J.Ch. 228; 112 L.T. 494; 43 Digest 48, 489.

(2) *British Reinforced Concrete Engineering Co., Ltd. v. Schelff*, [1921] 2 Ch. 563; 91 L.J.Ch. 114; 126 L.T. 230; 43 Digest 35, 310.

B (3) *Attwood v. Lamont*, [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 43 Digest 20, 131.

(4) *Gophir Diamond Co. v. Wood*, [1902] 1 Ch. 950; 71 L.J.Ch. 550; 86 L.T. 801; 43 Digest 46, 464.

(5) *Fitch v. Dewes*, [1921] 2 A.C. 158; 90 L.J.Ch. 436; 125 L.T. 744; 43 Digest 34, 276.

C INTERLOCUTORY APPEAL by the defendant, Isidore Green, from an order of ROXBURGH, J., dated Mar. 12, 1954, whereby he granted an injunction restraining the defendant until after judgment in the action or until further order from directly or indirectly carrying on, or being engaged or interested in, any business competing with the business formerly carried on by the plaintiff company, Ronbar Enterprises, Ltd., and the defendant in partnership, and, in particular, from writing or publishing articles or other matter in a paper known as "Sport and Show News."

D The business formerly carried on by the partnership was the publication of a newspaper known as the "Weekly Sporting Review and Show Business". Clause 21 of the partnership agreement provided that an outgoing partner whose share had been purchased by the other partner

E "shall not . . . directly or indirectly carry on or be engaged or interested in any business similar to or competing with the business of the partnership."

It was contended, inter alia, by the defendant (a) that the restrictive covenant in cl. 21 did not prevent him from rendering services for a salary as distinct from being engaged in a business on his own account, and (b) that the covenant was

F void as it was unlimited in point of area.

Eastham for the defendant.

Hesketh for the plaintiff company.

G JENKINS, L.J.: It appears that the plaintiff company, Ronbar Enterprises, Ltd., was incorporated on Nov. 28, 1951, being formed with a view to entering into the arrangements with the defendant which I am about to state. The defendant had for some time previously been publishing a weekly newspaper, known as the "Weekly Sporting Review and Show Business", containing feature articles and general news about the sporting and entertainment business. The company was formed to enter into partnership with him in his business, and to pay him £10,000 for a forty per cent. interest. There was to be a partnership

H agreement under the terms of which the paper was to be carried on, and the agreement, as executed, is dated Dec. 5, 1951. The partnership was to commence on Dec. 1, 1951. By cl. 7 of the agreement, the net profits of the business were to be divided as to sixty per cent. to the defendant, and as to forty per cent. to the plaintiff company, and there were provisions in cl. 13 and cl. 14 to the effect that the defendant should be managing editor of the partnership business and devote his whole time and attention thereto, and, as such managing editor, should receive salary at the rate of £1,000 per annum. The partnership was,

apart from particular events, to be determinable by either partner giving to the other three months' previous notice in writing, expiring on Dec. 1 in any year after Dec. 1, 1956, so that it was, in effect, to run for six years certain unless caused for sooner determination arose.

Clause 19 provided that, in the event of either partner committing a breach of the terms of the agreement, the other party should be at liberty to give notice to the offending partner determining the partnership, and the partner giving such notice was to have the option of purchasing the share of the other partner and the capital assets of the business on the terms which were set out in cl. 20. That clause provided for the purchase by a surviving or continuing partner of the share of a deceased or bankrupt partner at a valuation. Clause 21 is the most material clause for the purpose of this appeal. It provides:

"On the purchase by one partner of the share of the other partner pursuant to the last preceding clause hereof the purchase money shall be paid with interest thereon at the rate of five per centum per annum from the date of determination or dissolution of the partnership within one year from such date and the partner whose share is purchased shall not for five years from such date directly or indirectly carry on or be engaged or interested in any business similar to or competing with the business of the partnership."

That is, the business to be carried on under partnership agreement under the name of the "Weekly Sporting Review and Show Business Publications".

A case arose for the plaintiff company to determine the partnership by reason of a breach of its provisions by the defendant. There was a provision in cl. 16 of the deed that each partner should punctually pay his separate debts, and that provision was said to have been broken by the defendant. In lieu of valuation as contemplated by the partnership agreement, the price to be paid by the plaintiff company for the defendant's share in the business was agreed at £7,000. On July 31, 1953, the defendant was adjudicated bankrupt. In those circumstances the restrictive provisions of cl. 21 of the partnership deed came into operation. It appears that, after the defendant's connection with the plaintiff company had been severed, a company known as Jocal Productions, Ltd., was incorporated on Oct. 9, 1953, with a nominal capital of £100. The directors of that company were the defendant's wife, Mrs. Ada Green, and a Mrs. Calvert, and it commenced publication of a periodical called "Sport and Show News". That paper is in character and make-up very much the same as the partnership's show business periodical, and it has been published at intervals since October, 1953. It is clear that the defendant has been writing for this paper, and various issues of it have contained notices of the fact of his so writing, and commending to readers of the paper his merits and reputation as a writer on sporting subjects.

The questions that fall to be determined are, first, whether what the defendant has been doing in relation to "Sport and Show News" is a breach of the restrictive covenant contained in cl. 21 of the partnership deed, assuming it to be valid; and, if so, whether the restrictive covenant is valid. I will read it again:

"... the partner whose share is purchased shall not for five years from such date [i.e., the time of purchase] directly or indirectly carry on or be engaged or interested in any business similar to or competing with the business of the partnership."

Counsel for the defendant argued that there had been no breach of that restrictive provision because on its true construction it does not extend to the rendering of services for a salary or wages as distinct from being engaged in business on one's own account. I do not agree. In my opinion, the words

"carry on or be engaged or interested in any business similar to or competing with the business of the partnership"

are apt, particularly in view of the word "engaged", to include a case where the party subject to the restriction takes employment in a business of a different kind

kinds mentioned at a salary or wages, as well as a case in which he embarks on such a business on his own account or on a partnership. In my view, therefore, assuming that the covenant is valid, what has been done does *prima facie* amount to a breach of it. As to its validity, that was attacked by counsel for the defendant on these grounds. First, he said that, if, contrary to his primary submission, it did extend to prevent the defendant working as a salaried employee, it was on that account too wide. In my view, that is not so. I do not think it can be said that this covenant is too wide merely because it would extend to cases of salaried employment, or employment at a wage, in a business of either of the kinds mentioned.

Next, counsel for the defendant contended that the covenant was unreasonable as being unlimited in point of area. He said that a business similar to the business of the partnership might be carried on in any part of the world, and, in whatever part of the world it was carried on, it would be a breach of this covenant read in accordance with its terms. In my view, that argument must almost certainly prevail unless it is possible to sever the covenant so as to segregate the words "similar to or", and make it read: "shall not . . . carry on or be engaged or interested in any business similar to the business of the partnership or any business competing with the business of the partnership," the covenant being thus treated as imposing two distinct restrictions with respect to two distinct kinds of business, i.e., a business competing with the business of the partnership, and a business similar to the business of the partnership.

On the question whether such a severance is allowable, we were referred to *Goldsohl v. Goldman* (1), where there was a covenant, in connection with the sale of a business, not to

" . . . carry on or be engaged or concerned or interested in or render services (gratuitously or otherwise) to the business of a vendor of or dealer in real or imitation jewellery in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States of America, Russia or Spain "

or certain other places. In that case the business concerned was one confined to artificial jewellery, and not including real jewellery, and it was argued that the covenant was wider than was reasonably necessary for the plaintiff's protection as it extended to a subject-matter, viz., real jewellery, which was not included in the business sold. It was also attacked as being too wide in point of area owing to the long string of countries to which the restriction was expressed to extend. It was held by the Court of Appeal that the covenant was severable both as regards the areas mentioned and also as regards the reference to real or imitation jewellery.

A similar view on a comparable question of severance was expressed in *British Reinforced Concrete Engineering Co., Ltd. v. Schelff* (2). In that case a restriction was imposed in connection with the sale by the defendants to the plaintiffs of a business concerned in the sale, but not manufacture, of road reinforcements. The restriction restrained the defendants from being concerned or interested in the business of the manufacture or sale of road reinforcements in any part of the United Kingdom, and, again, it was held that the businesses to which the covenant related could be severed, and that, while the covenant would be unreasonable as regards a business in the manufacture of road reinforcements (in which the vendor had never been concerned), there would not be the same ground for holding it unreasonable in respect of the sale of road reinforcements. So that, although in that case the particular restriction was held to be too wide on other grounds, the objection based on the fact that it applied to manufacture as well as sale was surmounted by means of severance.

We were also referred to *Attwood v. Lamont* (3), which, at first sight, is inconsistent with the other two authorities that I have mentioned inasmuch as it was

a case in which there was a covenant not to carry on any of a long enumeration of different trades and businesses. There it was held by the Court of Appeal that the covenant could not be severed so as to make it equivalent to a string of independent covenants each dealing with a different business. The explanation of the different conclusion reached in *Attwood v. Lamont* (3), as compared with *Goldsoll v. Goldman* (1) and the *British Reinforced Concrete* case (2), appears to be that *Attwood v. Lamont* (3) was a case as between master and servant, whereas the other two cases were cases as between vendor and purchaser, as is the present case. I think it can be regarded as settled that the court takes a far stricter and less favourable view of covenants in restraint of trade entered into between master and servant than it does of similar covenants between vendor and purchaser. In the case of a covenant between vendor and purchaser, the court recognises that it is perfectly proper for the parties, in order to give efficacy to the transaction, to enter into such restrictive provisions as regards competition as are reasonably necessary to enable the purchaser to reap the benefit of that which he has bought; and restrictions of that kind are regarded as necessary, not only in the interests of the purchaser, but in the interests of the vendor also, for they not only preserve the value to the purchaser of that which he buys, but also enable the vendor to realise a satisfactory price. It is obvious that in many types of business the goodwill would be well-nigh unsaleable if it was unlawful for the vendor to enter into an adequate covenant against competition.

In this case, ROXBURGH, J., held that the covenant was severable in the sense that it could be regarded as a twofold covenant: first, against carrying on, and so forth, any business similar to the business of the partnership, and, secondly, against carrying on, and so forth, any business competing with the business of the partnership. Taking that view, the learned judge was of opinion that, *prima facie*, the covenant was not wider than was reasonably necessary for the protection of the plaintiff company, and, that being his *prima facie* view, he granted the interlocutory injunction, to the terms of which I have already referred. Counsel for the defendant advanced all the arguments that could be advanced on behalf of the defendant, but I am not prepared to hold that ROXBURGH, J., came to a wrong conclusion in this case. It must be remembered that this is only an interlocutory proceeding, and that the result of this appeal in no way governs the result which may ensue at the trial. But, for the purposes of interlocutory relief, I find that what the defendant has been doing is plainly contrary to the terms of the restrictive covenant. I find further that, *prima facie*, the covenant, construed in the way that I have construed it, should not be held to be invalid. It follows that, *prima facie*, and as a matter of interlocutory relief, ROXBURGH, J., was justified in granting the injunction under appeal. I am, accordingly, of opinion that this court should not interfere, and I would dismiss the appeal.

HODSON, L.J.: I agree. [His LORDSHIP stated the facts (and, after reading cl. 21 of the agreement of Dec. 5, 1951, continued:)] The first question to be determined is whether, on the construction of that clause, the defendant is in breach of his agreement by reason of the fact that he has been employed by a company, incorporated on Oct. 9, 1953—one of the directors being his wife—which is publishing, also in London, a paper of the same kind as the one which he had sold to the partnership. Counsel for the defendant contended that, being employed in that way, the defendant was not in breach of his covenant because he was not "carrying on" a business, nor was he "engaged or interested in any business similar to or competing with the business of the partnership." I agree with *DEWESE, L.J.*, that, on the true construction of that clause, the word "engaged" is apt to cover employment as a servant as well as employment as a principal. This view is, I think, supported by the authorities, in particular by the opinion expressed, for example, by *SWISTEN EADE, J.*, in *Guyder Diamond Co. v.*

Wood (4), where the learned judge used this language ([1902] 1 Ch. 952) about another covenant:

A "The covenant departs materially from the common form. It does not provide that the covenantor shall not be 'engaged or concerned or interested' in a similar business, but merely that he shall not be 'interested' therein. Nor does it contain the usual provision against accepting employment as a servant in a similar business. If it was intended to prevent the defendant accepting employment of that nature it would have been quite easy to say so . . . "

B Counsel for the defendant recognised, I think, that the authorities were not helpful to him on his construction of the word "engaged" as not being apt to cover employment as a servant, but he sought to argue that in the background of this case the word "engaged" did not cover the facts, because, previously, the defendant had been, not a servant, but a principal. Therefore, he contended that the word "engaged" ought to be construed in the light of that background. Accepting the force of that argument, so far as it goes, I still think that the position remains the same, and that the word "engaged" does comprise being engaged as a servant, and, therefore, on the face of the language, assuming
C that the clause is valid, the defendant is in breach.

D On the question whether the covenant was unreasonably wide, counsel for the plaintiff company conceded that, as it stood, it was, because the words "similar to or", preceding the word "competing", would be unnecessary for the protection of the company's interest. Recognising that position, the learned judge has excised those words, and thereby severed the covenant. The question
E principally argued on this appeal was whether it was legitimate so to do. I have no doubt in my own mind that it is. It is clear that in a vendor and purchaser case, in so far as matters of geography are concerned, it is quite legitimate to deal with the area by severance, as was pointed out by this court in *Goldsohl v. Goldman* (1). LORD COZENS-HARDY, M.R., referred to the judgment of NEVILLE, J., in the court below in this way ([1915] 1 Ch. 297):

F "On the question of the space covered by the covenant NEVILLE, J., has held, and I entirely agree with him, that it is unnecessarily large in so far as it is intended to cover not merely the United Kingdom and the Isle of Man but also the foreign countries mentioned in the covenant. He has also held, and his decision is consistent with a long series of authorities, that the covenant can be severed as regards the space covered by it. It is clear that part of the covenant dealing with the area is reasonable, and the learned judge has limited the injunction . . . "

in effect, to the United Kingdom and the Isle of Man.

G Counsel for the defendant accepts that, but he says that striking out the words "similar to or" is not a limitation of the area. In my judgment, it is, and, as JENKINS, L.J., pointed out, it is really the only way in which, in practice, the area can be limited for the protection of the plaintiff company's business. In the case of a publication which is said to be a rival publication, the competition of which is feared, it is, as I see it, impracticable to limit the area by drawing geographical lines on a map, and the only way in which the area can be practically limited is in the way adopted by ROXBURGH, J., namely, by limiting the area to that covered
H by the words "competing with the business of the partnership". I agree with my Lord that this appeal fails, and should be dismissed.

HARMAN, J.: I also agree that this appeal should be dismissed. There seems no doubt, on the evidence as it stands, that there is a strong *prima facie* case that the defendant has broken the covenant. The only question on the motion is whether he ought to be restrained until the trial from continuing to do so. The test, as I think, is whether the covenant is necessary for the protection

of the covenant; that was stated by LORD BIRKENHEAD, L.C. ([1921] 2 A.C. 163), in *Fitch v. Dees* (5). Protection against what?—protection against competition, in a vendor and purchaser case. The covenant, as limited by the learned judge of first instance, protects the purchaser from that very thing, and, therefore, in my judgment, is necessary for his protection.

Appeal dismissed.

Solicitors: *Isidore Goblman & Son* (for the defendant); *Norris, Allens & Co.* (for the plaintiff company).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. TOMLIN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hallett and Pearson, J.J.).
April 12, 13, May 3, 1954.]

Criminal Law—Embezzlement—Indictment—Count charging embezzlement of general deficiency.

The appellant was the manager of a shoe shop. On Sept. 26, 1953, a check of stock revealed that there was a deficiency of the proceeds from stock sold amounting to £420 15s. 3d. The appellant was convicted on a count charging that on a day unknown between Mar. 14, 1953 (the date of a previous check), and Sept. 26, 1953, he embezzled the sum of £420 15s. 3d. in money received by him on account of his employer. On appeal on the ground that the count was bad in law as alleging a general deficiency,

HELD: where, as in this case, it was impossible to split up the aggregate sum and to trace individual items it was proper to include the total sum in a count alleging a general deficiency.

R. v. Balls (1871) (L.R. 1 C.C.R. 328), applied.

R. v. Lawson ([1952] 1 All E.R. 804), approved.

AS TO INDICTMENT FOR EMBEZZLEMENT OF A GROSS SUM, see HALSBURY, Hailsham Edn., Vol. 9, p. 524, para. 895; and FOR CASES, see DIGEST, Vol. 15, pp. 930-932, Nos. 10,261-10,271.

Cases referred to:

- (1) *R. v. Lawson*, [1952] 1 All E.R. 804; 116 J.P. 195; 36 Cr. App. Rep. 30; 3rd Digest Supp.
- (2) *R. v. Robertson*, (1936), 80 Sol. Jo. 691; 25 Cr. App. Rep. 208; Digest Supp.
- (3) *R. v. Grove*, (1835), 7 C. & P. 635 (173 E.R. 278); 1 Mood. C.C. 447 (168 E.R. 1339); 15 Digest 934, 10,305.
- (4) *R. v. Jones*, (1837), 7 C. & P. 834; 173 E.R. 363; 15 Digest 932, 10,281.
- (5) *R. v. Jones*, (1838), 8 C. & P. 288; 173 E.R. 498; 15 Digest 918, 10,118.
- (6) *R. v. Chapman*, (1843), 1 Car. & Kir. 119; 1 L.T.O.S. 414; 174 E.R. 739; 15 Digest 930, 10,262.
- (7) *R. v. Lambert*, (1847), 2 Cox, C.C. 309; 15 Digest 934, 10,307.
- (8) *R. v. Balls*, (1871), L.R. 1 C.C.R. 328; 40 L.J.M.C. 148; 24 L.T. 760; 35 J.P. 820; 15 Digest 931, 10,267.
- (9) *R. v. Sheaf*, (1925), 134 L.T. 127; 89 J.P. 207; 19 Cr. App. Rep. 46; Digest Supp.
- (10) *R. v. Morris*, (1933), 24 Cr. App. Rep. 105; Digest Supp.
- (11) *R. v. Tucker*, [1952] 2 All E.R. 1074; 3rd Digest Supp.

APPEAL against conviction.

The appellant, William John Tomlin, was convicted on Mar. 16, 1954, before the recorder, at Hastings Quarter Sessions, of embezzlement and was sentenced to seven months' imprisonment.

N. Lawson for the appellant.

Fordham for the Crown.

May 3. PEARSON, J., read the judgment of the court (prepared by HALLETT, J.). The appellant was tried on Mar. 16, 1954, before the learned recorder of Hastings on an indictment containing five counts, whereof the first three counts charged him with embezzlement and the last two counts with falsification of accounts. The charge of falsification in the fourth count was connected with the charge of embezzlement in the second count, and on those two counts the jury, being dissatisfied with the evidence, acquitted the appellant. The charge of falsification in the fifth count was connected with the charge of embezzlement in the third count, and on those two counts the jury found the appellant Guilty and he does not appeal. This court is, therefore, concerned only with the first count which alleged that the appellant on a day unknown between Mar. 14, 1953, and Sept. 26, 1953, being servant to one Reynolds, fraudulently embezzled the sum of £420 15s. 3d. in money received by him for or on account of the said Reynolds his employer.

The first ground of appeal is that there was no evidence of embezzlement to go to the jury on the said count, and the third ground of appeal alleges misdirection by the recorder in three respects. We have considered these grounds and only think it necessary to say that we find no substance in them. The second ground of appeal raises the point of law which the recorder overruled, but has certified as fit for the consideration of this court, namely, that the first count was bad in law as alleging a general deficiency of moneys, or, to use the recorder's language:

“embezzlement of a lump sum or general deficiency arising from misappropriation of small unidentifiable sums over a number of months”.

The cases cited on this point in the text-books are, perhaps, not easily reconcilable, and, although the legal position has, as we think, been illuminated by the recent ruling of LYNKEY, J., in *R. v. Lawson* (1), a judgment of this court thereon may be helpful.

The facts of the case, so far as relevant, are as follows. The appellant had been employed for many years in a shoe shop at Hastings, and he was the manager in the middle of 1952 when a Mr. Reynolds bought the shop and retained his services. In March, 1953, a deficiency of stock was suspected, and, accordingly, a careful check was then taken. In September, 1953, certain records having been kept in the meantime, another check was taken which extended over about four days. This later check revealed that between the two stocktakings goods to the value of £420 15s. 3d. had, to use a neutral word, gone and that no proceeds from those goods had ever been paid over by the appellant to or for Mr. Reynolds or were still available in the hands of the appellant for Mr. Reynolds. The appellant later, while denying dishonesty on his part, admitted to the police that there was a deficiency and subsequently made restitution. He did not suggest that either stocktaking had been faulty or that there had been any loss of goods or money through a casualty, such as a theft by a third party. His only suggested explanation was that the deliveries of goods during the period between the two stocktakings might have been less than the invoices represented, and this explanation, which was mentioned to the jury in the summing-up, was clearly rejected by them. The recorder plainly directed the jury that they could only find the appellant guilty on the first count if they were satisfied that he had dishonestly embezzled the money which he got from customers for the shoes which had apparently left the shop, and that, if they thought he might have stolen the shoes, as distinct from stealing the proceeds of their sale, they must acquit the appellant. The verdict of the jury thus involves that the appellant had dishonestly embezzled the whole or part of the total sum of £420 15s. 3d. which he had received for or on account of his employer during the period between the two stocktakings from customers who bought shoes which had gone during that period. It was

clearly impossible for the prosecution to say that a particular pair of missing shoes had been sold on a particular day, or to a particular customer, or for a particular sum which had then been dishonestly placed in the appellant's own pocket. The question for this court is whether in such circumstances a count in the form of this first count is bad in point of law.

Where separate offences can be charged in separate counts the court regards as improper an "omnibus" count in an indictment charging an aggregate of offences over a long period: see, for instance, *R. v. Robertson* (2), but here no splitting up of the aggregate sum was possible. In *R. v. Grove* (3) the prisoner admitted a deficit of about £900, but the prosecution could not prove from whom the money was received or in what amounts or at what time. None the less, the court, by a majority, upheld the conviction. It is suggested in RUSSELL ON CRIME, 10th ed., vol. 2, p. 1279, that

"In view of the opinion expressed by BOLLAND, B., in the later case of *R. v. Jones* (4), *R. v. Grove* (3) would seem to be of no authority",

but counsel for the appellant has been unable to point out, and we have been unable to find, any passage in the judgment of BOLLAND, B., which supports this suggestion. The ruling of ALDERSON, B., in *R. v. Jones* (5) is not binding on us and such reports of circuit cases do not disclose either the facts or the reasons sufficiently to make them satisfactory authorities. The same observation applies to *R. v. Chapman* (6). In *R. v. Lambert* (7) ERLE, J., took a contrary view, remarking (2 Cox, C.C. 310):

"There would be constant failure of justice if I were to decide otherwise, since it is impossible, in cases like the present where a number of different amounts of money have been received, to specify which sum or sums, or the parts of which sum or sums, have been embezzled".

We feel that, if the technical rule alleged on behalf of the appellant in fact prevails, justice will in truth, in many cases, be defeated.

In our judgment, however, *R. v. Balls* (8) is inconsistent with the supposed rule. This was the unanimous decision of a very strong court, consisting of COCKBURN, C.J., WILLES, MELLOR, MONTAGUE SMITH, J.J., and CHANNELL, B., and it is to be observed that counsel for the prosecution was not even called on. Under s. 71 of the Larceny Act, 1861, only three acts of embezzlement could be charged or proved under one indictment, and then only if committed within six months. Accordingly, there was strong ground in 1871 for contending that where a number of small sums were separately embezzled one could not add them all together and treat it as one embezzlement of the whole, yet in *Balls' case* (8) the first count charged the embezzlement on Dec. 5 of the aggregate of ten different payments made by ten different persons during the preceding week, and, similarly, the second count related to the aggregate of ten payments, and the third count to the aggregate of eleven payments. In the present case we feel no doubt that when the stocktaking took place in September and shoes to the value of £420 15s. 3d. were found, as the jury's verdict implies, to have been sold, the appellant was under a duty to account then for the proceeds of sale, if he had not done so before, and the fact that he may have been also under a duty to account, week by week, for the proceeds received during each week, and might, as in *R. v. Balls* (8), have been indicted for embezzling any of the separate small sums received by him, does not prevent him from being indicted for embezzling the aggregate of those sums.

The decision in *Balls' case* (8) is binding on us, unless the facts are distinguishable, and we can see no valid distinction. On the contrary, evidence to establish the thirty-one separate payments was, apparently, available in that case, so that there was less necessity than here for the aggregation. In *R. v. Skaf* (9) the conviction for fraudulent conversion was quashed on the ground that the vital question of entrustment had never been left to the jury, but the question of

charging the embezzlement of a general deficiency was mentioned by AVORY, J. (134 L.T. 129). We find nothing in this passage inconsistent with the decision in *Balls'* case (8) or with our view that we should here follow *Balls'* case (8). We agree with the recorder that it was the appellant's duty, when stock was taken, to account for the money that he had received for stock which he had disposed of, assuming, of course, that he had not accounted already.

A The judgment in *R. v. Morris* (10) contains only one sentence which deals with the question now under consideration, and no reasons appear to have been given or cases cited either in the argument or in the judgment for the proposition affirmed. In particular, *Balls'* case (8) was, apparently, not mentioned. In these circumstances, LYNSEY, J., in *R. v. Lawson* (1), thought it right to hold that, if the evidence for the prosecution makes it clear that there has been a fraudulent conversion of either the whole or part of a general balance at one time, it is proper to charge the conversion of a general balance on a day between the specified dates. Having reviewed the authorities and had the advantage of a most careful and thorough argument by counsel for the appellant, we have no doubt that the ruling of LYNSEY, J., in *Lawson's* case (1) was correct and we can see no valid distinction between that case and the present case as regards the point in question. On the view taken by the jury there was clearly an embezzlement of one part of the aggregate at one time. We have been referred to the courts-martial case of *R. v. Tucker* (11), but, as appears ([1952] 2 All E.R. 1077), that court did not find it necessary to decide whether in that case it was proper to base the charge on an alleged general deficiency.

D We desire to make it plain in conclusion, agreeing therein with LYNSEY, J., that, in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property or money, it is undesirable to include them all in a count alleging a general deficiency. What we are not willing to do is to elevate a rule of practice, applicable to circumstances where it may be required to avoid injustice, into a rule of law applicable to circumstances where it will defeat justice. The appeal is dismissed.

Appeal dismissed.

E Solicitors: *Herington, Willings & Penry-Davey*, Hastings (for the appellant); *Norman Lester*, town clerk, Hastings (for the Crown).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

MAGEE v. MORRIS.

QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, JJ.).
May 5, 1954.]

Licensing—Search warrant—Search of licensed premises—Execution on Sunday—Sunday Observance Act, 1677 (c. 7), s. 6—Magistrates' Courts Act, 1952 (c. 55), s. 102 (3)—Licensing Act, 1953 (c. 46), s. 152 (1).

By virtue of the Magistrates' Courts Act, 1952, s. 102 (3), and notwithstanding the Sunday Observance Act, 1677, s. 6, a search warrant issued by a justice is "as effectual on Sunday as on any other day" and, therefore, a search warrant issued under s. 152 (1) of the Licensing Act, 1953, can lawfully be executed on a Sunday.

FOR THE SUNDAY OBSERVANCE ACT, 1677, s. 6, see HALSBURY'S STATUTES—Second Edn., Vol. 5, p. 512.

FOR THE MAGISTRATES' COURTS ACT, 1952, s. 102 (3), see *ibid.*, Vol. 32, p. 502.

FOR THE LICENSING ACT, 1953, s. 152 (1), see HALSBURY'S STATUTES, Interim Service, 1953, p. 623.

CASE STATED by Birkenhead justices.

On Nov. 6, 1953, a justice, after hearing evidence on oath, issued a warrant under s. 152 (1) of the Licensing Act, 1953, authorising the police to search the premises of the Hamilton Social Club, Birkenhead, it being alleged that the club was being so managed as to constitute a ground for striking it off the register, and otherwise contrary to s. 144 (1) of the said Act. The warrant was executed on Sunday, Nov. 8, 1953, and as a result informations were laid against the appellant and diverse other persons visiting the club for various offences against the Act. On Jan. 14, 1954, the justices were proceeding to hear the informations when counsel for the appellant submitted a preliminary point that the proceedings were bad in that the police had no authority to execute the search warrant on a Sunday, having regard to s. 6 of the Sunday Observance Act, 1677. It was contended by the respondent that s. 152 (1) of the Licensing Act, 1953, authorised the police to execute the warrant on a Sunday.

The justices were of opinion that, having regard to s. 102 (3) of the Magistrates' Courts Act, 1952, and s. 152 (1) of the Licensing Act, 1953, and the view expressed by the editor of PATERSON'S LICENSING ACTS, 62nd ed., p. 1101, that the police had authority to execute the warrant on a Sunday.

C. J. I. Cunningham for the appellant.

Paul Wrightson for the respondent.

LORD GODDARD, C.J.: This case raises the short point whether or not a search warrant issued under s. 152 (1) of the Licensing Act, 1953, authorising police officers to search premises to see if offences against the Act are being committed can be executed on a Sunday. If such a warrant could not then be executed, it would be a charter to publicans and other sinners to commit every conceivable offence on a Sunday, and there would be no means of putting it

It is clear, in my opinion, that a search warrant can be executed on a Sunday because, whatever might have been the true interpretation of s. 6 of the Sunday Observance Act, 1677, which is:

"... no person or persons upon the Lord's day shall serve or execute or cause to be served or executed any writ, process, warrant, order, judgement or decree (except in cases of treason, felony or breach of the peace)..."

it is now provided by the Magistrates' Courts Act, 1952, s. 102 (3) (formerly s. 4 of the Indictable Offences Act, 1848):

"The issue or execution of any warrant under this Act for the arrest of a person charged with an offence, or of a search warrant, shall be as effectual on Sunday as on any other day."

A

A search warrant is granted under various statutes, and I see nothing in the Magistrates' Courts Act, 1952, to limit the class of search warrant to which s. 102 (3) applies. Search warrants are issued in respect of searching premises for stolen goods (Larceny Act, 1861, s. 103), obscene books (Obscene Publications Act, 1857, s. 1), illicit stills (Customs and Excise Act, 1952, s. 296 (2)), women or girls who it is believed are detained for immoral purposes (Criminal Law Amendment Act, 1885, s. 10), and in respect of a number of other cases. In every case a search warrant has to be granted by the justice (in the case of obscene books, two justices), and there is no difference between one search warrant and another. Each warrant is issued under the particular statute because search warrants are not known at common law. As the Licensing Act, 1953, s. 152 (1), provides that a justice may issue a search warrant, it seems to me that s. 102 (3) of the Magistrates' Courts Act, 1952, applies, and that the warrant can be executed on Sunday as well as on any other day. This appeal, therefore, is dismissed.

B

HILBERY, J.: I agree.

DONOVAN, J.: I agree.

C

Case remitted.

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the appellant); *Sharpe, Pritchard & Co.*, agents for *N. B. Jennings*, Salford (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

D

MIDDLETON v. ROWLETT.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, JJ.), May 5, 1954.]

E

Justices—Procedure—Re-opening case for prosecution—Material fact not proved by prosecution—Discretion of justices.

In a prosecution before the justices for the dangerous driving of a motor car the prosecution omitted to prove the identity of the driver. At the close of the case for the prosecution the defendant submitted that there was no case to answer. The prosecutor contended that the justices were bound to allow the case for the prosecution to be re-opened so that evidence of identity might be tendered, but the justices refused to allow the case to be re-opened.

F

HELD: proof that the defendant was the driver of the car which was alleged to have been driven dangerously was a matter of substance; the justices had a discretion in the matter; and as, in the circumstances, they were not bound to exercise it in favour of the prosecution, the court could not interfere.

G

Duffin v. Markham (1918) (82 J.P. 281), distinguished.

AS TO RE-OPENING CASE FOR PROSECUTION, see HALSBURY, Hailsham Edn., Vol. 9, p. 170, para. 246; and FOR CASES, see DIGEST, Vol. 33, p. 344, Nos. 551, 552 and Digest Supps.

H Cases referred to:

- (1) *Duffin v. Markham*, (1918), 88 L.J.K.B. 581; 119 L.T. 148; 82 J.P. 281; 33 Digest 344, 552.
- (2) *Hargreaves v. Hilliam*, (1894), 58 J.P. 655; 33 Digest 344, 551.
- (3) *R. v. Harris*, [1927] 2 K.B. 587; 96 L.J.K.B. 1069; 137 L.T. 535; 91 J.P. 152; Digest Supp.
- (4) *R. v. Day*, [1940] 1 All E.R. 402; 162 L.T. 407; 104 J.P. 181; 2nd Digest Supp.

CASE STATED by Leicester justices.

On Oct. 28, 1953, at a court of summary jurisdiction sitting at Loughborough, an information was preferred by the appellant, a chief inspector of police, against the respondent, that he, on Sept. 10, 1953, at Rothley, in the county of Leicester, did drive a motor car on Leicester Road in a manner dangerous to the public, contrary to s. 11 of the Road Traffic Act, 1930.

At the hearing of the information the following evidence was given: (i) On Sept. 10, 1953, a green Riley motor car was being driven on the A6 road in the parish of Rothley and was travelling on its near side, being the third of a line of traffic proceeding in the same direction; (ii) when approaching a left hand bend the vehicle pulled out to overtake the traffic in front of it when it was unsafe to do so by reason of the fact that it made a third line of traffic; (iii) no evidence was tendered which in any way identified anyone as having driven, owned, or travelled in the said car at the time of the said occurrence or at any other time.

After the close of the case for the prosecution counsel for the respondent submitted that, as no evidence had been adduced by the appellant that the respondent was the driver of the car or was in any way connected with the offence charged, he had no case to answer. It was contended by the solicitor for the appellant that the justices had a bounden duty to permit the case to be re-opened so that evidence might be tendered to prove that the respondent was the driver of the car. It was contended by the respondent that it was not competent for the justices so to do, and, alternatively, that, if they had a discretion, they should refuse the application. The justices were referred to *Duffin v. Markham* (1), *Hargreaves v. Hilliam* (2), *R. v. Harris* (3) and *R. v. Day* (4).

The justices were of opinion (i) that the omission of the appellant to prove who was at the material time the driver of the motor car was one of substance and not merely one of form, and (ii) that they had a discretion, which must be exercised judicially, whether or not to permit the case for the prosecution to be re-opened and additional evidence called, and, in the exercise of such discretion, they refused a re-opening of the case, and, accordingly, dismissed the information.

R. E. Seaton for the appellant.

H. A. Skinner for the respondent.

LORD GODDARD, C.J.: In these cases, so far as my experience goes, the motor car is invariably identified in the information by quoting the index number. That was not done in the present case, and, apparently, no evidence was given that the respondent was the driver of the car.

[His Lordship stated the facts and continued:] Counsel for the appellant relied on *Duffin v. Markham* (1), but that was a prosecution under the Bread Order, 1917, where the prosecutor, no doubt thinking that the court had judicial notice of every statutory rule and order as it has of an Act of Parliament, had not formally put in the order. The justices said that that was not the sort of thing that could be tolerated and they would not then allow the order to be put in. *Avory, J.*, said (82 J.P. 282) that the justices had a judicial duty to allow an adjournment in a case of that sort for the Bread Order, 1917, to be produced. The present is a case in which the evidence falls short of proof. It is not the formal proof of a public document or something of that sort, but proof of a fact which ought to have been the first thing proved, or proved at a very early stage. I do not think we could say that, if the justices came to the conclusion that they were not going to encourage carelessness in prosecutions, and, therefore, were not going to allow the case to be re-opened, they were bound to allow it to be re-opened. I think it was a matter of discretion, and I do not think we can say that the justices who considered the case were bound to allow the case to be re-opened. It is a border-line case, and I do not know that we need lay down any

particular rule on the subject beyond saying that we cannot hold that the justices exercised their discretion unjudicially.

A There are many cases in which a prosecution is being conducted in a court of summary jurisdiction or even at the assizes or quarter sessions and somebody forgets to ask a material question. For instance, in a case of false pretences, as DONOVAN, J., has reminded me, sometimes the question is not asked: "Would you, but for that statement made to you, have acted in the way you did?" It may be a formal question, but it is a necessary one, and it is surprising sometimes how witnesses answer in a way which the prosecution least expect when that question is put. Of course, if his attention were called to the matter by a discussion which has taken place, it being said that there is no case to go to the jury, the witness would probably go into the box and answer in the way in which he is expected to answer, so I think one has to be careful in these matters. Though B I think what has happened is regrettable and I do not think the court would have interfered for a moment if the justices had exercised their discretion the other way, I do not think we can say that they were bound to exercise their discretion in favour of the prosecution. Therefore, this appeal fails and is dismissed with costs.

C **HILBERY, J.:** I am of the same opinion. In the present case, a prosecution for dangerous driving, the prosecutor wholly omitted to give any evidence that the respondent was the driver. That has only to be stated to be seen to be a most material step in establishing the case against the respondent. It cannot be said that that was the omission of some merely technical matter. The question is whether or not in refusing to allow the prosecution to re-open their case the D justices exercised their discretion judicially. It is true that in *Duffin v. Markham* (1), speaking of the facts and circumstances of that case, AVORY, J., said that it was the duty of the justices to adjourn to allow to be given the evidence which had been omitted, but it has to be borne in mind that he was using those words in connection with a case where what had been omitted was a highly technical piece of formal evidence which did not in any way touch the substance of the matter E which was under the consideration of the justices. Nothing could more materially touch the substance of the matter which was before the justices in the present case than proof that the respondent was the person who was driving the car which, it was alleged, was being driven dangerously. In the circumstances, therefore, I do not think the matter is concluded by *Duffin v. Markham* (1), from which, I think, the present case is easily distinguishable. F Unless we were to say that the justices were bound to exercise their discretion in one way, it is impossible to quarrel with what they did. I am clearly of opinion that, in the circumstances, they were not bound to exercise their discretion in one way, and for those reasons I agree that this appeal fails.

G **DONOVAN, J.:** I agree entirely with both judgments which have been delivered.

Appeal dismissed.

Solicitors: Vizard, Oldham, Crowder & Cash, agents for Bartlett, Walters & Parry, Loughborough (for the appellant); Taylor, Jelf & Co., agents for Philip J. Hammond, Leicester (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

SHAVE v. ROSNER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, JJ.)
May 6, 1954.]

Street Traffic—Dangerous vehicle—“Causing” such vehicle to be used on road—Owner driving vehicle after repair by garage—Accident due to negligence of garage proprietor’s workman—Liability of garage proprietor—Motor Vehicles (Construction and Use) Regulations, 1951 (S.I., 1951, No. 2101), reg. 101.

The owner of a motor vehicle left it at the respondent’s garage to have the brakes re-shoed. After the work was completed the respondent delivered the vehicle to the owner, who then drove the respondent back to the garage so as to test the brakes himself. Later on the same day, while the owner was driving the vehicle, one of the front wheels came off and injured a passer-by, the accident being due to the fact that the hub nuts had not been properly fastened by the respondent’s workmen after re-shoeing the brakes. The respondent was charged with unlawfully causing a vehicle to be used on a road in such condition that danger was caused to a person on the road, contrary to the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 72 (1) and reg. 101.

HELD: the word “causes”, in reg. 101, involved some degree of dominance or control over the person who used the vehicle, or some express or positive mandate to him, by or from the person alleged to have caused the user; after the respondent had delivered the vehicle back to the owner he ceased to have any control over it; and, therefore, he had not caused it to be used on a road within the meaning of reg. 101.

Dicta of LORD WRIGHT in *McLeod (or Houston) v. Buchanan* ([1940] 2 All E.R. 187), applied.

FOR THE MOTOR VEHICLES (CONSTRUCTION AND USE) REGULATIONS, 1951, reg. 101, see HALSBURY’S STATUTORY INSTRUMENTS, Vol. 22, p. 203.

Cases referred to:

(1) *McLeod (or Houston) v. Buchanan*, [1940] 2 All E.R. 179; 1940 S.C. H.L. 17; 2nd Digest Supp.

(2) *Watkins v. O’Shaughnessy*, [1939] 1 All E.R. 385; Digest Supp.

CASE STATED by County of London justices.

At a court of summary jurisdiction sitting at West London Magistrate’s Court on Sept. 24, 1953, the appellant, Samuel Shave, a police constable, preferred an information against the respondent, Emil Rosner, a motor car dealer and repairer, charging that on July 11, 1953, at King Street, Hammersmith, he unlawfully caused to be used on a road part of a motor vehicle, to wit, the front nearside wheel, being in such condition that danger was caused to a person on a road, contrary to the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 72 (1) and reg. 101. The information was heard at a court of summary jurisdiction sitting at Bow Street Magistrate’s Court on Dec. 8, 1953, and the following facts were found.

On the morning of July 11, 1953, one Ralph Hugh Chapman left his Morris motor van at the respondent’s garage, known as the Ace Motor Co., at A Lam and Eve Mews, London, W.8, for the brakes to be re-shoed. This was done by the respondent’s mechanics and in the afternoon of the same day the respondent drove the van from the garage and delivered it to Chapman at 43, Earls Court Road. Chapman then drove the respondent in the van back to the garage, testing the brakes himself. Later on the same day, while Chapman was driving the van in King Street, Hammersmith, the front nearside wheel of the van came off, and knocked down and injured a woman walking on the pavement. The wheel came off because the hub nuts had not been properly fastened by the respondent’s workmen when they replaced the wheels after re-shoeing the brakes. On July 15, 1953, Chapman interviewed the respondent and his partner in the

business at the respondent's garage and told them of the accident. Later that day, the respondent called on Chapman at his home and said that he had found the workman responsible for the repair and had discharged him, and that he (the respondent) accepted full responsibility for the accident on behalf of his firm. He offered to repair the van free of charge. The question of criminal responsibility was not discussed.

- A It was contended on behalf of the appellant that the respondent, after his workmen had re-shoed the brakes, had handed the van to Chapman in the full knowledge and understanding that Chapman would drive the van on the public roads believing that, when the respondent delivered it to him, it was in a road-worthy condition, and that, particularly in view of the fact that Chapman drove the respondent back to his garage, the respondent, therefore, caused the vehicle to be used on a road and was guilty of the offence. It was contended on behalf of the respondent that, although he might well be liable civilly to Chapman, he was not criminally responsible, because he could not stop the driver or anyone else using the van, nor authorise anyone to use it, and, therefore, could not cause the van to be used on a road that afternoon.

The justices dismissed the information and the appellant now appealed.

- C *Paul Wrightson* for the appellant.
Aldous and *Vowden* for the respondent.

- D **LORD GODDARD, C.J.**, stated the facts and continued: If the Motor Vehicles (Construction and Use) Regulations, 1951, reg. 72 (1) and reg. 101, are wide enough to make the respondent liable, I have no doubt that it might be proper that he should be made liable, because it was owing to the faulty work at his garage that the accident happened. But, however desirable we might think it would be to have a regulation framed in such a way as to make him liable, we must not stretch the regulations and find a criminal offence unless a criminal offence has been committed. Regulation 72 (1) says that a vehicle

- E “... shall at all times be in such condition ... that no danger is caused or is likely to be caused to any person on the vehicle or trailer or on a road”.

The regulation which imposes a penalty and creates the offence is reg. 101, which says:

- F “If any person uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of or fails to comply with any of the preceding regulations contained in Part III of these regulations he shall for each offence be liable to a fine not exceeding £20.”

- G That is an absolute prohibition; there is no question of negligence. Therefore, if the owner of the van who was driving it at the time had been summoned, it is difficult to see that he would have had any defence in law, although he would have had so much in mitigation that I have no doubt the police exercised a wise discretion in not prosecuting him. After all, he had no reason to suppose that the van brought back from the repairers was not in good condition. But the police have prosecuted the garage proprietor for causing the van to be used on a road in contravention of the regulations, and the question is whether we can say that he caused it to be used on the road in a dangerous condition. I suppose in one sense one may say he did, because he sent it back in a dangerous condition.
- H and, as it was sent back in a dangerous condition, the owner of the van unwittingly used it on the road. But we have to consider whether it can be fairly said, within the meaning of reg. 101, that the garage proprietor caused the vehicle to be used on the road. The words are “uses or causes or permits to be used”. He obviously did not use the van himself. He obviously did not permit it to be used, because to permit is the giving of permission, and he could not give permission to the owner to use his own van. The question is whether he caused it to be used. I think that, when one finds those two expressions “causes or permits”

in contrast or juxtaposition, "permit" means giving leave and licence to somebody to use the vehicle, and "causes" involves a person, who has authority to do so, ordering or directing another person to use it. If I allow a friend of mine to use my motor car, I am permitting him to use it. If I tell my chauffeur to bring my car round and drive me to the courts, I am causing the car to be used. There may be civil liability to indemnify the owner if he is made liable, or, possibly, there are authorities to suggest that the injured person would have an action direct—I do not think he would have. No doubt, if the owner were sued, the garage proprietor would have an action brought against him, and part of the damage for not doing the work properly would be the damages the owner is caused to pay to the person injured. But, from the point of view of the criminal law, I do not think the regulation is wide enough to catch this case. Therefore, I think the justices came to a right decision in point of law, and the appeal is dismissed. A B

HILBERY, J.: I am of the same opinion. On the facts stated the garage proprietor who had executed the repairs to the brakes of the van re-delivered it to the owner. Once he had re-delivered it to the owner, he ceased to have any control or dominion over the vehicle. It was then for the owner to act according to his own will and volition in deciding whether he used it on the road or not. I cannot see how it can be said that, when the owner thereafter takes the van on to the road, electing to use it on the road, the garage proprietor has been any cause of his so doing. He has not directed him to do it. He has not ordered him. Indeed, he could not do either. He has done nothing which is an active cause of the use of the van on the road, and it is only when the van is used on the road in a condition which contravenes the regulations that the offence charged in the present case is committed. Therefore, I think the words used by LORD WRIGHT in *McLeod (or Houston) v. Buchanan* (1) apply where, speaking of the word "cause", he said that the man in question did not cause his brother to use the van on the road ([1940] 2 All E.R. 187): C D

"To 'cause' the user involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case". E

Almost similar words were used—and, inferentially, at any rate, approved by the Court of Appeal in *Watkins v. O'Shaughnessy* (2)—in the judgment of the learned county court judge in that case, where he said ([1939] 1 All E.R. 387):

"There must, in my view, be something involving control, dominance or compulsion of B.'s movements by A. to 'cause' ". F

I respectfully agree with those expressions, and, for the reasons also given by my Lord, I think this appeal fails.

DONOVAN, J.: Without condoning in any way the omission on the part of the respondent to see that the wheel was firmly secured before delivery of the van back to the customer, which omission may well involve him in civil liability, I agree it is not possible to say, as a matter of law, that the respondent caused the van to be driven on the road within the meaning of this penal regulation. "Cause", in this context, involves, on the authorities cited, some degree of dominance or of control, or some express or positive mandate, that is, in or by the person alleged to have caused the prohibited act, and in the present case there was no such dominance or control, and no such mandate. H

Appeal dismissed.

Solicitors: Solicitor, Metropolitan Police (for the appellant), Sunbford, Messrs Taylor & Co. (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

Re RAYLEIGH WEIR STADIUM.

[CHANCERY DIVISION (Harman, J.), February 18, 19, 23, 1954.]

Land Charge—Registration—General equitable charge—Estate contract—Contract of sale of one-eighth share of partnership property—Freehold vested in one partner—Land Charges Act, 1925 (c. 22), s. 10 (1), Class C (iii), (iv).

A M. who was the fee simple owner of premises comprising a greyhound racing stadium, entered into partnership before Oct. 11, 1948, with R. On Dec. 14, 1949, M. and R. were adjudicated bankrupt and the applicant was appointed to be their trustee in bankruptcy. In or about November, 1953, the applicant wished to sell the premises, but he was unable to make a good title by reason of two land charges affecting the premises which had been registered in favour of the respondent, viz. (a) a land charge under the Land Charges Act, 1925, s. 10 (1), Class C (iii), registered on Oct. 17, 1953, against the bankrupts and stated to be created by an instrument dated Oct. 11, 1948, whereby the respondent had paid £10,000 in respect of the purchase of a one-eighth part of the premises and in respect of which no conveyance had been executed, and (b) a land charge under s. 10 (1), Class C (iv), registered on Feb. 16, 1949, against the bankrupts and the applicant, stated to be created by an instrument dated Oct. 11, 1948. The applicant demanded that the respondent should vacate the registrations. The respondent claimed that on Oct. 11, 1948, the bankrupts had agreed to sell and he had agreed to buy for £10,000 a one-eighth share of the freehold in the premises and other property and on the same day he had paid to each of them the purchase price of £5,000. He said further that he had mislaid the document which he claimed was a receipt, and, was, therefore, unable to produce it. On a summons for an order that the respondent should vacate both registrations, the court assumed that the document dated Oct. 11, 1948, in fact existed.

E HELD: from the time when M. took R. into partnership M. held the freehold of the premises on trust for sale and M. and R. each had an interest in half the proceeds of sale only, and, accordingly, the only interest that they could each have contracted to give the respondent was an eighth share in half the proceeds of sale of the premises; that did not constitute a contract "to convey or create a legal estate", and, therefore, the respondent's interest was not registrable under Class C (iv); nor was his interest registrable as a general equitable charge under Class C (iii), it being excluded from that class as affecting the interests of M. and R. which arose under a trust for sale; and, as he had no interest in the land which entitled him to register a charge against it, the respondent must vacate both registrations.

FOR THE LAND CHARGES ACT, 1925, s. 10 (1), (8), see HALSBURY'S STATUTES, Second Edn., Vol. 20, pp. 1076, 1078.

G Cases referred to:

- (1) *Turley v. Mackay*, [1943] 2 All E.R. 1; [1944] Ch. 37; 169 L.T. 90; 2nd Digest Supp.
- (2) *Rose v. Watson*, (1864), 10 H.L. Cas. 672; 33 L.J.Ch. 385; 10 L.T. 106; 11 E.R. 1187; 35 Digest 331, 739.

H ADJOURNED SUMMONS for an order that the registration of the following land charges in the register of land charges at H.M. Land Registry be vacated, viz.: (i) a land charge of Class C (iv) alleged to have been created by Francis Bernard McGreavey and Frederick Leslie Rundle in favour of Ernest Charles Randall on Oct. 11, 1948, and registered on his behalf on Feb. 16, 1949, under the reference number L.C. 8756/49 and 8757/49 and (ii) a land charge of Class C (iii) alleged to have been created by Francis Bernard McGreavey and Frederick Leslie Rundle in favour of Ernest Charles Randall on Oct. 11, 1948, and registered on his behalf on Oct. 17, 1953, under the reference numbers L.C. 71846/53, 71847/53, 71848/53

From before Oct. 11, 1948, Francis Bernard McGreavey and Frederick Leslie Rundle carried on in partnership the business of a speedway and greyhound racing stadium of freehold premises known as the Rayleigh Weir Stadium at Thundersley, Essex. Although the premises were among the assets of the partnership, the legal estate in fee simple therein was at all times vested in McGreavey alone. On Dec. 14, 1949, McGreavey and Rundle were adjudicated bankrupt, and on Dec. 16, 1949, the applicant, Daniel Mahony was certified by the Board of Trade as their trustee in bankruptcy. As trustee in bankruptcy, the applicant wished to sell the said premises in or about November, 1953, but he was unable to make a good title by reason of land charges affecting the premises which had been registered on behalf and in favour of the respondent, Ernest Charles Randall under the Land Charges Act, s. 10 (1), namely, (i) in Class C (iii), an estate contract registered on Oct. 17, 1953, against the bankrupts, and (ii) a land charge in Class C (iv), a general equitable charge, registered on Feb. 16, 1949, against the two bankrupts and the applicant. In the registration of the said charge under Class C (iv) it was claimed by the respondent that the land charge was imposed or created by an instrument dated Oct. 11, 1948, and made between the respondent and the bankrupts. In the registration of the land charge Class C (iii) the respondent claimed that the charge was imposed or created by an instrument dated Oct. 11, 1948, whereby the respondent paid £10,000 in respect of the purchase of one-eighth part of the premises and in respect of which no conveyance had been executed. In his examination on Apr. 27, 1950, in the bankruptcy proceedings, the respondent claimed that the bankrupts had sold to him a one-eighth part of the said premises and of the chattels thereat on the said Oct. 11, 1948, and alleged that on the same day a receipt was signed relating to his purchase of the one-eighth share, but that he could not find the document or any draft or copy of it. The applicant called on the respondent to have the registration of the land charges cancelled, but the respondent refused to do so. In the present proceedings the respondent alleged that on Oct. 11, 1948, the bankrupts agreed to sell and he agreed to buy for £10,000 a one-eighth share of the freehold in the premises and other property and on the same day he paid to each of them the purchase price of £5,000. The respondent contended that McGreavey, being the fee simple owner of the premises, had impliedly contracted to convey his legal estate on trust for sale: that pending the creation of such trust for sale, the respondent became entitled on paying the two sums of £5,000 to a lien or charge on the premises; and that, if the premises became in the hands of McGreavey affected by a trust for sale for giving effect to the respondent's interest therein, then the applicant had never acquired and had not any right or title to sell or dispose of the legal estate in the premises.

Harold Christie, Q.C., and G. B. H. Dillon for the applicant.

S. Pascoe Hayward, Q.C., and J. W. Mills for the respondent.

HARMAN, J., stated the facts and continued: The document which the respondent, Randall, described either as an estate contract or a general equitable charge and which he mislaid was in fact, so he says, a receipt. What was the form of receipt he modestly declines to say. He avers moreover that he put it in a drawer immediately after he received it and has not been able to find it. He is not quite sure whether he ever saw it again, but he says that a search for it had produced no result. Consequently, the instrument said to constitute the document of charge is not forthcoming. It is said, and, fortunately, no doubt, it is so, that on a summons of this kind to vacate the register the question whether or not there ever was (and) a document is not one which I can determine. I think I must proceed with this application on the footing that the respondent did, as he says, pay to McGreavey and Rundle £5,000 each. On his examination in the bankruptcy proceedings, he produced two cheques, one of which went to McGreavey and one to Rundle, drawn on the respondent's clients' account, being moneys on which he was, apparently, entitled to draw and which were

he drew in his own favour and indorsed severally. What was in the receipt remains a mystery. As far as I can tell, it was not a contract. It may have been a memorandum of a contract and it may have contained the terms of a contract, but its operative effect, according to the respondent, was to go beyond that of a receipt. It is extraordinary that a solicitor of experience, as the respondent was, should pay the whole of his purchase money and have no scrap of paper to show for it, or, indeed, that he should pay the whole of the purchase money and have nothing but a receipt. The applicant, the trustee in bankruptcy, has claimed that in fact what the respondent did was to enter into partnership with McGreavey and Rundle to the tune of £10,000 for an eighth share. But the respondent denies that and says that, although he bought one-eighth of the assets, he certainly did not buy one-eighth of the liabilities. That, too, is not a matter which I can determine.

I have to decide whether this alleged receipt, or the contract evidenced by this receipt, is capable of registration under the Land Charges Act, 1925. Section 10 (1) provides:

“ The following classes of charges on, or obligations affecting, land may be registered as land charges in the register of land charges, namely . . . ”;

C “ So that it must be a charge on land. In the definition section, s. 20 (6), “ land ” does not include “ an undivided share in land ”. So, by definition, if this be only a charge on an undivided share in land, it cannot be registered under the Act. The respondent’s first thoughts were to register in Class C (iv) where the following is defined as an “ estate contract ”:

D “ Any contract by an estate owner . . . to convey or create a legal estate . . . (in this Act referred to as ‘ an estate contract ’).”

McGreavey was, undoubtedly, “ an estate owner ”, though Rundle was not. The question, therefore, is whether there was a contract by McGreavey to create a legal estate. In Class C (iii), which was the second category on which the respondent relied, a general equitable charge is thus described:

E “ Any other equitable charge [other than a charge under C (ii)] which is not secured by a deposit of documents relating to the legal estate affected and does not arise or affect an interest arising under a trust for sale or a settlement and is not included in any other class of land charge . . . ”

Therefore, in order to come under Class C (iii) the instrument has first to constitute an equitable charge, and, secondly, it has to be an equitable charge not affecting an interest arising under a trust for sale.

What was the position on Oct. 11, 1948 ? McGreavey, who had been the absolute owner of this land, had taken Rundle into partnership. He then became obliged to hold the property which constituted partnership property on trust for himself and Rundle in equal shares. He retained the legal estate, but he could have been obliged by Rundle to sell it and divide the proceeds equally between them. Rundle could not have obliged him to convey to him a half share in the land itself. That emerges, first, from the Law of Property Act, 1925, s. 1 (6), which provides:

“ A legal estate is not capable of subsisting or of being created in an undivided share in land . . . ”

H Section 34 (1) is to the same effect and provides:

“ An undivided share in land shall not be capable of being created except as provided by the Settled Land Act, 1925, or as hereinafter mentioned ”.

When I turn to s. 42 (6) of the Law of Property Act, 1925, I find this rather oracular statement :

“ Any contract to convey an undivided share in land . . . shall be deemed to be sufficiently complied with by the conveyance of a corresponding

share in the proceeds of sale of the land in like manner as if the contract had been to convey that corresponding share".

McGreavey's obligation to Rundle, therefore, could have been carried out by the conveyance of a share in the proceeds of sale. Accordingly, McCreavey, in my view, held the land on trust for sale although the trust for sale did not appear in the title, and, no doubt, he could have made a good title at that time without showing it if Rundle did not choose to object or to register his interest.

That being the position, what was it that the respondent received for his two sums of £5,000? From Rundle he could receive no more than Rundle could give him, viz., one-eighth of Rundle's interest in the partnership assets. That was clearly an interest in the proceeds of sale and nothing else. Indeed, even if Rundle had expressly contracted to give him an undivided share in land, a conveyance of a corresponding share in the proceeds of sale would, by virtue of s. 42 (6), have satisfied the contract. On the other hand, what did McCreavey convey or agree to give to Randall, if anything? He agreed to give him one-eighth share of his interest in the land and the chattels. His interest in the land, in my view, having regard to his obligations vis-à-vis Rundle, was clearly only an interest in the proceeds of sale. Therefore, I think that the respondent received by this payment, at the highest, a contract to convey or to assign to him a share in the proceeds of sale of the land. Looking, therefore, at (Class C (iv)), which relates to estate contracts, I do not think that this was a contract (if it were a contract at all) by McCreavey to convey or create a legal estate.

Leading counsel for the respondent argued that McCreavey was bound to create a legal estate, not in Randall, but in himself and his partner in order to implement the trust for sale, and he referred me to *Turley v. Mackay* (1) in support of the proposition that a legal estate to be conveyed or created in conformity with Class C (iv) need not be created in favour of the obligee. I accept that, but I do not see that McCreavey was under any necessity of creating a legal estate. It seems to me the trust for sale existed while the property was in his hands. It is true that, if somebody wanted him to execute the trust, it would be necessary for him to appoint a trust corporation to be trustee, or to appoint another person to give a good receipt to the purchaser, but that is merely a matter of machinery, and it does not seem to me that there was a contract to convey or create a legal estate as envisaged by Class C (iv). In my judgment, therefore, this was not a contract (assuming there was such a thing) which could be registered under Class C (iv).

Turning now to Class C (iii), counsel says, first, that the respondent, having paid his purchase money and not having a conveyance, is entitled to a general equitable charge on the land, and he cites for that *Rose v. Watson* (2). There LORD CRANWORTH, in concurring in LORD WESTBURY'S opinion, says (10 H.L. Cas. 683):

"There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him: in other words, that he acquires a lien exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent".

Now, says leading counsel for the respondent, payment of part of the purchase money for the whole gives a lien. So, also, does payment of the whole of the purchase money for a part. It is a neat way of turning the thing upside down, but, in my judgment, it does not help him because, in order to come within

Class C (iii), he must have a charge which does not affect an interest arising under a trust for sale. In my judgment, that is precisely what this charge does. The interest of both McGreavey and Rundle was an interest arising under a trust for sale, and it is precisely that which is excluded from Class C (iii) in s. 10 (1). The respondent, if he received anything, received a charge, I suppose a general equitable charge, on the proceeds of sale of this partnership property. Whether he became a partner or not does not seem to me to matter for that purpose. Therefore, I take the view that, assuming the respondent to have all that he says he has, and notwithstanding the fog in which the facts remain concealed, I cannot find that on the facts stated he could have any such interest in this land as entitled him to register a charge against it, and I, accordingly, propose to make an order vacating the registration in both classes.

Declaration accordingly.

Solicitors: *Zeffertt, Heard & Morley Lawson*, agents for *Heard & Coleman*, Hadleigh, Essex (for the applicant); *E. C. Randall* (for the respondent).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

Re A. B. (an infant).

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, J.J.), April 27, 28, 1954.]

Child—Care—Care by local authority—Child boarded out with foster parents—Mother's desire to take over care—Intention to board out child with putative father and his wife—Obligation of foster parents to return child—Children Act, 1948 (c. 43), s. 1 (1) (b), s. 1 (3), s. 13 (1) (a).

On Mar. 30, 1951, the applicants, a local authority, received an illegitimate child into their care under the Children Act, 1948, s. 1 (1), and on the same day, under s. 13 (1) (a) of the Act and with the consent of the mother, they boarded out the child with foster parents (the respondents) under an agreement in the form set out in the schedule to the Children and Young Persons (Boarding Out) Rules, 1946. In January, 1954, the mother informed the local authority that she desired to take over the care of the child by boarding it out with the putative father who wished to look after it. The local authority then required that the child should be delivered up to them by the respondents, their intention being to deliver it to the mother. The respondents having refused to hand over the child, on an application for a writ of habeas corpus to issue against them,

HELD: one of the provisions of the agreement in the schedule to the rules of 1946, entered into between the respondents and the local authority, was that the respondents would allow the child to be removed when required by the local authority; the local authority being the body to whom the care of the child had been entrusted by Parliament, the court was not entitled to review the discretion of the authority as to what was for the welfare of the child; and, consequently, the writ must issue.

Per curiam (DONOVAN, J., dissentiente): the desire of the mother to take the child and board it out with the putative father was a desire "to take over the care of the child" within s. 1 (3) of the Act.

FOR THE CHILDREN ACT, 1948, s. 1 and s. 13, see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 1105 and 1114.

FOR THE CHILDREN AND YOUNG PERSONS (BOARDING OUT) RULES, 1946, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 11, p. 222.

APPEAL from judge in chambers ordering writ of habeas corpus to issue.

On Aug. 15, 1950, a child, A.B., was born, illegitimate. After the birth of the child, both child and mother went to a home for unmarried mothers for some months. On Mar. 30, 1951, the local authority (the applicants) received the child

into their care under the Children Act, 1948, s. 1 (1). On the same day the local authority under s. 13 (1) (a) of the Act with the consent of the mother boarded out the child with foster parents (the respondents) under an agreement in the statutory form set out in the schedule to the Children and Young Persons (Boarding Out) Rules, 1946. After that date the child lived with and was cared for by the respondents under the agreement with the local authority. On or about Jan. 14, 1954, the mother notified the authority that she desired to take over the care of the child by boarding out the child with the putative father. The putative father, who was a bachelor at the time the child A.B. was born, had since married. He desired to have the child, and he and his wife were willing to look after it.

Accordingly, the local authority resolved that in pursuance of the Children Act, 1948, s. 1 (3), the child should be recovered from the respondents and delivered to the mother. On Jan. 28, 1954, and on subsequent occasions, a representative of the authority requested the respondents to hand over the child to them, but on each occasion the respondents refused to do so. The authority then applied for a writ of habeas corpus to issue against the respondents and on Feb. 22, 1954, the judge in chambers ordered that the child should be handed over to the putative father and his wife. The respondents appealed.

R. J. Parker for the local authority.

Simon, Q.C., and *Blennerhassett* for the respondents.

Laskey for the mother.

LORD GODDARD, C.J., stated the facts and continued: This case is a proceeding by a local authority for the return of a child to them, and, in considering whether they have a right to the child, it is necessary to consider the provisions of the Children Act, 1948, because, in my opinion, that Act entirely governs the situation. Under that Act, by s. 1, there is a duty on the local authority to assume the care of children in certain circumstances. The Act provides by s. 1:

"(1) Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of seventeen—(a) that he has neither parent nor guardian or has been and remains abandoned by his parents or guardian or is lost; or (b) that his parents or guardian are, for the time being or permanently, prevented by reason of mental or bodily disease or infirmity or other incapacity or any other circumstances from providing for his proper accommodation, maintenance and upbringing; and (c) in either case, that the intervention of the local authority under this section is necessary in the interests of the welfare of the child, it shall be the duty of the local authority to receive the child into their care under this section. (2) Where a local authority have received a child into their care under this section, it shall, subject to the provisions of this Part of this Act, be their duty to keep the child in their care so long as the welfare of the child appears to them to require it and the child has not attained the age of eighteen."

I pause to consider the effect of those two sub-sections. It will be observed, in the first place, that they put a positive duty on a local authority to receive the child into their care if they are satisfied of certain things. "Where it appears" means where it appears to them to their satisfaction. Therefore, if there is a child whose parent is unable to provide for the proper accommodation, maintenance and upbringing of the child—as in this case, because the mother was a young woman who had to earn her living as a domestic servant—it is necessary for the local authority to intervene because there is nobody to take care of the child. It is also their duty to keep the child so long as the welfare of the child appears to require it. Supposing this child had been a lost child or its parents had been dead and it had no friends or relatives, it is obvious that there

would have been a duty on the local authority not only to take the child but to keep it.

Before I go on to sub-s. (3) and refer to the duty placed on the local authority, we will see how Parliament has provided that the local authority shall carry out that duty. They are to carry out that duty under s. 13, to which the marginal note is:

“ Mode of provision of accommodation and maintenance ”.

DONOVAN, J., has reminded us during the course of the case that this Act was not a consolidating Act to consolidate previous Children Acts. It was a new Act, passed after the recommendations of the reports of the Care of Children Committees (Cmd. 6760 and 6922). One thing it was sought to avoid, if possible, was institutional treatment, and, secondly, proper provision was to be made for the inspection of children boarded out. Accordingly, Part II of this Act, in which s. 13 is to be found, is headed:

“ Treatment of children in care of local authorities.”

Prima facie, the way in which children are to be treated is to board them out with people selected by the local authority. The persons who take children take them as foster parents and not as adoptive parents, and it is unfortunate that in many of these cases the foster parents get very fond of the children, while under the Children Act, 1948, they are in quite a different position from foster parents who take a child under an agreement between them and the parent of the child. They are not making a bargain with the parent of the child or taking the child under an agreement of any sort with the parent: they are taking the child by agreement with the local authority. The local authority are performing their statutory duty in placing the child with the foster parents, and the Children and Young Persons (Boarding Out) Rules, 1946 (S.R. & O., 1946, No. 2083), made under the Children and Young Persons Act, 1933, s. 84 (2), which apply by reason of the provisions of s. 60 (1) of, and para. 4 (1) of sched. II to, the Children Act, 1948, deal with the terms and conditions under which the child is to be placed with the foster parents. An agreement has to be signed by the foster parents, and two of the provisions in the form of agreement prescribed by the schedule to the rules which has to be signed are these:

“(e) I will at all times permit any person authorised by the Home Office or by the council to see the child, and his home and clothing, and I will attend to the advice of any such person; (f) I will allow him to be removed from my home when required by any person so authorised”.

In the present case the local authority have required the child to be returned to them, and the foster parents have refused to return it. The local authority, therefore, have applied for habeas corpus to obtain possession of the child by the notional production of its body before the court, so that the court might hand it over to them. No doubt, the local authority intend to hand the child to the putative father and his wife; they have said that they take the view that they are bound to do this on the request of the mother under s. 1 (3) of the Act. But before I consider that sub-section, I want to ask: What answer could there be to the demand of the local authority that the foster parents should return the child to them in accordance with the undertaking which the foster parents gave in a statutory form as a condition of their having the child? Counsel for the respondents says that this court is exercising the power formerly exercised by the Lord Chancellor in the Chancery Courts as *parens patriæ*—the delegated power of the Crown, i.e., the guardianship of all infant children, and no matter what the Act of Parliament says, unless it clearly limits in some way the prerogative right of the Crown as regards infants, this court has the same power as it would have if it was a case simply between the putative father and his wife and the foster parents.

I cannot take that view. The Act of 1948 introduced a means of protection of children or care of children which, up to the time of its passing, did not exist. Before the passing of the Act, there was power under the Children and Young Persons Act, 1933, s. 62, to bring children before the court as in need of care and protection, either on the grounds that they were exposed to moral danger or for any other reason. Under that Act the juvenile court could make an order, sending the child to the care of a local authority, and once the child was in the care of the local authority under the Act, neither this court nor any other court, so far as I know, could, exercising its power as guardian over infants, proceed to consider whether the child was being looked after in as good a way by the local authority as it would be by someone else. The Act of 1948 extends the matter, and it not only enables but directs the local authority to act without the order of the court. In the present case the local authority have taken the steps which the statute directs. The statute has directed them either in terms in the Act or by the combined effect of the Act and the rules to board the child out with foster parents on the foster parents giving an undertaking to return the child if it is required. I cannot see, in those circumstances, how we can say, contrary to the wishes of the local authority, that the child should remain with the foster parents. If we did, we should then be usurping the duties which are laid on the local authority by the Act of Parliament, and substituting our own view as to what was right for the child as against the view of the local authority, to which Parliament has entrusted that duty. I think it would be quite contrary to the whole tenor of Part I and Part II of the Act of 1948 if this court were to assume the duty of reviewing the discretion of the local authority and substituting their own opinion of what was for the benefit of the child.

The local authority raise another matter as to why they acted in the way they did, and I gather from the affidavits that, if it had not been for the view they took of their duty under s. 1 (3) of the Act, they would have been quite prepared to leave this child with the foster parents because no one suggests that the child has not been well looked after by them or that it would not be. Section 1 (3) is in these terms:

" Nothing in this section shall authorise a local authority to keep a child in their care under this section if any parent or guardian desires to take over the care of the child, and the local authority shall, in all cases where it appears to them consistent with the welfare of the child so to do, endeavour to secure that the care of the child is taken over either— (a) by a parent or guardian of his, or (b) by a relative or friend of his, being, where possible, a person of the same religious persuasion as the child or who gives an undertaking that the child will be brought up in that religious persuasion "

The local authority say: The mother has told us that she wishes this child to be given to the father, and we regard that as her desiring to take over the care of the child by putting it in the care of somebody else. I think that, if the mother of a child, says: " I am prepared to care for my child and the method by which I mean to do so is by putting it into the charge of someone who will look after it for me ", that would be a taking over care of the child within s. 1 (3). The mother could take over the care of the child by putting it in the care of a nurse. Many mothers do entrust their children to the care of nurses. Another way of taking care of a child would be by putting it in an appropriate nursing school, if of tender years, or in a kindergarten school which was prepared to take the child on boarding terms. The aim of s. 1 (3) is to prevent the child being an abandoned or deserted child, and it deals with a child who has no one to look after it because its parents are dead or are unable to care for it. If s. 1 is read carefully, it is quite intelligible, and comes to this. First of all, the deserted child. I use the term " deserted " as generic, is taken into the care of the local authority. But the local authority may find that a parent comes forward and says: " I will look after the child ", or " I can now look after the child because my

temporary disablement has gone". Then there is somebody to look after the child and the local authority must hand the child over to the parent. If that does not happen, the local authority are to do their best to persuade the parent to take over the care of the child, and, if they fail to do that, they must do their best to persuade a relative or friend to take over the care of the child. In other words, s. 1 (1) directs the local authority as follows: "Take the child into your care. Directly you have the child in your care, deal with it by boarding it out as the statute directs. You should then endeavour to get the parent to assume care of the child especially if the parent says that he or she can look after it and wants it, or find a friend or relative who will care for the child." If the local authority think that the parent cannot be trusted to look after the child, then s. 2 comes into play. The local authority can pass resolutions and go through the machinery provided by that section and thereby get complete control over the child until it is of a certain age. This puts the authority in loco parentis, in practically the same way as if they had adopted the child. It gives the authority all parental rights and deprives the parent of parental rights. This happens where the authority consider that in all the circumstances there would be a grave risk in letting the child go back to the mother or the father, as the case may be. But where the local authority have simply acted under s. 1 (1) in taking the child and under s. 1 (2) in keeping it in their possession, they are not in any way depriving the parent of any rights nor are they able to.

If a parent places his child in the care and custody of other persons by his or her own volition, a question may arise between the parent and the foster parents whether the child should remain with the foster parents or the parent, but that does not arise here. We have only to examine the provisions of the Act and see that they are carried out. One thing that ought not to be altogether ignored is that while a child is in the care of the local authority, *prima facie*, the authority have to support and maintain it, and one does not want in these days to assist parents to get rid of their parental and financial responsibilities in connection with their children. One of the things for which the section provides is to make a parent look after and support a child; that is the object of s. 1 (3). If the parent wants the child and can look after it, let the parent have it. The local authority should first try to persuade the parent to have the child (s. 1 (3) (a)), and if they cannot do so they must try to get a relative or friend. Undoubtedly, the putative father in this case is a relative within that section.

Therefore, I put my judgment in this way. First, the child, having come into the possession of the foster parents simply by virtue of the machinery of the Children Act, 1948, and the rules which apply to this matter, one of the provisions in the Act is that the child is to be returned to the local authority if they demand it. There is no answer to the claim by the local authority when they demand its return. Parliament will not presume that the local authority, and this court will not presume that the local authority, are not proper persons to have the child back. It is irrelevant whether or not the mother wants the child handed to Mr. A. or Mr. B. or whether she wishes to keep it herself. What the court has to see is that the child goes back to the local authority, who have demanded it and from whom the foster parents cannot withhold it. So far as s. 1 (3) is concerned, in my opinion, the local authority have taken a correct view. There being no resolution of the authority under s. 2, and no order of the court under the Act committing the child to the care of the authority, and the authority being satisfied that the mother desires to take over the care of the child, we are bound to make it possible for the mother to have the child. How the mother will take care of the child is a matter for her. If she does not take care of it, proceedings can be taken under the Act of 1948 or other proceedings might be taken. In any case, the local authority can also justify what they are doing on the ground that a relative or a friend, that is to say, the putative father, is willing to take the

child. I desire to leave the matter in the widest possible terms, and I think that the only alteration that should be made in the order of GERRARD, J., is that the provision that the child be delivered by the authority to the putative father and his wife should be omitted from the order. In my opinion, we should make an order the effect of which will be to give the child to the applicants, and I would, therefore, dismiss the appeal.

HILBERY, J.: I agree. Counsel for the respondents contended that in the circumstances of this case the local authority could not act under s. 1 (3) inasmuch as on the admitted facts the mother was not asking to take over the care of the child since she was asking, not to take it over into her personal care, but to take it over and deliver it to the care and keeping of its putative father. It is necessary, therefore, I think, to see whether the mother's request for the child, accompanied by a statement of her intention, was a request for the child within the terms of s. 1 (3). In my view, having regard to the whole tenor of the Children Act, 1948, it is impossible to read into the words "take over the care" the word "personal" so that it has to be read "take over into her or his personal care".

If one looks at s. 1 (1) there is little light thrown on this matter because, first of all, the heading above that section is:

"Duty of local authorities to assume care of children".

What is the lack of care on the part of parents which will make it the duty of the local authority to assume the care of children? We find that it is expressed in this way (s. 1 (1)):

"Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of seventeen—(a) that he has neither parent nor guardian or has been and remains abandoned by his parents or guardian or is lost; or (b) that his parents or guardian are, for the time being or permanently, prevented by reason of mental or bodily disease or infirmity or other incapacity or any other circumstances from providing for his proper accommodation, maintenance and upbringing . . ."

If, therefore, a parent was in a situation to provide for the proper accommodation, maintenance and upbringing, there would be no power in the local authority to assume the care of that child, nor would it become its duty to do so because the parent would be providing proper care. The measure of the care which a parent is expected to provide is proper accommodation, maintenance and upbringing, and when the mother here makes her demand to take over the care of the child, she is able to establish to the satisfaction of the authority, who have the statutory care of the child, that she can take over the care of that child in that sense. She can none the less provide for the proper maintenance, accommodation and upbringing of the child, though the maintenance may be provided by the putative father and his wife by agreement with her, and the accommodation may be in their house and not in one occupied by the mother. Under the Act, in assuming the care of a child, the local authority is not only empowered, but is, it may be said, required to board it out with suitable foster parents, and under the rules of 1946 when a mother proposes merely to board out her child, it does not cease to be in her care. There is evidence here, moreover, that the local authority has purported to act under the second part of s. 1 (3) in addition to the first part, because the words of the second affidavit in this case sworn by a representative of the local authority follow the words of the second part of s. 1 (3), inasmuch as it says, that she is satisfied

"that it is consistent with A.B.'s welfare that she should be handed over to the mother, and thence to the putative father and his wife, although I fully realise that the move will almost certainly upset her for a short while."

I do not add one word to what my Lord has said about the situation between the local authority and the respondents. This child being in the care of the local authority under the Children Act, 1948, on the terms of that Act, and pursuant to the statutory terms imposed on the respondents, the respondents could have no possible answer to the application for the writ of habeas corpus ordering them to bring up the child and hand it over to the local authority.

A **DONOVAN, J.:** I agree. I add a few words only because of the importance of the matter and because on one point I hold a view which is entirely my own. If this were a question whether the welfare of the child would be better served by leaving it where it is, or sending it to the putative father and his wife, like my brethren, I would answer it by saying that on the facts as disclosed by the affidavits, it would be far better to leave the child alone. But I agree that that question is not for this court to decide. I do not think the comparative merits of the two homes emerges as a question for decision at all. The welfare of the child simpliciter certainly does, but where a local authority think it consistent with the child's welfare to hand its care over to a relative, it can do so. Thus far, at any rate, Parliament has entrusted the welfare of the child to the local authority, and to that extent the prerogative right to secure the welfare of the child is, in my view, by necessary implication, restricted. Accordingly, as there is no question of any default on the part of the local authority, the court cannot intervene simply because it differs from the local authority as to what is best for the child.

D The difficulty which this case has caused me arises from the circumstance that the local authority began these proceedings because they thought that they were bound to remove the child from the respondents as the mother herself wanted to take over the care of the child, and they seem to have prosecuted the case on that footing before GERRARD, J. Were that really so, the local authority's case would be unanswerable, for s. 1 (3) of the Act would, on that basis, deprive the local authority, and, consequently, the respondents, of all rights to the child. But the mother wants the child handed over, not to her, but E to the putative father and his wife, so that it may be brought up as one of their family. I am unable to regard such an arrangement as a "taking care" of the child by the mother. It is argued that arranging for care to be taken is the same thing as taking care, and so in many cases, it may be, but, if what the mother proposes—i.e., to leave to someone else every decision regarding the child's welfare—is "taking care" of the child, she is taking care of it already, for she F arranged for the child to be taken care of by the council. On that view, the first part of s. 1 (3) would never come into play at all. But whatever the position may be, in this respect, s. 1 (3) goes on to impose a separate duty on the local authority to endeavour to secure, where they think it consistent with the welfare of the child, that the care of the child is taken over by, among others, a relative G or friend, and the putative father is, by definition, a relative. That, in fact, is what the council is here trying to do, and once questions of what is best for the welfare of the child in such circumstances are removed from the court's jurisdiction, clearly it cannot intervene to prevent the local authority doing what Parliament has told it to do. I agree that under this section the local authority could leave the child with the respondents as a "friend", within the meaning of H s. 1 (3). If, on the contrary, the child goes to the putative father and his wife, the local authority has ample powers at its command under this and the Children and Young Persons Act, 1933, to take action to secure the future welfare of the child should it become again imperilled. It remains only to say that s. 1 (3) requires where possible a continuance of the same religious persuasion, but this child of three obviously cannot yet have such a persuasion. For these reasons, while I could wish that the child had been left alone and I have great sympathy

with the respondents. I agree that the appeal must fail, subject to the order being modified as proposed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. R. Scurfield*, clerk of the county council, Worcester (for the local authority); *Stafford Clark & Co.*, agents for *W. Stanley Mobberley & Son*, Lye, Wores. (for the respondents); *Edwin Gae & Calder Woods*, agents for *Tree, Hemming & Johnston*, Worcester (for the mother).

[*Reported by* MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

Re JOYNSON'S WILL TRUSTS. GADDUM AND ANOTHER v. INLAND REVENUE COMMISSIONERS AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), April 29, 1954.]

Estate Duty—Accountability—Trustee—Determination of life interest—Life tenant appointing fund to be held on trusts of second settlement—Release of life interest—Death of life tenant within five years—“Settlement”—Liability of trustees of head settlement—Finance Act, 1950 (c. 15), s. 44 (1). (4).

Estate Duty—Determination of life interest—Property to be included in property passing—£25,000 appointed to trustees of second settlement—Life interest released in £25,000—Investments and cash transferred to appointees—Finance Act, 1940 (c. 29), s. 43 (1), as amended by Finance Act, 1950 (c. 15), s. 43 and sched. VII.

A testator by his will settled a fund of £100,000 on trust for his daughter G. during her life and after her death to hold the fund and the income thereof on trust for all or any of her children or remoter issue with the usual trust in favour of her children in default of appointment. On Dec. 1, 1947, by a deed of appointment of that date, G. released her life interest in £25,000 of the fund and directed the transfer to the trustees of two settlements ("the A settlement" and "the B settlement") of even date therewith of £20,000 and £5,000 respectively to be held on the trusts of the settlements. The whole of the £20,000 was satisfied by the transfer of investments by the trustees of the testator's will to the trustees of the A settlement. The £5,000 was satisfied partially by the transfer of investments and partially in cash. On Jan. 17, 1952, G. died and a claim for estate duty arose in respect of the property in which G.'s life interest had subsisted by virtue of the Finance Act, 1940, s. 43 (1). By her will, G. directed payment out of the residue of her free estate of estate duty payable in respect of the property appointed by her deed of Dec. 1, 1947. The residue was insufficient to meet the duty and other payments which G. directed to be made, although from time to time as annuities and a reversionary interest fell in, money would become available. The trustees of the A settlement and the B settlement had no readily available funds. The Inland Revenue Commissioners called on the trustees of the testator's will to account for the duty exigible in respect of the property appointed by the deed of 1947.

HELD: (i) the word "settlement" in the Finance Act, 1950, s. 44 (1) (a), as applied to this case, related to the settlement of the fund of £100,000 by the testator's will, and, therefore, the trustees of the testator's will were accountable under s. 44 (1) for the duty in respect of the appointed property, and were entitled under s. 44 (4) to a lien on the residue of the said fund remaining in their hands in order to meet their liability.

(ii) "the property in which the interest [of G.] subsisted" for the purposes of the Finance Act, 1940, s. 43 (1) (a), was £25,000 in cash, and, therefore, the duty was exigible in respect of that sum, and not in respect of

the assets actually taken by the trustees of the two settlements or in respect of the property at the time of G.'s death representing those assets.

AS TO DETERMINATION OF LIFE INTEREST, see HALSBURY, Hailsham Edn., Vol. 13, p. 236, para. 226; and FOR CASES, see DIGEST, Vol. 21, pp. 7 and 10, Nos. 26 and 42.

Case referred to:

(1) *Re Iveagh Trusts*, [1954] 1 All E.R. 609.

A ADJOURNED SUMMONS to determine, inter alia, (i) whether, on the true construction of the Finance Act, 1894, the Finance Act, 1950, and the other enactments relating to estate duty, and in the events which had happened, the plaintiffs and the third defendant, as trustees of the will of the testator, Richard Hampson Joynson, were or were not accountable for estate duty payable on the death of the life tenant (who died on Jan. 17, 1952) in respect of the sum (or the assets representing the sum) of £25,000 (part of a settled legacy of £100,000 given by the will of the testator on trust for the life tenant during her life with remainders over) wherein the life interest of the life tenant was determined by a deed of appointment dated Dec. 1, 1947; and (ii) whether the relevant property on whose principal value estate duty was payable (as being property deemed to pass on the death of the life tenant) was: (a) the sum of £25,000; or (b) the assets representing at the death of the life tenant the sum of £25,000 in which her life interest was determined as aforesaid, then in the hands of the trustees of two settlements both dated Dec. 1, 1947; or (c) some other and what property.

D The testator, Richard Hampson Joynson who died on June 12, 1908, by his will dated May 7, 1908, appointed executors and trustees and gave his residuary estate to his trustees on trusts for conversion and administration and directed them to set apart on certain declared trusts the sum of £100,000 (hereinafter called "the settled fund") and to hold the ultimate residue of the proceeds of conversion on trust for his daughter, Grace Lynn Joynson-Hicks (afterwards Viscountess Brentford and hereinafter called "Lady Brentford") absolutely. By cl. 10 of his will, the testator directed his trustees to invest the settled fund as therein mentioned and to pay the income thereof to Lady Brentford for her life and after her death to hold the settled fund and the income thereof on trust for all or any of her children or remoter issue as she should by deed, will or codicil appoint and in default of appointment in trust for all her children who being sons should attain twenty-one or being daughters should attain that age or marry, in equal shares, with the usual provision for hotchpot and with a power of advancement.

F Lady Brentford married the late Lord Brentford, who died on June 8, 1932, and there were three children of the marriage, the Right Honourable Richard Cecil, second Viscount Brentford (hereinafter called "the present Lord Brentford"), the second defendant, Helen Grace Joynson-Hicks (hereinafter called "Miss Joynson-Hicks") and the third defendant, Lancelot William Joynson-Hicks (hereinafter called "Mr. Joynson-Hicks") all born before the death of the testator.

G On Dec. 1, 1947, a transaction was effected by means of a deed of appointment and two settlements (hereinafter called "the A settlement" and "the B settlement" respectively). Both settlements were executed contemporaneously with, or immediately after, the deed of appointment. The deed of appointment was expressed to be made with the consent and confirmed by the children of Lady Brentford as the persons interested in the settled fund in default of appointment, the appointment being in a manner wider than the terms of power permitted. It was therein recited that Lady Brentford was "desirous of making an appointment of £20,000 out of the trust fund" and "a further appointment of £5,000" for the benefit of the persons therein mentioned. In the operative part, Lady Brentford appointed that the trustees of the testator's will should subject to her life interest therein "hold the sum of £20,000

(part of the said sum of £25,000) upon trust to transfer the same to "the trustees of the settlements, the same persons being trustees of each settlement, to be held by them on the trusts of the A settlement, and that "the remaining sum of £5,000 (part of the said sum of £25,000) shall be held by the will trustees "on the trusts of the B settlement. Further, by cl. 3 Lady Brentford released "her life interest in the said sums of £20,000 and £5,000 ". By the A settlement £20,000 was settled on a discretionary trust to pay and apply either the income or part of such income during the life of the present Lord Brentford for the maintenance and personal support of all or any one or more of a class consisting of the present Lord Brentford and any wife or issue of his, with a provision for the accumulation of any unapplied income during twenty-one years, and after the death of the present Lord Brentford on certain trusts for successive holders of the title. By the B settlement £5,000 was settled on trust to accumulate the income during the life of the present Lord Brentford or for twenty-one years (whichever was the shorter) and thereafter to pay the income of the trust fund and accumulations to the present Lord Brentford for life on protective trusts, with power to pay or apply capital to or for the benefit of the present Lord Brentford at any time during his life, subject thereto on trust for such persons as the present Lord Brentford should by will or codicil appoint, and in default to the persons entitled on Lord Brentford's intestacy.

The respective sums of £20,000 and £5,000 were raised and paid not wholly in cash, but in most part by the transfer of investments of agreed value from the trustees of the will to those of the settlements.

By her will dated Mar. 2, 1948, Lady Brentford bequeathed a number of pecuniary and specific legacies and annuities, referred to her power of appointment over the settled fund, and to certain sums which had previously been raised under the power of advancement contained in the testator's will, and thereby directed that the trustees of the settled fund should after the death hold the balance then remaining of the settled fund in trust to pay the income to Miss Joynson-Hicks for life and on her death to her children or issue and in default of issue for Mr. Joynson-Hicks absolutely. As to the residue of her free estate, Lady Brentford provided, inter alia, for the payment thereof of any estate duty leviable in respect of the sums of £20,000 and £5,000 appointed by deed of appointment of Dec. 1, 1947, and subject thereto she directed her trustees to pay all the death duties leviable at her death in respect of the balance then remaining of the settled fund.

Lady Brentford died on Jan. 17, 1952, and the free estate then available was insufficient to provide for the duties payable. At the date of Lady Brentford's death the trust fund subject to the A settlement consisted of a farm in South Africa, which was let to the present Lord Brentford, and approximately £4,171 in investments in Great Britain. The whole of the trust fund subject to the B settlement had been paid to or applied for the benefit of the present Lord Brentford with the exception of £3,000 which was lent free of interest to the present Lord Brentford. A substantial trust fund comprised in Lady Brentford's marriage settlement, also passed on her death and the rate of estate duty payable was fifty per cent. In due course, further moneys would become available as the annuitants under her will died and when her reversionary interest under the testator's will fell in and was sold. The trustees of the A settlement and the B settlement had no readily available funds except to a comparatively small amount, so that if estate duty on the £25,000 had to be raised out of the balance of the settled fund that balance would be for the time being almost entirely dissipated and there would be considerable delay before it could be recouped from other sources. The Inland Revenue Commissioners had called on the trustees of the will of the testator to account for estate duty in respect of the investments which, at the death of the late Lady Brentford, represented the settled fund of which she was life tenant, and also in respect of the sum of £25,000 in

which her life interest determined within five years of her death. Miss Joynton-Hicks, as beneficiary under the will of Lady Brentford, contended that the trustees of the will of the testator were not accountable for estate duty in respect of the £25,000, and that in any case they were not entitled to have recourse to the balance of the settled fund appointed by Lady Brentford for the purpose of paying such duty. The further question arose as to the identity of the relevant property chargeable with estate duty, i.e., whether it was the sum of £25,000 or the assets held by the trustees of the A settlement and the B settlement respectively at the death of Lady Brentford.

E. I. Goulding for the plaintiffs, two of the trustees of the will of the testator, *Cross, Q.C.*, and *J. H. Stamp* for the Inland Revenue Commissioners.

Wilberforce, Q.C., for the second defendant (Miss Joynton-Hicks), beneficially interested in part of the settled fund.

J. A. Gibson for the third defendant (Mr. Joynton-Hicks), a trustee of the will of the testator, and a trustee of both settlements, beneficially interested in part of the settled fund.

Newsom for the fourth defendant, a trustee of both settlements.

DANCKWERTS, J. (having stated the facts): A claim is now made by the Inland Revenue Commissioners for estate duty at the rate of fifty per cent. on the two funds dealt with in 1947, against the present trustees of Mr. Joynton's will who are the two plaintiffs and the third defendant, Mr. Lancelot William Joynton-Hicks. It is claimed that they are entitled to pay the amount of the duty out of the balance of the settled legacy of £100,000, which would otherwise benefit Miss Joynton-Hicks, and that the trustees have a lien for that purpose.

So far as the funds dealt with in 1947 are concerned, they have partly been invested in a farm in South Africa, and in part are represented by a loan to Lord Brentford who lives on that farm. Therefore, there are not funds readily available in respect of the A settlement and the B settlement for the payment of the duty. It is contended that, if necessary, the Revenue can rely on the accountability of the trustees of Mr. Joynton's will under the Finance Act, 1894, s. 8 (4). Principally they base their claim, however, on the terms of the Finance Act, 1950, s. 44. That section by sub-s. (1) provides:

"Where an interest limited to cease on a death (within the meaning of s. 43 of the Finance Act, 1940) after becoming an interest in possession is disposed of or determines wholly or partly, then, whatever the nature of the property in which the interest subsisted, the following persons shall be accountable for any estate duty payable on the death by virtue of that section (in addition to any persons accountable therefor apart from this section), that is to say—(a) if the settlement under which the interest subsisted is in existence at the death, the trustees for the time being of that settlement . . ."

It is contended by the Inland Revenue Commissioners that the settlement is in existence, being a settlement of the legacy of £100,000 by the will of the testator, and that "the trustees for the time being of that settlement" are the two plaintiffs and Mr. Joynton-Hicks, and, accordingly, it falls within the terms of para. (a). In sub-s. (2) there is a provision which deals with the case of an advance to infants or to any person not absolutely entitled, and it is provided that if not more than one half of the settled fund has been advanced the trustees of the settlement relevant to the matter are protected because any accountability is limited to the rest of the settled fund remaining in their hands. Sub-section (3) provides for the ascertainment by the trustees of a settlement of the maximum liability which they may be under by virtue of this section. It provides:

"Where—(a) the trustees of a settlement may become accountable for estate duty payable by virtue of the said s. 43 in respect of any property;

and do it is intended that the property or any part thereof shall cease to be comprised in the settlement; then if the trustees obtain from the commissioners a certificate of the amount which in the opinion of the commissioners may properly be treated as the prospective amount of the duty, and give the commissioners all the information and evidence required by the commissioners in connection with the application for the certificate, no person shall be accountable as trustee of the settlement for the duty to which the certificate relates to an amount in excess of the amount certified."

Under that sub-section, trustees who fear that on the death of the life tenant, in a case of this kind, a claim for duty may be made, may obtain a certificate from the commissioners fixing the maximum amount which the trustees will be afterwards asked to account for when the tenant for life dies.

It was claimed by counsel for the Crown, that, as regards any fund which may be retained by the trustees as a result of that certificate, a lien would be conferred on the trustees by virtue of the Finance Act, 1894, s. 9 (1). It appears to me that that was not an accurate submission because the essence of the matter is that until the life tenant dies—and the life tenant may live for more than five years from the date of the transaction which causes the possible trouble—there will be no liability or any claim which can be made for duty by the Inland Revenue Commissioners, and it may turn out in the end that no claim will arise.

I turn to s. 44 (4), which is the sub-section on which the Crown relies, and which is in these terms:

"It is hereby declared that a person who may become accountable as trustee of a settlement for estate duty payable by virtue of the said s. 43 on property which is or has been comprised in the settlement has a lien for the prospective amount of the duty and the costs in respect thereof on any property in his hands which is so comprised."

It is claimed that, by reason of that sub-section, the balance of the property which was settled by the will of the testator and which has been retained by the trustees—because it was not a subject of the provisions of the deed of appointment of 1947 and the A settlement or the B settlement—is liable to be held by the trustees of the testator's will by virtue of the lien conferred by the sub-section. It is claimed that the trustees are accountable under the provisions of sub-s. (1), and can provide for their liability by exercising the lien conferred by sub-s. (4).

It is obvious that in the circumstances of this case—and it may be in the circumstances of many other cases—very great hardship may be imposed on the beneficiaries who are interested in the balance of the fund which has not been the subject of an arrangement attracting duty under the Finance Act, 1940, s. 43. Counsel for the Crown says that there is a liability to recoupment thrown on the persons who were interested under the arrangement of 1947, and it may be in the present case that that liability to recoupment, if required, can be given effect to, but one can conceive many cases in which the property dealt with on the surrender of the life interest has been disposed of once and for all to persons who can never be made effectively liable to recoup the liability for estate duty in respect of the property which they have had. That makes it very hard on beneficiaries who, it may be, were no party to the arrangement, and who are interested in the balance which is left. However, the fact that the sub-section causes hardship to innocent beneficiaries by conferring rights, numerous or otherwise, on the Inland Revenue is not a relevant consideration. I have to consider what is the effect of the words to be found in the Act.

It has been argued by counsel for Miss Johnson-Hicks as the person interested in the balance of the £100,000 legacy, that "settlement" in this sub-section means the settlement that dealt with the proportion of the fund coming originally from the testator which was the subject of the arrangement of 1947, but I am afraid that I must come to the conclusion that for the purposes of sub-s. (4)

" the settlement " means the settlement of the fund of £100,000 which was made by the will of the testator, and consequently any part of the £100,000 fund which remains in the hands of the trustees of the will is, as it seems to me, property which is comprised in that settlement at the present time. It seems to me unavoidable that in the present case sub-s. (4) confers on the trustees of the testator's will a lien on the settled part of the £100,000 which is left in their hands to meet their liability for duty under the Finance Act, 1940, s. 43, which is imposed by s. 44 (1) of the Act of 1950. That being so, I must come to the conclusion that the claim of the Inland Revenue is justified.

[His LORDSHIP heard argument on the second question specified above.]

DANCKWERTS, J.: The question which I now have to decide is what is the property in respect of which duty is payable by reason of the death of Lady Brentford, for which the trustees of the testator's will are accountable. There are three possible views. One is that it is the sum of £25,000. The second is that it is the investments and money which were actually handed over as a result of the transaction of 1947 by the trustees of the testator's will to the trustees of the A settlement and the B settlement. In the case of the A settlement, which was the settlement of £20,000, the whole sum was satisfied by the handing over by the trustees of the testator's will of investments, some of which had ceased to exist at the date of Lady Brentford's death by reason of certain vicissitudes. In the case of the sum of £5,000 settled by the B settlement, what was handed over was an amount of £3,000 $2\frac{1}{2}$ per cent. consolidated stock and £2,480 cash. Presumably, all those investments which are mentioned and the £2,480 cash were part of the property actually held by the trustees of the testator's will on the trusts of the legacy of £100,000 settled by his will in favour of Lady Brentford and her issue. The third possibility is that by reading s. 43 of the Act of 1940 with the definition of " property " in s. 22 (1) (f) of the Act of 1894 the property to be taxed is the investments representing the property handed over on Lady Brentford's death. The second would suit the interests of the beneficiaries in this case most favourably, because, as I have pointed out, a certain number of investments have ceased to exist, and, therefore, it may be that there will be no fund at the death of Lady Brentford which would be taxable in respect of such investments. The third view has not been urged before me today (though the beneficiaries and the trustees concerned in this case wish to keep the point open in case the matter goes further), because it is concluded adversely to them by the judgment of UPJOHN, J., in *Re Iveagh Trusts* (1). The contest, therefore, seems to be plainly between the first two contentions.

I must now consider the provisions of the relevant section on which, after all, any conclusion must be based. Section 43 of the Act of 1940, slightly amended by the Act of 1950, is conveniently set out in the Finance Act, 1950, sched. VII, Part II, and to that I will refer. Sub-section (1) provides:

" Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner . . . whether wholly or partly, and whether for value or not, after becoming an interest in possession, and the disposition or determination (or any of them if there are more than one) is not excepted by sub-s. (2) of this section, then—
(a) if, had there been no disposition or determination as aforesaid of that interest and no disposition of any interest expectant upon or subject to that interest, the property in which the interest subsisted would have passed on the death under s. 1 of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death . . . "

The property which is to be included in the property passing under this notional

passing, therefore, is the property in which the interest subsisted, i.e., in the present case it is the property in which Lady Brentford's interest subsisted.

An argument was put before me which seemed to me at first to be very convincing, i.e., that the property in which Lady Brentford had an interest and in which her interest ceased at the date of the documents of 1947 was the aggregate of the investments and cash which were, in fact, handed over to the trustees. It is that property, therefore, which is referred to in s. 43 (1) (a) of the Act of 1940. When, however, one looks into what actually happened, it seems to me that that argument cannot succeed. It is quite true that Lady Brentford had an interest for her life in the property consisting of the investments and cash included in the settlement of the £100,000 legacy, but one must look at the documents of 1947 and see what, in fact, was appointed and in what, in fact, Lady Brentford released her interest. When one does that, it seems to me that the answer is plain and conclusive. She did not appoint any particular investments forming part of the settled legacy, as was the case in *Re Iccagh Trusts* (1), but she appointed the two sums of £20,000 and £5,000 to be raised. Therefore, she charged those sums of £20,000 and £5,000, amounting together to £25,000, on the whole of the investments which remained subject to the trusts of the £100,000 legacy. It was those sums of £20,000 and £5,000 which were settled respectively by the A settlement and the B settlement. It was, in fact, though made on the same day, an arrangement between the trustees of the testator's will and the trustees of the A settlement and the trustees of the B settlement which enabled the liabilities to raise £20,000 and £5,000 respectively to be satisfied by the handing over of the investments and a certain amount of cash. As it seems to me, that was not part of the transaction between Lady Brentford and her children and the trustees of the respective settlements. It was merely a method of carrying out what in fact had been done, i.e., an appointment of the two sums and a release of Lady Brentford's interest as life tenant in those two sums. When one looks at cl. 3 of the deed of appointment, dated Dec. 1, 1947, it seems to me that the matter is clear beyond argument. That clause is:

"The appointor hereby releases her life interest in the said sums of £20,000 and £5,000."

Therefore, in the circumstances of this case one can only answer the question: What was the property in which the interest subsisted and ceased to subsist by virtue of what was done by Lady Brentford?, by saying that it was the two sums of £20,000 and £5,000.

Order accordingly.

Solicitors: *Jagunson-Hicks & Co.* (for the plaintiffs and the third and fourth defendants); *Solicitor of Inland Revenue*; *Walters & Hart* (for the second defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

O'CONNOR v. HUME.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.JJ.), April 28, 29, 1954.]

Rent Restriction—Premises not within the Acts—Rent less than two-thirds of rateable value—Tenancy for one year at such weekly rent “in consideration of the payment by the tenant” of a stated sum, “and thereafter (should the tenant be desirous of continuing his tenancy) on a monthly basis at the said rent”—Tenant remaining in occupation after expiry of year—Notice to quit served after expiry of initial year—Admission of extrinsic evidence to contradict written tenancy agreement—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (7).

By an agreement, dated Oct. 6, 1952: “In consideration of the payment by the tenant to the landlord of the sum of £47 the landlord lets and the tenant takes . . . 3 Cobden's Cottages, for a period of one year from Oct. 1, 1952, at a rental of 2s. per week . . . and thereafter (should the tenant be desirous of continuing his tenancy) on a monthly tenancy at the said rent of 2s. per week”. The rent of 2s. per week was less than two-thirds of the rateable value of the premises. After Oct. 1, 1953, the tenant remained in occupation and on Dec. 22, 1953, the landlord served a notice to quit which was to take effect on Feb. 1, 1954. In an action by the landlord for possession of the premises, the tenant claimed the protection of the Rent Restrictions Acts, and sought to adduce extrinsic evidence to show (a) that the £47 payable under the agreement should be regarded as part of the rent, which, therefore, was more than two-thirds of the rateable value of the premises, and (b) that the tenancy was intended to be for one year only and that after the year he remained in occupation as a statutory tenant.

HELD: as the tenant remained in occupation after Oct. 1, 1953, without informing the landlord that he did not wish to continue the tenancy in the manner contemplated by the agreement of Oct. 6, 1952, he must be regarded as having remained in occupation under the agreement, as a monthly tenant at a rate of 2s. a week, and, therefore, as this rent was less than two-thirds of the rateable value of the premises, under s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the tenancy was not protected by the Rent Acts; there being nothing illegal in an agreement between landlord and tenant that premises should be let at a reduced rent so as to avoid the application of the Rent Acts, extrinsic evidence was not admissible to contradict the terms of the written agreement by showing that the real agreement between the parties was for a tenancy of only one year and that, after the end of that year, the tenant remained in occupation as a statutory tenant; even if extrinsic evidence was admitted to show that the £47 payable under the agreement should be treated as part of the rent for the purposes of the Rent Restrictions Acts, under the contract between the parties this sum was to be paid within the period of one year from Oct. 1, 1952, and was in respect of that year, and, at the time when the notice to quit was given, the rent was 2s. a week and the tenancy was not protected by the Acts; and, therefore, the landlord was entitled to possession.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (7), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1014; and FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 2, see *ibid.*, p. 1097.

Cases referred to:

- (1) *Rush v. Matthews*, [1926] 1 K.B. 75; 95 L.J.K.B. 70; 134 L.T. 94; *aff'd*. (C.A., [1926] 1 K.B. 492; 95 L.J.K.B. 409; 134 L.T. 571; 31 Digest, Replacement, 688, 7796.
- (2) *Foster v. Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149; 31 Digest, Replacement, 697, 7888.

(3) *Mudley v. Deacon*, [1944] 1 All E.R. 22; 170 L.T. 49; 31 Digest, Replacement, 653, 7567.

APPEAL by the tenant from an order of His Honour JUDGE ARCHER, made at Chichester County Court on Mar. 5, 1954, in an action for possession of a dwelling-house.

The learned county court judge held that there were no grounds for admitting extrinsic evidence to contradict an agreement in writing between the parties, and that, as the rent payable under the agreement was less than two-thirds of the rateable value of the premises, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), the tenancy was not protected by the Rent Restrictions Acts, and, accordingly, he made an order for possession.

Plume for the tenant.

Chope for the landlord.

SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE ARCHER in a landlord and tenant case. The learned county court judge made an order for possession on the basis that, having regard to the contract of tenancy, the tenant could not claim, as he was seeking to do, the protection of the Rent Restrictions Acts. From that decision the tenant appeals.

Clause 1 of the agreement of tenancy, which is dated Oct. 6, 1952, reads:

"In consideration of the payment by the tenant to the landlord of the sum of £47 the landlord lets and the tenant takes the cottage and appurtenances at East Ashling Chichester in the county of Sussex known as 3 Cobden's Cottages, for a period of one year from Oct. 1, 1952, at a rental of 2s. per week payable in advance on the first day of each month and thereafter (should the tenant be desirous of continuing his tenancy) on a monthly tenancy at the said rent of 2s. per week".

When Oct. 1, 1953, came round, the tenant remained in occupation. On Dec. 22, 1953, the landlord served on him a notice to quit which was to take effect on Feb. 1, 1954. As the tenant continued to remain in occupation, the landlord brought an action for possession in the county court. Two shillings a week is below two-thirds of the rateable value of the property, and, therefore, if the agreement of Oct. 6, 1952, had stood alone, the landlord would, plainly, have been entitled to possession because the tenancy would have been outside the Rent Restrictions Acts; [see s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920]. But it was sought to adduce evidence in the court below and in this court to show that the agreement in writing did not represent the real bargain between the parties. It was said, on behalf of the tenant, that the real bargain between the parties was that the premises should be let for £1 a week. After some trouble had arisen between the parties, the landlord wrote to the tenant saying: "You made an offer of £52 per annum and I accepted it for one year only". If the £52 represented the rent, whether paid at once or in weekly sums, that would have been more than two-thirds of the rateable value of the premises. It was admitted by both sides that the basis of the negotiations was that the occupation should be for a year. The landlord made it quite clear that he did not want to part with possession for more than a year, and, whatever the agreement may be in law, the tenant accepted that basis. This is not the first example of a tenant having entered into possession on an undertaking that he would surrender possession on a certain date, and, when that date has come, seeking to rely on the Rent Acts. The learned judge decided that this was a case in which there were no grounds for going behind the agreement.

Although it is unnecessary to come to a final conclusion on this first point, for reasons which will emerge, it is right to draw attention at this stage to the operative legislation with regard to premiums. It is now contained in the Landlord and Tenant (Rent Control) Act, 1949, s. 2, which prohibits premiums

on the grant or assignment of tenancies. That prohibition, however, does not apply where the rent reserved is less than two-thirds of the rateable value of the dwelling-house: [see s. 2 (3) of the Act of 1949 and s. 12 (7) of the Act of 1920]. If the proper construction of this agreement, with any admissible extrinsic evidence, were that the £47 was a premium, and the rent, with any sums which could properly be treated as rent, was only 2s. a week, then it is plain—and this was the view of the learned county court judge—that the landlord is entitled

A to an order for possession.

We were referred to certain authorities which indicated that, particularly in this field of rent restriction, if the court be satisfied that the document purporting to set out the rights between the parties is a “sham”—I am not attempting to define what a sham is—then the court will accept and consider evidence as to the real bargain between the parties. Having had the evidence and the corres-

B pondence between the parties read to us, I see no ground for regarding the agreement in the present case as a “sham”, whatever that may mean. It is clear that there was no trickery or anything of that sort. The landlord made it plain that he wished the transaction to be arranged in this way at this low rent because he did not want to part with possession for more than a year. The tenant's replies and the letters indicate, as, indeed, counsel agreed, that that was well

C understood. As I have said, there is nothing contrary to the provisions of s. 2 of the Act of 1949 in agreeing to a premium in the case of a tenancy where the rent is below two-thirds of the rateable value. On the other hand, I think it is right to say that, in such a case, the court would scrutinise a sum which was put forward as a premium. The sum is not so described in this case and there is no provision in the agreement as to the time of payment. In my opinion, extrinsic

D evidence was permissible to deal with that point. It is clear that it was never intended that the amount should be paid as a lump sum at or about the time when the tenant went into possession. According to his evidence, he was to pay 2s. a week, and the idea, originally, was that a balance of about 18s. a week should be satisfied in produce. The correspondence supports this evidence. The produce was not satisfactory to the landlord, who then demanded money

E on a periodical basis, payment of the £47 being spread over the twelve months. The tenant was advised that he was not liable to pay the balance of the £47 and the payment fell into arrears. There were various difficulties which appear from the letters. In my view, evidence was admissible to prove the intention of the parties that the payment of the £47 should be periodic and spread over the year. On that basis I think that there was a strong case for submitting on behalf of

F the tenant that the principle of *Rush v. Matthews* (1) was applicable and that, notwithstanding the distinction between the facts in that case and those in the present case, there should be added to the weekly rent of 2s. a sum which was not technically rent but was to be treated as rent for the purposes of the Rent Acts, and which would have brought the rent, for the purposes of those Acts, above two-thirds of the rateable value of the premises.

G In this court counsel for the landlord took a further point in support of the learned judge's conclusion. The point is based on the provision at the end of cl. 1 of the agreement:

“ . . . and thereafter (should the tenant be desirous of continuing his tenancy) on a monthly tenancy at the said rent of 2s. per week.”

H Even admitting the extrinsic evidence, under the contract the £47 was to be paid within the year and was in respect of the year. At the end of the year the tenant did, in fact, stay on. It was submitted on his behalf that he should be regarded as having stayed on as a statutory tenant, but he did not assert that position in any letter. I think the proper conclusion to be drawn from the fact of his remaining in occupation, as he did, after the year is that he desired to continue the tenancy, and, therefore, the tenancy continued at a rent of 2s. per week under the agreement. That sum being less than two-thirds of the rateable

value, the notice to quit operated on a tenancy to which the provisions of the Rent Acts do not apply, and, therefore, the landlord is entitled to possession.

Counsel for the tenant, however, submitted, first, that we should disregard that part of the written agreement which refers to the period after the year was over. That submission was based on statements in the letters that the intention was that the tenancy should be for one year. I do not accept the submission. I think it is impossible, on ordinary principles, to admit extrinsic evidence to contradict that term of the agreement. It may have been inserted by some person who thought that the tenant might go back on his undertaking and seek to stay on. The person who inserted it may have foreseen this point and been desirous of meeting it. That does not entitle the tenant, who accepted and signed the agreement, to say that it should be disregarded. In fact, it enables the intention of the parties, as admitted by him, to be carried out. We were referred to some observations by SIR RAYMOND EVERSHED, M.R., in *Foster v. Robinson* (2) where a sitting tenant, who was an old retainer of the landlord, was allowed to stay on, rent free, after he had ceased work. It was held that that was a new agreement and that, on the tenant's death, a member of his family could not claim the right to possession conferred by s. 12 (1) (g) of the Act of 1920. It was said in effect, however, that, where one is dealing with a tenant who is already in occupation and entitled under his existing agreement to claim the rights afforded by the Rent Acts, the court should scrutinise with great care an arrangement whereby the landlord has offered to him an apparently attractive substitute agreement with a view to enabling him, the landlord, to deprive the tenant of the rights which, as it were, he had already acquired. But that is not the present case. Here, it was all agreed at the outset, and the agreement was put before the tenant who signed it at a time when he was having legal advice. Once it is agreed that one can have a tenancy where rent is reduced so as to bring the provision of s. 12 (7) of the Act of 1920 into operation, it is plain that such an agreement may be made, as here, in advance, and, if it is clear that there is nothing in the nature of trickery or of the landlord taking advantage of his position against a sitting tenant, I can see no reason why the provision should not be enforced. For that reason I would dismiss the appeal.

BIRKETT, L.J.: I agree entirely with the judgment which has been delivered by SOMERVILLE, L.J. The learned county court judge decided this case on the simple ground that there was an agreement, perfectly valid and legal, which did not offend against any provisions of the Rent Restrictions Acts. He said that in that agreement there were two specific things mentioned, one being the sum of £47, and the other being the rent of 2s. a week; that those two things were distinct and separate; that the 2s. a week was, clearly, less than two-thirds of the rateable value of the premises, and, therefore, it was within s. 12 (7) of the Act of 1920; and that, whether the £47 was called a premium or not, it did not offend against the provisions of s. 2 of the Act of 1949. On that simple ground, having listened to the evidence, the judge said: "I shall give effect to the provisions of the agreement".

In view of arguments which have been addressed to us, I think, perhaps, it is necessary to say that it is open to parties to avoid, if they can, the Rent Acts applying to their particular transaction. In *Mackay v. Dean* (3) 8 *Comm. L.J.*, dealing with the facts of that case, said ([1944] 1 All E.R. 23):

"There was no shadow of deception practised by the landlord upon the tenant. In my opinion, they were both entitled so to arrange the matter, as not to attract the control of the Acts, or, putting it positively, as to prevent the Acts from applying. If the actual transaction was not within the Acts, it made no legal difference that the parties had intentionally kept it out of the Acts. It was argued that the intention to keep it out of itself showed want of bona fides, but unless the court has other material on which to hold that the whole thing was a sham, that intention was irrelevant."

The first ground of appeal in the present case was that the learned judge was wrong in holding that the tenant was not a statutory tenant of the premises under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. Counsel for the tenant submitted that the agreement between the parties was for one year certain and that, at the end of the year, the tenant was entitled to say, "I have now become a statutory tenant and, as such, ought to be protected by the Rent Acts". The second submission on behalf of the tenant was that the learned judge was wrong in deciding the case merely on the construction of the written agreement, and that he should have inquired into the surrounding circumstances to ascertain whether that agreement was, in fact, a mere sham which did not accurately record the true contract between the parties. In a word, what counsel for the tenant sought to say, as I understood it, was that the real agreement between the parties was an agreement for a tenancy at £1 a week, and the written agreement went out of its way to depart from the terms of the agreement which was actually made. A third ground of appeal was that the learned judge was wrong in law in holding that the sum of £47 named in the agreement could not be regarded as rent and that he should not inquire into the facts of the case to ascertain the true nature of that sum. In my view, it is clear that, where there is a written agreement, it is not competent to call oral evidence to contradict its terms. Counsel for the tenant said that he was not seeking to do that; he was merely seeking to show by evidence that the sum of £47 was not required to be paid as a lump sum, but was to be split up into periodic payments. He said that he was merely explaining the nature of the £47 so as to show that the real agreement between the parties was for a tenancy at a rent which would enable the tenant to claim the protection of the Rent Acts.

Quite late in the argument counsel for the landlord introduced another point, namely, that, at the time when the notice to quit was given and when the plaint was heard in the county court, the tenancy which then existed was, in fact, a monthly tenancy at a rental of 2s. a week. In support of this contention counsel relied on cl. 1 of the agreement, which reads:

"In consideration of the payment by the tenant to the landlord of the sum of £47 the landlord lets and the tenant takes the cottage and appurtenances at East Ashling Chichester in the county of Sussex known as 3 Cobden's Cottages, for a period of one year from Oct. 1, 1952, at a rental of 2s. per week payable in advance on the first day of each month and thereafter (should the tenant be desirous of continuing his tenancy) on a monthly tenancy at the said rent of 2s. per week".

Counsel for the tenant submitted that we ought completely to disregard the words

"and thereafter (should the tenant be desirous of continuing his tenancy) . . ."

I think it is impossible to do so. It seems to me, although certainty cannot be achieved in this matter, that what emerges from the evidence and the documents, is this. There is no doubt whatever that the landlord intended this to be an agreement for one year only. He repeated it in various letters and asserted that he had said it many times before the agreement was entered into. The tenant did not speak with the same assurance as the landlord did, but it was quite clear that he never denied the landlord's assertion. When we look at the agreement, we find that it is not just for one year certain, but that these words are added:

"and thereafter (should the tenant be desirous of continuing his tenancy) on a monthly tenancy at the said rent of 2s. per week".

Nowhere in the correspondence or in the evidence do we find that the tenant expressed his desire to exercise that option. But it is plain from his attitude

and his conduct throughout that he did desire to remain, and, as he did remain, he must be taken to have done so on the terms which are set out in the agreement. As 2s. a week is less than two-thirds of the rateable value of the premises, under s. 12 (7) of the Act of 1920 his tenancy is not protected by the Rent Restrictions Acts, and, therefore, he is not entitled to remain. Having considered the various matters which have been put before us in argument, I think that the judgment of the learned judge cannot be disturbed in its result, and that the appeal should be dismissed.

ROMER, L.J.: I also agree. There is nothing that I wish to add to what my brethren have said on the particular point on which the learned judge decided the case. I must, however, say a word on the alternative submission which counsel for the landlord made before us to the effect that, at the time when the landlord served the notice to quit, the tenant was not entitled to the protection of the Rent Acts. It seems to me that that was clearly so. The main way in which counsel for the tenant sought to escape from it was to say that the court ought to look behind the language in which this agreement was expressed and find out what the true bargain between the parties was, and that, if it did so, it would find that the agreement was for a tenancy for one year only, and that, therefore, the court should disregard the additional provision in cl. 1 of the agreement that at the expiration of the first year the tenant should, if he were desirous of so doing, continue the tenancy on a monthly basis. The obvious intention behind that submission was to ask us to look at the true nature of the bargain for the sole purpose of enabling the tenant to break it. I should not feel at all disposed so to do to achieve that object, even if the court were entitled to do so. I am satisfied that the court has no right to resort to correspondence and oral evidence for the purpose of striking out, for that is what it amounts to, an important provision which the parties agreed on and expressed in the agreement. The general rule with regard to extrinsic evidence is that such evidence is not admissible to add to, vary, modify, or contradict a written instrument. To that rule there are, of course, exceptions. The only exception which might be regarded as relevant is if the written instrument is affected by illegality. I can see nothing illegal in the object which the parties sought to attain by entering into an agreement in this form. The bargain was, admittedly, that the tenant was to have occupation as tenant of the landlord's property for one year. The agreement was formed so as to give effect to that intention and to prevent the tenant from obtaining something additional to that for which he had asked and which the landlord had consented to give, namely, the additional status of irremovability which attaches to a statutory tenant. There is nothing illegal in that and it is wholly different from a case where a landlord attempts by contractual means or otherwise to deprive a statutory tenant of his rights, or to exact from a statutory tenant, either by way of premium or rent, something to which he is not lawfully entitled, having regard to the provisions of the Rent Acts. As I say, the object which the parties had in mind was perfectly lawful, and I cannot see that this agreement is tainted with any kind of illegality such as would admit extrinsic evidence to alter the terms which expressly appear on its face. Therefore, one has to treat the agreement as one finds it, and one finds that at the end of the initial year the tenant, if he was desirous of continuing his tenancy on a monthly basis, could do so. One finds that he did, in fact, remain in occupation at the end of the year. He did not, as he could have done before the year came to an end, communicate with the landlord and say that he did not desire to continue his tenancy in the manner contemplated by the contract, and that he intended, instead, to remain on as a statutory tenant. He chose simply to remain there, and, inasmuch as the agreement does not require any notice, either in writing or otherwise, from the tenant to the landlord of his intention to continue his tenancy, the obvious inference, as I see it, is that, as he did not communicate with the landlord but merely stayed on, he was playing

on under the contract and not in any other capacity. Therefore, I do not think that, either on the ground that one must ignore the monthly tenancy provision, or on the ground that he was remaining on, not as a contractual tenant, but as a statutory tenant, the tenant can say that he was protected by the Rent Acts. The result is, therefore, that the notice to quit was a perfectly valid notice and the tenant cannot succeed. Accordingly, although, perhaps, for different reasons from those which commended themselves to the learned judge, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woodham Smith, Borradaile & Martin*, agents for *Maurice, Bew & Bailey*, Chichester (for the tenant); *Williams & Poole* (for the landlord).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

BARBER v. BARBER.

[COURT OF APPEAL (Jenkins and Hodson, L.JJ.), May 3, 7, 1954.]

Divorce—Restitution of conjugal rights—Answer—Prayer for dissolution of marriage—Competency—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 32—Matrimonial Causes Act, 1950 (c. 25), s. 6.

In a suit for restitution of conjugal rights the respondent in her answer prayed for a dissolution of the marriage on the ground of cruelty. On a summons to strike out that prayer,

HELD: there was no provision in any statute or in any rule of court enabling a respondent to claim a divorce in his answer to a petition for restitution, and, so, by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 32, the jurisdiction of the court must be exercised as nearly as might be in the same manner as that in which it might have been exercised, in such a case as the present, by the ecclesiastical courts; although the relief claimed in the answer in the present case was not such as could have been given by the ecclesiastical court in any proceedings, it was not unduly straining the language of s. 32 to hold that regard might be had to the effect of subsequent legislation (e.g. the Matrimonial Causes Act, 1950, s. 6) in deciding whether or not the proposed exercise of jurisdiction vested in the High Court would be an exercise of it as nearly as might be in the same manner as that in which it might have been exercised by the ecclesiastical courts; in proceedings for restitution of conjugal rights the ecclesiastical courts would have entertained an application by the respondent for such relief as then could be granted in respect of the adultery or cruelty of the opposite party; and, therefore, the High Court was not bound to decline jurisdiction to entertain the prayer for divorce in the answer merely on the ground that the ecclesiastical courts would have had no jurisdiction to grant that particular form of relief.

Dictum of Dr. LUSHINGTON in *Anon.* (1857) (Dea. & Sw. 304), applied.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 6, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 396.

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 32, see *ibid.*, Vol. 5, p. 361.

Cases referred to:

- (1) *Blackborne v. Blackborne*, (1868), L.R. 1 P. & D. 563; 37 L.J.P. & M. 73; 18 L.T. 450; 27 Digest, Replacement, 485, 4235.
- (2) *Pickett v. Pickett (otherwise Moss)*, [1951] 1 All E.R. 614; [1951] P. 267; 27 Digest, Replacement, 484, 4233.
- (3) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *affd.* H.L., [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest, Replacement, 307, 2551.

- (4) *Annell*, (1857), Dea. & Sw. 295; 164 E.R. 581; 27 Digest, Replacement, 441, 3715.
- (5) *Timmins v. Timmins*, [1953] 2 All E.R. 187.
- (6) *Werber v. Werber*, (Apr. 2, 1954), unreported.

APPEAL by the wife against an order of WALLINGTON, J., dated Apr. 6, 1954, striking out a prayer for dissolution of the marriage contained in her answer to a petition by the husband praying for restitution of conjugal rights.

Levene for the wife.

Frankel for the husband.

Cur. adv. vult.

May 3. HODSON, L.J., read the following judgment of the court. This appeal raises a highly technical question of procedure which does not appear to be directly covered by authority, although the question has been tacitly answered in favour of the wife on more than one occasion.

On Nov. 18, 1953, the husband presented a petition for restitution of conjugal rights, on the ground that his wife had refused to live with him. By her answer, dated Feb. 18, 1954, the wife admitted that she had ceased to live with the husband, but said that by reason of the facts thereafter stated she had had and still had just cause for refusing to live with him. Following a number of paragraphs containing allegations of cruelty against the husband, the answer concluded with a prayer that the prayer of the petition might be rejected, and, *inter alia*, that the marriage might be dissolved. On a summons issued by the husband, WALLINGTON, J., on Apr. 6, 1954, struck out that part of the prayer of the answer which prayed for a dissolution, and gave leave to appeal to this court. The matter was heard by WALLINGTON, J., in chambers and no reasons for the order are available, but it seems that the learned judge considered that the right to claim divorce in answer to a petition is regulated by statute and that there was no statutory provision enabling the respondent to a suit for restitution to make such a claim, and, accordingly, that the respondent must make such a claim, if so advised, by separate petition.

By the Matrimonial Causes Act, 1950, s. 6, it is provided:

"If in any proceedings for divorce the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief."

This section reproduces in shortened form s. 180 of the Supreme Court of Judicature (Consolidation) Act, 1925, which, in turn, replaced with a slight extension, immaterial to this case, s. 2 of the Matrimonial Causes Act, 1866. Since these proceedings are not proceedings for divorce, but for restitution of conjugal rights, which would formerly have been determined by the ecclesiastical courts, regard must be had to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 32, which reads as follows:

"The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained."

There is no special provision in the Act or in rules of court applicable, and the jurisdiction in restitution proceedings formerly appertained to the ecclesiastical court which had no power to pronounce a decree of divorce *a vinculo*, which is now a purely statutory remedy. Hence it is said that there is no room for a

claim for divorce in an answer to a petition for restitution, but that it must be the subject of a separate petition.

On a literal reading of the section, we think that there is force in this contention, unfortunate though it would be if the expense and inconvenience of a separate petition were to be held necessary in such cases as the present, where divorce is prayed, whereas, if the relief sought in the answer were judicial separation (an ecclesiastical remedy), no such step would be necessary: see *Blackborne v. Blackborne* (1). If, however, a more liberal meaning can fairly be given to the section, it will be possible for the relevant issues between the parties to be decided in the same proceedings and the appropriate consequential relief granted.

The question has arisen in a slightly different form in nullity proceedings, where respondents to petitions have sought to raise issues as to adultery, cruelty and desertion in answer to a petition praying for a declaration of nullity of marriage. In those cases it has been pointed out that such issues are irrelevant to the nullity suit, since, if there is no marriage, proof of such matrimonial offences is no answer to the petition: compare *Pickett v. Pickett* (otherwise *Moss*) (2). In a suit for restitution of conjugal rights, however, such issues can be raised as an answer to a petition and, indeed, since the decision of this court in *Russell v. Russell* (3) defences to a suit for restitution of conjugal rights are not limited to so-called matrimonial offences.

It is, we think, plainly desirable that when such issues are relevantly raised by way of answer in the original suit, the court should be able to give the respondent relief in the same proceedings in accordance with the findings made on those issues. That the ecclesiastical courts would have so acted if placed in the position in which the court now finds itself appears to be supported by the language of Dr. LUSHINGTON in a nullity case cited as *Anon.* (4), where he said (Dea. & Sw. 304):

"The results of these cases were twofold: first, if the marriage be denied, that question must be disposed of before evidence can be taken as to adultery or cruelty; second, that without fresh citation the court may, in any matrimonial suit where the validity of the marriage has been disposed of, receive an allegation pleading adultery or cruelty, and separate the parties if it be proved. Therefore, I am of opinion, both upon principle and authority, that I ought not now, at this stage of the cause, to admit the article pleading adultery to proof; but I am equally clear, for the same reason, that the court might possibly come to a decision in this case which would justify the court in receiving this, or an allegation to the same effect."

Although the relief claimed in the answer in the present case is not such as could have been given by the ecclesiastical court in any proceedings, it is not, we think, unduly straining the language of s. 32 of the Act of 1925 to hold that regard may be had to the effect of subsequent legislation in deciding whether or not the proposed exercise of jurisdiction vested in the High Court would be an exercise of it as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained. The allegation in the answer is relevant to the petition, and, reasoning by analogy, having regard to the language of Dr. LUSHINGTON in *Anon.* (4) from which it appears that the ecclesiastical courts would, in proceedings for restitution of conjugal rights, have entertained an application by the respondent for such relief as then could be granted in respect of the adultery or cruelty of the opposite party, we do not think that the High Court is bound to decline jurisdiction to entertain a prayer for divorce a vinculo in the answer merely on the ground that the ecclesiastical courts would have had no jurisdiction to grant that particular form of relief.

We are fortified in this opinion by the knowledge that a practice has grown up of accepting jurisdiction to pronounce decrees of divorce in such a case as the

present without insisting on a separate petition. *Timmins v. Timmins* (5) is an example of such a case, where the circumstances were exactly paralleled to those in the case now under consideration. It is true that the prayer for relief was rejected, but no point was taken, either at first instance or in the Court of Appeal, that there was no jurisdiction to entertain the prayer for divorce in the answer. The same situation arose in a recent unreported case of *Werber v. Werber* (6), which is within the recollection of both members of this court, where, again, no relief was granted, but no point as to jurisdiction was taken. In our judgment, this course, now commonly followed in practice, is sufficiently warranted by the construction we have placed on s. 32 of the Act of 1925 and should be recognised as a legitimate mode of procedure. We would allow the appeal accordingly.

Appeal allowed.

Solicitors: *Ronald Fletcher & Co.* (for the wife); *Cameron, Kenn & Co.* (for the husband).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re LAPFORD.

[EXETER CONSISTORY COURT (The Chancellor (W. S. Wigglesworth, Esq.)),
January 2, March 12, 1954.]

Ecclesiastical Law—Ornaments—Aumbry—Tabernacle—Reservation of the Sacrament—Reservation sanctioned by the bishop.

A faculty was sought by the rector and churchwardens to instal above the centre of the altar in the Lady Chapel of the parish church a tabernacle for the reservation of the Blessed Sacrament. Reservation in an aumbry had previously been authorised by the bishop and he was now willing to sanction reservation in a simple tabernacle. The petition was supported by a unanimous resolution of the parochial church council and no appearance was entered in opposition.

HELD: that a tabernacle was an illegal ornament, and a faculty would not be granted.

Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard (1927) P. 289, applied.

HELD, further, that reservation with the sanction of the bishop was not unlawful. The Prayer Book neither forbade, nor authorised reservation: it made no provision for it. Where the bishop considered reservation to be necessary it was for him to sanction it, and where he sanctioned it the court could, and should by faculty, authorise such alterations or additions in the church as were necessary to secure that due provision was made for reservation. An aumbry was not an unlawful ornament, and, therefore, though the application failed, the parish would not be without any provision for reservation.

AS TO ILLEGAL ORNAMENTS, see HALSBURY, *Hailsham Edn.*, Vol. 11, pp. 786-793, paras. 1445-1456; and FOR CASES, see DIGEST, Vol. 19, pp. 433-439 Nos. 2762-2947.

Cases referred to:

- (1) *Kerest v. St. Etheldreda, Bishopscote, Withen (Rector)*, [1900] P. 80, 19 Digest 446, 2892.
- (2) *Thorn v. Hulse*, [1901] P. 95; *subsequent proceedings*, [1903] P. 211, 19 Digest 448, 2903.
- (3) *Sheppard v. Bennett*, (1870), L.R. 4 P.C. 350; 9 Moo. P.C.C.N.S. 120; 39 L.J. Eccl. 59; 23 L.T. 145; 34 J.P. 789; 17 E.R. 459; 19 Digest, 338, 1498.

- (4) *Martin v. Mackonochie*, (1868), L.R. 2 P.C. 365; 5 Moo. P.C.C.N.S. 500; 38 L.J. Eccl. 1; 19 L.T. 503; 33 J.P. 35; 16 E.R. 603; *varying*, S.C. sub nom. *Martin v. Mackonochie*, *Flamank v. Simpson*, L.R. 2 A. & E. 116; *subsequent proceedings*, P.C., sub nom. *Martin v. Mackonochie*, (1869), L.R. 3 P.C. 52, 409; 39 L.J. Eccl. 11; 21 L.T. 512; 19 Digest 450, 2948.
- A (5) *Oxford (Bp.) v. Henly*, [1907] P. 88; *subsequent proceedings*, [1909] P. 319; 19 Digest 452, 2974.
- (6) *Gore-Booth v. Manchester (Bp.)*, [1920] 2 K.B. 412; 89 L.J.K.B. 1123; 123 L.T. 301; *on appeal C.A.*, 89 L.J.K.B. 1128; 19 Digest 315, 1147.
- (7) *Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard*, [1927] P. 289; *subsequent proceedings*, [1928] P. 69; Digest Supp.
- B (8) *Re St. Hilary, Cornwall, Roffe-Silvester v. King*, [1938] 4 All E.R. 147; [1939] P. 64; 159 L.T. 546; Digest Supp.
- (9) *Re St. Luke's, Southport*, (1936). Unreported.
- (10) *Re Altofts, Parish of*, (July 4, 1941). Unreported.
- (11) *Re St. Mary the Virgin, Swanley*, (Dec. 19, 1946). Unreported.
- (12) *Re West Ilsley, Parish Church of*, (1952). Unreported.
- C (13) *Liddell v. Westerton*, (1857), 29 L.T.O.S. 54; 21 J.P. 499; *subsequent proceedings*, P.C., sub nom. *Liddell v. Beal*, (1860), 14 Moo. P.C.C. 1; 15 E.R. 206; 19 Digest 435, 2762.

PETITION for a faculty.

The facts appear in the learned Chancellor's judgment.

E. Garth Moore for the petitioners.

Cur. adv. vult.

Mar. 12. **Mr. CHANCELLOR WIGGLESWORTH** read the following judgment. On Nov. 12, 1953, the rector of the parish of Lapford in the county of Devon and diocese of Exeter, the Reverend Henry Pomeroy Judd, and the churchwardens of the parish, Mr. F. V. Elworthy and Mr. H. H. Partridge, presented a petition praying for a faculty authorising them to place above the centre of the altar in the Lady Chapel of their parish church a simple tabernacle for the reservation of the Blessed Sacrament for the sick in accordance with plans prepared by Mr. Herbert Read of Exeter. The petition was supported by a unanimous resolution passed by the parochial church council on Nov. 9, 1953. Citation issued on Nov. 17, 1953, and no one entered an appearance in opposition to the citation. Although the petition was unopposed I felt it necessary to hear the case in court as I was not satisfied that a tabernacle could lawfully be introduced into a church and I, therefore, wished to hear argument on the matter. I heard the case in the chapter house at Exeter on Jan. 2, 1954, when counsel for the petitioners by his able and careful argument gave me great assistance. To avoid any misunderstanding it may be convenient if at the outset of this judgment I say that when I use the expression "tabernacle" I mean a safe placed on or immediately above an altar or a retable immediately behind an altar. By the expression "aumbry" I mean a recess in a wall containing a safe and by the expression "pyx" I mean a receptacle suspended in the air above an altar.

The circumstances which led to this application were explained to me by the rector who gave evidence in support of the petition. The rector was appointed in November, 1952, and on his arrival he found that the Blessed Sacrament was reserved in an aumbry resting on a window-sill in the wall on the north side of the principal altar. The aumbry had been placed there some fifteen years earlier during the incumbency of the Reverend W. F. Bond who, so far as it could be ascertained, had sought and obtained the permission of Bishop Curzon, then Bishop of Exeter, to reserve the Blessed Sacrament and for that purpose to place the aumbry on the sill. No faculty was on that occasion sought from this court.

On the arrival of the present rector he was authorised by the present bishop to continue the practice of reserving the Blessed Sacrament in the aumbry and he has done so. No one suggested that there was no need for reservation in this parish. Indeed, I was told that no less than one hundred and twenty-two such communions had been made from the reserved Sacrament in 1953. In this particular parish the reserved Sacrament is also required for the communion of certain workers in a factory who are unable to make their communion in church on Sunday or weekday mornings and who (with the bishop's sanction) make their communion from the reserved Sacrament in the Lady Chapel after Evensong on those Sundays when there is no celebration of the Holy Communion in the evening. The petition was amended at the hearing so as to make it clear that the reserved Sacrament was not intended to be used only for the sick but was also to be used for those who cannot attend the ordinary celebrations of the Holy Communion.

The rector found that the aumbry was neither safe (it has no lock or key) nor conveniently placed, and shortly after his arrival began to consider ways and means for making other provision for the safe custody of the reserved Sacrament. He considered that a tabernacle would be better and was able to ensure that the necessary money for the change would be available, the tabernacle itself being the subject-matter of a gift. He then sought the bishop's directions in the matter and received a letter from the bishop dated Dec. 31, 1952, which (so far as material) was as follows:

"I am glad to hear that you have been able to get a grant towards the cost of a simple tabernacle for the reservation of the Blessed Sacrament at Lapford, and I am content to leave it to you to decide—when applying for a faculty—whether this shall be placed on the High Altar or in the Lady Chapel."

Supported by this letter from the bishop, the rector with his churchwardens in the first instance presented a petition for a faculty to authorise the placing of a tabernacle on the High Altar. This proposal was considered by the Exeter diocesan advisory committee who advised against it on architectural and aesthetic grounds, adding to their report:

"It would be better either to use an aumbry in the north wall or to place the tabernacle above the altar of the Lady Chapel in accordance with the alternative suggestion of the bishop."

It was because of this advice that the present proposal for a tabernacle on the altar in the Lady Chapel was made. Mr. Read, who described himself as a sculptor and designer, explained in the evidence he gave that it was not in fact proposed that the tabernacle should be placed on the altar but that it should be bolted to the wall behind so that it would protrude over the back of the central part of the altar allowing a slight clearance between the bottom of the tabernacle and the top of the altar to facilitate the placing and changing of altar cloths. The Lady Chapel is so constructed that nowhere in its walls could an aumbry be conveniently placed. The north side is occupied by the door into the vestry leaving only a strip of wall four feet wide to the east of the door and the east wall is largely occupied by the altar and its surrounding curtains. There is no south wall.

If the matter were free from authority, I should have no hesitation in granting a faculty to authorise a rector and churchwardens to introduce into such part of the church as they select such receptacle for the reserved Sacrament as they wish in a case (like the present) where the Blessed Sacrament is reserved under the authority of the bishop, where there is no opposition, and where the receptacle and its proposed site are approved by parochial church council, diocesan advisory committee and bishop alike. Unfortunately, however, the matter is not free from authority: indeed, the editors of the current text-books evidently consider the matter so far covered by authority that they feel justified in describing tabernacles

as unlawful in the most uncompromising terms. For instance, the editors of the title on ecclesiastical law in *HALSBURY'S LAWS OF ENGLAND*, Hailsham ed., vol. 11, p. 791, para. 1452, say:

"A tabernacle for the reception of the reserved sacrament is not a lawful church ornament"

and the editor of *CRIPPS ON CHURCH AND CLERGY*, 8th ed., p. 229, says:

A "A tabernacle for the reservation of the holy Sacrament is illegal."

I have, therefore, to consider carefully the authorities which these editors cite and other authorities in order to determine whether I am, as counsel has argued, free to grant the faculty sought in this case.

B The earliest case cited is *Kensit v. St. Ethelburga, Bishopsgate Within* (Rector) (1), in which DR. TRISTRAM, Q.C. (chancellor of the diocese of London), speaking of a tabernacle which had already been removed, said ([1900] P. 103): "This tabernacle was clearly an illegal church ornament". The views of so learned a chancellor as DR. TRISTRAM are worthy of great respect, but this statement on an issue no longer before him is not an actual decision on the unlawfulness of a tabernacle. *Davey v. Hinde* (2) came before DR. TRISTRAM sitting as C counsel of Chichester. This case involved (among many other matters) two tabernacles, one on the principal altar and the other on the altar in a side chapel. Counsel for the petitioner (later SIR LEWIS DIBDIN, Dean of Arches) argued against the legality of tabernacles, saying ([1901] P. 103):

D "They are obviously in the church to be used for the reservation of the Sacrament, and as the reservation of the Sacrament is clearly illegal according to the view of the Judicial Committee of the Privy Council in *Sheppard v. Bennett* (3) and *Martin v. Mackonochie* (4), they must be condemned as subserving only an illegal purpose. They are also either unlawful church ornaments not authorised by the ornaments rubric, or fittings of the Communion Tables, liable to be abused by superstitious use and not authorised by law."

E Counsel for the respondent said (*ibid.*, 106):

"... its [the tabernacle's] illegality would only be provable if reservation of the Sacrament had been decided to be illegal, as to which much might be said on either side, the point being still in doubt."

F DR. TRISTRAM (*ibid.*, 121), ordered the removal of both the tabernacles in the church without giving any reasons. It should be observed that reservation was not an issue in either of the Privy Council cases, *Sheppard v. Bennett* (3) or *Martin v. Mackonochie* (4). A writ of prohibition was obtained against the first order of DR. TRISTRAM in *Davey v. Hinde* (2) and the case came before him again some two years later when he again ordered the removal of the tabernacles without giving any reasons ([1903] P. 236).

G Counsel next referred me to *Oxford (Bp.) v. Henly* (5) and *Gore-Booth v. Manchester (Bp.)* (6), but I need not, I feel, consider them in detail as they were not faculty cases and in each case reservation had been forbidden or was not permitted by the bishop concerned. The last reported case referred to in the text-books is *Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard* (7), H a faculty case in the Arches Court of Canterbury on appeal from the consistory court of St. Edmundsbury and Ipswich. This case involved a number of ornaments and articles including a tabernacle for the removal of which F. K. NORTH, Esq., chancellor of the diocese of St. Edmundsbury and Ipswich, had granted a faculty ([1927] P. 291) "because it was illegal". Counsel for the appellants (SIR HENRY SLESSER, K.C.) felt that as the law then stood, he could not contend that the tabernacle was legal. SIR LEWIS DIBDIN, the Dean

of Arches, affirmed the chancellor's decision for the removal of the tabernacle, observing ([1927] P. 305):

"That is an illegal ornament used in connection with an illegal ceremony."
Oxford (Bp.) v. Henly (5); *Davey v. Hinde* (2)."

There is one other reported case (decided since the publication of the current editions of the text-books) which I should mention—*Re St. Hilary, Cornwall, Roffe-Silvester v. King* (8), also a faculty case in the Arches Court of Canterbury. This was an appeal from an order of SIR WILLIAM GRAHAM-HARRISON, chancellor of the diocese of Truro, which came before MR. STABLE, K.C., as deputy Dean of Arches. It is not clear whether the articles in this case used for reservation fell within my definition of tabernacle or aumbry. The deputy dean's judgment as to them was as follows ([1938] 4 All E.R. 162):

"The next articles with which I must deal are two tabernacles or aumbries, one in a steel safe in the wall, at the back of what has been called the high altar, to which access is obtained through a door in a wooden structure which serves both as a support to the crucifix and as a cupboard, the other also in a safe in the wall, above and behind the altar in the south chancel aisle, which has been called the Jesus altar. No grounds have been advanced which satisfy me that the decision of the chancellor on this point was anything but right, and I affirm his order authorising their removal."

The deputy dean then declined an invitation to give a judgment deciding whether the practice of granting faculties for aumbries was right or wrong, but added (*ibid.*, 163):

"The observations I have just made relate to the submissions made on the facts of this case, and are not directed in any way to other cases where the sacrament is reserved with the approval of the bishop, and application is made to a consistory court for provision to be made for its proper and decent reception. . . . I see no ambiguity whatever in the chancellor's judgment. He has made it clear that his judgment does not preclude the vicar at some future time from applying to him for a faculty authorising an aumbry, and, while it will be open to any person interested to oppose that application, it cannot be on the ground that, by reason of the judgment given in this case, the matter is *res judicata*. Neither the chancellor nor this court has prejudged any such application, nor do I intend to express or indicate any view as to how such an application, if it is made, should be entertained."

There is a number of unreported faculty cases dealing with receptacles for the reserved Sacrament where copies of the judgments of the chancellors are available. Among them are *Re St. Luke's, Southport* (9) where CHANCELLOR DOWDALL, K.C., of Liverpool in an uncontested case granted a faculty for an aumbry; *Re All Saints, Parish of* (10), where CHANCELLOR VAISEY, K.C., of Wakefield, also in an uncontested case, granted a faculty for an aumbry; *Re St. Mary the Virgin, Swanley* (11), where CHANCELLOR ASHWORTH of Rochester in a contested case refused a faculty for a tabernacle and, in the alternative, for a pyx, and (no one objecting) granted a faculty for an aumbry, and *Re West Huby, Parish Church of* (12), where CHANCELLOR SCOTT of Oxford in a contested case granted a faculty for an aumbry. I shall refer later to some of these judgments. Counsel also referred me to seven cases during the period 1930 to 1953 where faculties had been granted for tabernacles, but in none of these cases had there, so far as was known, been any opposition or any hearing.

Before I leave this part of the case there are two other matters which I should mention. In 1900 Archbishop Frederick Temple of Canterbury and Archbishop Madragan of York, after hearing argument expressed the view that although there was nothing wrong in reservation yet it was unlawful. In 1929 after the rejection of the revised Prayer Book by the House of Commons the Upper House of the Convocations of Canterbury and York sought to regulate reservation by

reference to the rubric in the revised Prayer Book which permitted reservation in an aumbry in the wall of a church,

“provided that it shall not be immediately behind or above a Holy Table.”

Of the various judgments mentioned the only two in faculty cases which are binding on me are *Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard* (7) and *Re St. Hilary, Cornwall, Roffe-Silvester v. King* (8). *Re St. Hilary, Cornwall, Roffe-Silvester v. King* (8) does not bar the grant of a faculty in the present case. On the contrary, it contains at least a strong hint that in cases such as the present where the Sacrament is reserved with the approval of the bishop the chancellor can by faculty provide for its proper and decent reception. The *Capel St. Mary* case (7), however, presents a greater difficulty with its twofold condemnation of

a tabernacle as an illegal ornament used in connection with an illegal ceremony. I will deal with the latter point first. I know of no authority which compels me to hold that reservation is unlawful when it takes place with the sanction of the bishop. I do not consider that it is forbidden by article 28 or by the rubric at the end of the Communion Service which was inserted for a wholly different reason, namely, for the prevention of the irreverent practices of Puritans. In my view, the Prayer Book neither forbids nor authorises reservation. It makes no provision for it. Where the bishop considers that something not provided for is needed, it is for the bishop to make provision in the exercise of that authority which he has in his diocese. Where he considers reservation to be needed, it is for him to sanction it, and where he sanctions it, this court can and should by faculty authorise such alterations or additions in the church as are necessary to secure that due provision is made for reservation. In this connection I derive much assistance from the judgment of CHANCELLOR VAISEY, K.C., in *Re Altofts, Parish of* (10), where he said:

“If I am told that the Blessed Elements are to be reserved in a church with the sanction, or at any rate, not contrary to the directions or express wishes, of the bishop (that is a fact to which I am bound to pay attention), I regard it as my duty as chancellor of the diocese, and as such, custodian of all churches in it, to see that such reasonable steps are taken to secure the sacred Elements which are, in point of fact, to be reserved in the church, from anything in the nature of desecration or profanation. If I were to refuse this application, it might well be that the vicar was driven to house the consecrated bread and wine in some unworthy place as a cupboard in the vestry, and, in my view, I am fully justified in permitting the construction of this aumbry or safe in the place now occupied by the piscina and I shall direct that it may continue to be part of the furnishing and fitting out of this church until further order.”

CHANCELLOR ASHWORTH's judgment in relation to the grant of the faculty for an aumbry in *Re St. Mary the Virgin, Swanley* (11) and CHANCELLOR SCOTT's judgment in *Re West Ilsley, Parish Church of* (12), are also of much assistance on this part of the case, and I respectfully follow these three judgments. I am glad to feel able to hold the view that reservation with the sanction of the bishop is not unlawful. We all know that reservation is widely practised. I was told in argument that the Sacrament was reserved in some 1,750 churches. It would be most unfortunate, to say the least of it, if so general a practice had to be stigmatised as unlawful.

It remains to consider the other point made in the *Capel St. Mary* case (7), namely, that a tabernacle is an illegal ornament. It was suggested in argument that this was not really a separate point, that the judgment of SIR LEWIS DIBDIN, Dean of Arches, only amounted to a statement that where reservation was unlawful a tabernacle was unlawful, and that, if I consider reservation lawful in the present case, I was free to grant a faculty for any receptacle approved by the

bishop, including a tabernacle, in any part of the church approved by the bishop, including in the wall "behind or above a Holy Table". I am unable to accept this argument. In my view, SIR LEWIS DIBDIN affirmed the order for the removal of the tabernacle not only because he considered reservation unlawful in that case, but also as a separate and additional ground because he considered a tabernacle an illegal ornament. I say this because SIR LEWIS DIBDIN cited as authorities for his propositions not only *Oxford (Bp.) v. Henly* (5), but also *Darey v. Hinde* (2), and it must be remembered that he had himself been counsel in *Darey v. Hinde* (2) and in that case had argued for the removal of the tabernacles on the two grounds separately. Both grounds must, therefore, have been present to his mind when he decided the *Capel St. Mary* case (7). That decision is binding on me and I cannot consistently with that obedience and respect which I owe to the Provincial Court grant a faculty for a tabernacle when it has declared that a tabernacle is an illegal ornament. This disposes of the matter, but out of deference to counsel's argument there are certain observations which I should add.

I agree with counsel that the resolutions of the Upper Houses of the Convocations in 1929 are not so binding on the bishop as to disable him from approving any receptacle other than an aumbry or any place which is "behind or above a Holy Table". In my view, the only limiting factor (and it limits bishop and chancellor alike) is the ornaments rubric in general and those decisions of binding authority which have been made thereon. The ornaments rubric prescribes that "chancels shall remain as they have done in times past" and that

"such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this church of England, by authority of Parliament in the second year of the reign of King Edward the Sixth."

The Judicial Committee of the Privy Council held in *Liddell v. Westerton* (13) that the ornaments prescribed were the articles which were used under the first Prayer Book of Edward the Sixth. This has sometimes been questioned on the ground that the Act of Uniformity, 1548, did not receive the royal assent until Mar. 14, 1548-9*, when Parliament was prorogued, a date in the third year of Edward the Sixth, which had begun on Jan. 28, 1548-9, and on the ground that the Prayer Book was not brought into use until a still later date, namely, Whitsunday, June 9, 1549. It was not the custom then for the royal assent to be given to Bills save on the last day of a session of Parliament, so it is probably true that the Act of Uniformity (although it had been passed by both Houses of Parliament by Jan. 21, 1548-9) did not receive the royal assent until a date in the third year of the King's reign, but the session had begun in November, 1548, and by a fiction of law (not abolished until the Acts of Parliament (Commencement) Act, 1793) the whole session was supposed to be held on its first day and to last only that one day and every Act (unless otherwise stated) took effect, by relation back, from the first day of the session: MAXWELL ON INTERPRETATION OF STATUTES, 10th ed., p. 409. In this sense the Act of Uniformity took effect in November, 1548, well within the second year of the reign. This supports the Privy Council's view, if, indeed, their view requires support.

So far as a tabernacle is concerned, it is necessary to consider, therefore, whether it was in use under the Prayer Book of 1549, and in relation to this part of the case counsel quoted from books of reference which referred to the presence of tabernacles in churches at about this period. Examples of tabernacles were, however, rare and it seems clear that the normal method of reservation

* Before this position was regularised by the Calendar (New Style) Act, 1752, see *Harbington v. Statutes*, Second Edn., Vol. 25, p. 135, the "legal" year began on Mar. 25 and ended on the following Mar. 24, while the "historical" or "popular" year began on Jan. 1 and ended on the following Dec. 31. Thus, Mar. 14, 1549, in the "historical" year is the same day as Mar. 14, 1548, in the legal year. To avoid doubt whether a date is being given according to the "legal" or the "historical" year, it is customary to write Mar. 14, 1548-9.]

was in a pyx. In this connection I was interested to see in *NIERURGHIA ANGLICANA*, Part II, in *THE LIBRARY OF LITURGIOLOGY AND ECCLESIOLOGY FOR ENGLISH READERS*, vol. III, edited by VERNON STALEY, 1903, at pp. 161, 162, a quotation from a letter from Dr. ECLES published in the *GUARDIAN* of Sept. 11, 1901, which included the following sentence:

A "The hanging pyx over the high altar is clearly the lawful ornament by the ornaments rubric as it was the ornament in use for the purpose in this Church of England in the second year of the reign of King Edward the Sixth. LYNDWODE explains Archbishop Peckham's constitution as covering the hanging pyx. But he considers the aumbry in the wall near the altar safer."

B It is not for me to decide in this case whether the pyx was in use under a Prayer Book which prescribed only a temporary system of reservation. Indeed, I heard no evidence on the point. What is significant is that Dr. ECLES does not suggest that a tabernacle was in use in the year in question, indeed, precisely the opposite is stated in a footnote (*ibid.*, 162) which includes the statement:

C "The tabernacle is not covered by the ornaments rubric and cannot be used in face of the rule that 'chancels shall remain as they have done in times past.'"

Thus, even if it were open to me to review this ground on which SIR LEWIS DIBDIN based his decision, it seems to me that he had good reason for it. I should add that the ornaments rubric was one of the two grounds on which CHANCELLOR ASHWORTH granted a faculty for the removal of a tabernacle in *Re St. Mary the Virgin, Swanley* (11).

D Counsel also suggested that the tabernacle could in this particular case be called an aumbry and that I could grant a faculty for it under that name. It is true that faculties are constantly granted for aumbries, and that nowhere, so far as I know, have they been held to be unlawful ornaments, but I cannot regard the receptacle in this case as an aumbry. It may be wondered how it is that a tabernacle is an unlawful ornament and an aumbry is not, but for a long time now an aumbry has been treated as constituting, not an ornament at all, but part of the furnishings of the church let into the wall. CHANCELLOR ASHWORTH felt able so to treat an aumbry in *Re St. Mary the Virgin, Swanley* (11) and other chancellors have taken the same line. A tabernacle has been held to be an unlawful ornament, but an aumbry has not, and unless and until there is a decision of a higher court declaring an aumbry an unlawful ornament, there is, in my view, no need for bishop or chancellor to feel limited by the ornaments rubric when considering in any given case whether an aumbry is a suitable receptacle for the reserved Sacrament.

E The result is that the application fails, but I am glad to think that this result does not leave the parish without any provision for the reserved Sacrament. They still have the aumbry, which they have used for the last fifteen years and if its inconveniences are such that it is thought necessary for other provision to be made, alternative proposals not involving a tabernacle can be put before this court.

Solicitors: *Trollope & Winckworth* (for the petitioners).

G [Reported by G. H. WOOLVERIDGE, Esq., Barrister-at-Law.]

GREENE v. CHELSEA BOROUGH COUNCIL.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), April 29, 30, 1954.]

Licence — Negligence — Requisitioned premises — Liability of requisitioning authority — Concealed danger — Unsafe ceiling — Occupation by family of five — Authority's agreement with husband — Injury to wife.

Requisition — Licence injured through concealed danger — Liability of requisitioning authority — Unsafe premises — Occupation by family of five — Authority's agreement with husband — Injury to wife.

In exercise of their powers of providing accommodation for people without houses as the requisitioning authority under the Defence (General) Regulations, 1939, the defendants allotted rooms in a requisitioned house to the husband of the plaintiff. The plaintiff on behalf of her husband signed and supplied to the defendants an assessment form specifying the family for which accommodation was required (the plaintiff, her husband and their three children) and the total income of the family, and the husband signed an agreement with the defendants under which, in return for a weekly payment equal to one fifth of the total family income, they gave their "licence and authority for the occupier to occupy the [main rooms] and to use the second floor bathroom and basement back room from Mar. 21, 1949, until such occupation is determined . . . The occupier will permit the [defendants or their] officers . . . at all reasonable times of the day to enter into and upon the said premises and examine the state and condition thereof and to effect any repairs which " the defendants might consider necessary. The occupier was defined as the plaintiff's husband. The plaintiff reported a crack and a bulge in the ceiling of the kitchen to the defendants' rent collector. A week later two men inspected and tested it for the defendants and, apparently, found it "all right " and nothing was done. Six months later part of the ceiling fell on the plaintiff and injured her.

Held: (i) the defendants' agreement with the plaintiff's husband was, not for a tenancy of the rooms, but merely for a licence to the whole family to use them: *Southgate Borough Council v. Watson* ([1944] 1 All E.R. 603) and *Errington v. Errington & Woods* ([1952] 1 All E.R. 149), applied;

(ii) the defendants remained in possession of the rooms as requisitioning authority, and, being responsible for repairs, owed a duty of care towards all the members of the family as licensees: *Hawkins v. Coulsdon & Purley Urban District Council* ([1954] 1 All E.R. 97), applied.

(iii) the defendants having failed after warning to remedy the danger from the state of the ceiling, they were guilty of negligence and liable for breach of duty to the plaintiff: *London Graving Dock Co., Ltd. v. Horton* ([1951] 2 All E.R. 1), distinguished.

AS TO THE DUTY OWED BY AN OCCUPIER TO LICENSEES, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 609-612, paras. 859, 860; and FOR CASES, see DIGEST, Replacement Vol. 36, pp. 63-70, Nos. 345-375.

Cases referred to:

- (1) *Cavalier v. Pope*, [1906] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 31 Digest, Replacement, 386, 5124.
- (2) *Southgate Borough Council v. Watson*, [1944] 1 All E.R. 603, [1944] K.B. 541; 113 L.J.K.B. 337; 171 L.T. 26; 108 J.P. 207; 31 Digest, Replacement, 637, 7448.
- (3) *Errington v. Errington & Woods*, [1952] 1 All E.R. 149; [1952] 1 K.B. 290; 3rd Digest Supp.
- (4) *Booker v. Palmer*, [1942] 2 All E.R. 674; 30 Digest, Replacement, 339, 1737.
- (5) *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238, [1944] K.B. 298; 113 L.J.K.B. 436; 170 L.T. 146; 30 Digest, Replacement, 540, 1747.

- (6) *Minister of Agriculture & Fisheries v. Matthews*, [1949] 2 All E.R. 724; [1950] 1 K.B. 148; 2nd Digest Supp.
- (7) *Hawkins v. Coulsdon & Purley Urban District Council*, [1954] 1 All E.R. 97; [1954] 1 Q.B. 319; 118 J.P. 101.
- (8) *Paris v. Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.
- A (9) *Mersey Docks & Harbour Board v. Procter*, [1923] A.C. 253; 92 L.J.K.B. 479; 129 L.T. 34; 36 Digest, Replacement, 15, 60.
- (10) *Donoghue v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (11) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.
- B (12) *Porter v. Jones*, [1942] 2 All E.R. 570; 112 L.J.K.B. 173; 31 Digest, Replacement, 348, 4797.

APPEAL by the defendants from an order of CASSELS, J., dated Jan. 28, 1954, in an action for damages for negligence.

C The plaintiff was the wife, subsequently widowed, of a greengrocer's handyman, who with his family, including three children, had been granted a licence to occupy rooms in a house requisitioned under the Defence (General) Regulations, 1939, by the defendants. She had given notice to the defendants of a crack and a bulge in the kitchen ceiling which they were liable to repair, but, after tests carried out on behalf of the defendants, nothing had been done. Six months later she was injured by part of the ceiling falling on her. The defendants contended that they owed no duty of care to the plaintiff, since she was not a party to their agreement with her husband, the effect of which, in relation to their liability for failure to repair, should be similar to that under a tenancy agreement. They also submitted that the plaintiff was disentitled to claim damages because she had known of the danger. CASSELS, J., gave judgment for the plaintiff. The defendants appealed.

E *Marven Everett, Q.C.*, and *Sir Shirley Worthington-Evans* for the defendants. *Field-Fisher* for the plaintiff.

F SINGLETON, L.J.: This is an appeal from an order of CASSELS, J., made on Jan. 28 of this year on a claim for damages for personal injuries which the plaintiff alleged were caused through the negligence of the defendants. She was the wife of one Joseph Greene who was a plaintiff with her in the action, but died before it came on for trial. The action was treated as her action alone.

G The defendants are the requisitioning authority for the borough of Chelsea, and, like many other local authorities, they exercised their powers of requisitioning property in order to provide accommodation for people without homes. The plaintiff and her husband had applied to the defendants for housing accommodation in 1947, and the husband gave particulars of the family in the form he signed. Further particulars were given later. On Mar. 7, 1949, the property manager for the defendants wrote to the husband:

H "Dear Sir/Madam, With reference to your application for housing accommodation, the council can now offer you:—third and fourth floors, at 28, Elm Park Gardens. Will you please call here between 9.30 a.m. and 4.30 p.m. (excepting Saturday) for the key to view and bring this letter with you. I should be glad to hear from you immediately whether you wish to accept this offer which can, in any case, only remain open for three days from this date".

An assessment form, dated Mar. 9, 1949, was filled up and supplied to the defendants. It gives the address, the position in the house of the rooms, i.e., the third and fourth floors, the name of the householder, and the names and ages of those for whom the accommodation is required: the plaintiff, her husband,

Christopher, who was then fourteen years old and was an apprentice bootmaker earning £1 7s. a week, or 18s. net income, a girl of thirteen, and John, a boy of eight. At the foot of the form there appear the words:

"I declare that the foregoing particulars of my family circumstances are true and that any change will be notified at once to the housing manager. Signed on behalf of J. Greene, Mary Greene (wife)."

At odd times thereafter there was correspondence between the property manager and the plaintiff. The plaintiff said that she wanted ground floor accommodation because of heart trouble, and the property manager wrote to her on one or two occasions. I do not attach great importance to the fact that correspondence took place with her. The plaintiff and her husband and the family of three children were allowed into the third and fourth floors of 28, Elm Park Gardens. That was thought by the defendants, as the housing or requisitioning authority, to be suitable accommodation for the family and the amount to be paid for the accommodation was, according to the defendants practice, one-fifth of the total family income, viz., 26s. 3d. a week. An agreement was signed by the plaintiff's husband as follows:

"Metropolitan Borough of Chelsea. An agreement made Apr. 6, 1949, between the council of the metropolitan borough of Chelsea (hereinafter called 'the council') acting by Ernest William Johnstone Nicholson the town clerk of the one part and Joseph Greene greengrocer's handyman (hereinafter called 'the occupier') of the other part. Whereas the use of the premises known as 28, Elm Park Gardens, Chelsea, for certain emergency purposes is, as the result of action taken under reg. 51 of the Defence (General) Regulations, 1939, under the control and management of the council. Now therefore it is hereby witnessed and agreed as follows: 1. In consideration of the payments by the occupier hereinafter mentioned and of the conditions hereinafter contained on the part of the occupier to be observed the council hereby gives its licence and authority for the occupier to occupy the front middle and back rooms and w.c. on the third floor front and middle rooms on the fourth floor and to use the second floor bathroom and basement back room from Mar. 21, 1949, until such occupation is determined in manner hereinafter provided . . . 4. The occupier will permit the council or its officers or agents at all reasonable times of the day to enter into and upon the said premises and examine the state and condition thereof and to effect any repairs which the council may consider necessary . . . 7. Nothing in this agreement contained shall authorise the occupier to continue in occupation of the premises after the use of the premises has ceased to be under the control and management of the council under emergency powers."

Thus, the defendants, the local authority, had requisitioned a house and allotted the use of part of it to the plaintiff's husband, as it is said by the defendants, or to her husband and the members of his family, as it is said by and on behalf of the plaintiff.

On some date in May, 1951, the plaintiff noticed a crack in the ceiling of the back room on the third floor, which was her kitchen. She reported it to the rent collector when he called for what has been termed the rent, and she said that about a week later two men from the council came and inspected the ceiling. They took the handle of a brush and went round the ceiling to test it by tapping it, and as they were going round they said: "All right", as though speaking to themselves. She was asked:

"They said what? A.—It was all right. Whether they meant the ceiling or not I do not know, but they just said that it was all right as they were going out."

On Dec. 3, 1951, the defendants had done nothing further so that ceiling. The plaintiff described it as having a large crack in it, and as bulging. She was

not asked many questions on this matter in cross-examination. Obviously, it was something which she thought she ought to point out, in view of the fact that the defendants had retained the right to do, and the duty of doing, repairs on the premises. No one did anything. On Monday, Dec. 3, 1951, she was in her kitchen getting the tea, when more than a quarter of the ceiling came down without any warning. She was injured, and she brought this action against the defendants, alleging negligence. CASSELS, J., held that she was entitled to succeed and assessed the damages at £271, being £21 agreed out-of-pocket expenses and £250 general damages, and he gave judgment in her favour for that amount. The defendants appeal against that judgment.

There is no authority directly covering the position. The defendants submit that they are under no liability to the plaintiff, that the case ought to be regarded in the same way as if there had been a tenancy agreement between the defendants and the plaintiff's husband, in which case since the plaintiff, being no party to the contract, could not recover. Counsel for the defendants relied on *Cavalier v. Pope* (1) where the owner of a dilapidated house contracted with his tenant to repair it, but failed to do so. The tenant's wife, who lived in the house and was well aware of the danger, was injured by an accident caused by the want of repair. It was held that the wife, being a stranger to the contract, had no claim for damages against the owner. LORD LOREBURN, L.C., affirming the judgment of the Court of Appeal, said ([1906] A.C. 429):

"I can find no right of action in the wife of the tenant against the landlord either for letting the premises in a dangerous state or for failing to repair them according to his promise. The husband has sued successfully for breach of contract, but the wife was not party to any contract. Accordingly the appeal fails."

Counsel for the defendants submitted that that decision of the House of Lords ought to be treated by this court as binding in the circumstances of this case, and that we ought to allow the appeal. He submitted that it did not really matter whether the position of landlord and tenant, properly so called, existed, so long as there was a contract between the plaintiff's husband and the defendants, and that the rights of those parties were to be determined by that contract, and the plaintiff could have no rights of any kind. No duty was owed by the defendants to the plaintiff or to any member of the family inside the premises the use of which was given or allotted to the plaintiff's husband. On the other hand, counsel for the plaintiff submitted that, whether the documents or the purpose of the requisition was looked at, there was an allowing by the defendants of the use of the premises to husband, wife and children, certainly to those named on the application and assessment forms, and the decision in *Cavalier v. Pope* (1) did not govern such a case. The court ought to look at all the circumstances and to say that a duty was owed to the plaintiff and to the other members of the family named on the application form, and that there was a breach of that duty, i.e., negligence, which led to the injury which the plaintiff sustained.

The duties of a requisitioning authority and the position which arises in circumstances such as these require consideration. In *Southgate Borough Council v. Watson* (2) the decision of the Court of Appeal was ([1944] 1 All E.R. 603):

"The clerk of the respondent council had been authorised by the Minister of Health to requisition empty houses as the agent of the Minister, pursuant to the Defence (General) Regulations, for the purpose of providing accommodation for persons rendered homeless by enemy action. The appellant, being such a person, in March, 1941, was provided with a house which had been left vacant by its owner. Shortly after being put into possession the appellant was informed that he would be required to pay a reasonable rent, but no other terms were ever suggested. The rent was fixed at 16s. 6d. per week and had been paid weekly. In 1944 the owner of the house desired

to return and the respondent council brought proceedings to recover possession of the premises. The appellant contended that in the circumstances his occupation was a tenancy and that he was protected by the Rent Acts: Held: no tenancy had been created and the appellant was not entitled to the protection of the Acts."

SCOTT, L.J., said (*ibid.*):

"The question in the case was and is, whether that competent authority had power under the Defence (General) Regulations to create a tenancy, turning himself into a landlord and making the person who was put into the house, because he had by enemy action lost possession of his own, a tenant. The county court judge gave a very simple, short and entirely sound judgment, saying that no tenancy had been created, and the appeal is from that judgment. I think it was entirely right. The ground of defence put forward is that, if the tenancy was created, as contended, the house being of a rateable value within the Rent and Mortgage Interest Restrictions Act, 1939, the appellant, as a person accommodated by the local authority, acting as competent authority, by the use of these requisitioned premises, thereby became a tenant within the meaning of the Rent and Mortgage Interest Restrictions Act, so that he gained the right to remain there until turned out pursuant to those Acts. It would have been a great injustice to the owner of the house, but that is neither here nor there. It is quite clear that no tenancy was created and that defence, the only defence, entirely fails. The appeal must be dismissed with costs."

That view has been followed ever since. In *Errington v. Errington & Woods* (3) DENNING, L.J. ([1952] 1 All E.R. 153-156), referred to several decisions, and in particular (*ibid.*, 154) to the words of LORD GREENE, M.R., in *Booker v. Palmer* (4) ([1942] 2 All E.R. 677):

"To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind.' Those emphatic words have had their effect. We have had many instances lately of occupiers in exclusive possession who have been held to be not tenants, but only licensees . . .";

and the learned lord justice referred to *Minister of Health v. Bellotti* (5), *Southgate Borough Council v. Watson* (2), and *Minister of Agriculture & Fisheries v. Matthews* (6).

When premises are requisitioned by a competent authority, and the competent authority allow homeless people to go into them, no tenancy is created. The requisitioning authority are in possession, and they allow the person, or persons, the use of those premises. The purpose of the requisition is, not to let a house to a homeless person, but to provide accommodation for him, i.e., to allow him the use of it. Counsel for the defendants submits that in these circumstances no duty is owed by the requisitioning authority to anyone except the person who signs the agreement, which, as I have already pointed out, is not an agreement of tenancy, but an agreement covering the use of the rooms in question. During the course of the argument I wondered what the position would be in a case of (say) ten exiles, all of different families, or ten soldiers who had occupied and for whom a place was found in this way. Someone has to be responsible for the outgoings falling due week by week or month by month. Someone, somebody, enters into an agreement of some kind. Is it right to say in such a case that no duty is owed to anyone except to the one who signs the agreement? I cannot think it is. Surely there must be a duty to act reasonably in regard to all those for whom accommodation is found, or, at least, to take reasonable care of the

A premises. What is reasonable care depends on all the circumstances. If a requisitioning authority, doing the best they can, take over a house in bad repair when accommodation has to be found urgently, it may be that they cannot do, or be expected to do, very much. Those who enter into the house know its condition, and, it may be, the measure of duty is not very high. In the present case the requisitioned house was in Elm Park Gardens, a well-known part of Chelsea. After the plaintiff's family had been there about two years, the plaintiff pointed out that there was a crack and a bulge in the ceiling. Two men made an inspection, and they said something to the effect that all was right, and the plaintiff and her husband and family remained there. I do not suppose they had anywhere else to go—the correspondence shows some of the difficulties. After another six months, a large part of the ceiling fell on and injured the plaintiff. In those circumstances, can it be said, first, that no duty was owed to the plaintiff, and, secondly, if such a duty was owed, that there was not evidence on which the decision of CASSELS, J., that the defendants failed in their duty, can be supported?

B It seems to me on the first point that, when the defendants, the requisitioning authority, are told that the premises are required for the use of five people who are named on the application form, and those five people go to live on the premises, each of them is in the same position as a licensee, and that the court ought not to look on the one who signs the agreement as the licensee to the exclusion of the others. The purpose of the requisitioning in this case was the use of the requisitioned premises by the persons named in the application, and it appears to me that a duty of care was owed by the requisitioning authority to each one of the persons so named and accommodated. Did the defendants fail in the duty which they owed? The duty varies according to the circumstances. DENNING, L.J., said in *Hawkins v. Coulsdon & Purley Urban District Council* (7) ([1954] 1 All E.R. 106):

C “What is reasonable care . . . depends on all the circumstances of the case. The relevant considerations include all those facts which could affect the conduct of a reasonable man and his decision on the precautions to be taken: see *Paris v. Stepney Borough Council* (8) per LORD NORMAND ([1951] 1 All E.R. 48)”;
 E

and in 1923 in *Mersey Docks & Harbour Board v. Procter* (9), a case dealing with the duty owed to a licensee, LORD SUMNER stated the position of a licensee, and in the middle of the paragraph used these words ([1923] A.C. 274):
 F

“As usual in cases of duties of care, the reasonable man is the standard on both sides.”

G The plaintiff saw a crack in the ceiling and a bulge which she pointed out to the rent collector. The defendant sent two men, who, I assume, were competent men, to inspect, and they did the inspection they thought necessary. They said something to the effect that it was all right, and nothing was done. After the accident a further inspection was made by someone on behalf of the defendants who gave evidence. Mr. Harbourn said:

H “We can generally guess what caused it to fall—the key breaking. Before we test we know that it is the key that has gone and that is the cause of the fall. Q.—But was there anything to indicate to you what had broken the key? A.—No. Q.—Was there any sign of excessive water? A.—No; it was quite dry there. Q.—This may appear to you to be a silly question, but is there anything which helped you to see whether there had been a crack in the plaster before it fell? A.—Well, I can enlighten you on this. It was a new patch of plasterwork—that is, what we call new; about twelve years old . . . Any ceiling is liable to fall although it looks good. There need not be any cracks in the ceiling, but the key can be gone and it

will fall down in bulk. You would not know until you tested. That is why we make tests."

The plaintiff had no expert knowledge on this subject. Because of her complaint the defendants sent people who made some sort of tests. Either the test they made cannot have been sufficient, or the defendants delayed unduly to do the repairs which were necessary. In cross-examination Mr. Harbour was asked:

"You have told my Lord that the ceiling with a crack or two in it may or may not be dangerous according to whether the key has been affected? A.—Yes, that is right. Q.—Suppose it has a few cracks in it—quite large cracks—and in addition to that it is bulging? A.—If it is bulging you do not need to test; you know that has got to come down naturally. Q.—If it has got a bulge, that would indicate to you as an experienced man that the key has gone? A.—Yes, definitely."

Those whom the defendants sent to inspect ought to have discovered that the ceiling was dangerous. There is nothing to show that the plaintiff knew that it was dangerous. She was entitled to rely on what was said by the defendants' men. She thought it her duty to point out to those responsible for repairs that there was a cracked ceiling. Six months later the ceiling collapsed and she was hurt. In those circumstances, it appears to me that CASSELS, J., was entitled to hold, as he must be taken to have held, that there was in the ceiling a danger of a kind which was not appreciated by the plaintiff (though she knew of the crack), and that the defendants had not done what they ought to have done after she pointed out the crack. They could have said: "You must not remain under that crack; it is dangerous." They did not do that. They could have put someone on to repair the crack where this patch was, and the accident would not have happened. In the circumstances, it seems to me that the defendants did owe a duty to the plaintiff, and they failed to perform the duty which they owed to her; in other words, there was negligence on their part, and she is entitled to the judgment in her favour given by CASSELS, J. I do not think it necessary to go into other points raised. The decision is given on the facts of this case, and I have been anxious not to say anything which might suggest that there is a wider duty on the defendants as a requisitioning authority than that stated. In my judgment, the appeal should be dismissed.

DENNING, L.J.: During the nineteenth century a doctrine was current in the law which I will call the "privity-of-contract" doctrine. It was thought that, if a defendant became connected with the matter because of a contract he had made, his obligations were to be measured by the contract and by nothing else. It was said that he owed no duty of care to anyone who was not a party to the contract. This doctrine received its quietus by the decision of the House of Lords in *Donoghue v. Stevenson* (10), but it has been asserted again before us today. We must, I think, firmly resist the revival of this out-worn fallacy. The duty of the defendants here arose, not out of contract, but because, as the requisitioning authority, they were in law in possession of the house, and were in practice responsible for the repairs. This practical responsibility meant that they had control of the house for the purpose of repairs, and this control imposed on them a duty to every person lawfully on the premises to take reasonable care to prevent damage through want of repair. What is reasonable care depends on all the circumstances of the case. This is borne out by the decision of this court in *Huckles v. Coudsdon & Purley Urban District Council* (7).

There is no doubt in this case that the local authority did not take reasonable care. They were warned of the defect and did not remedy it within a reasonable time. It was said that they were not liable because the plaintiff knew of the defect, or, at all events, had notice of it. She knew that the ceiling was cracked and had a bulge in it. Indeed, she herself, or her husband, had drawn it to the attention of the rent collector. It was said that that knowledge disentitled her

A to recover on the authority of *London Graving Dock Co., Ltd. v. Horton* (11). I recognise that that case is applicable to licensees as well as to invitees, but I think it has been misunderstood. In my judgment, knowledge or notice of the danger is only a defence when the plaintiff is free to act on that knowledge or notice so as to avoid the danger. LORD PORTER, in *Horton's* case (11), made it clear ([1951] 2 All E.R. 5, 6) that the plaintiff, to be disentitled, must not only know of the danger, but must "accept the risk" of it, or, as he put it (*ibid.*, 6), the man must "undertake the risk" of performing his task with full appreciation of the danger. A man can hardly be said to accept the risk, or to undertake the risk, when he is not free to avoid it.

B The point in *Horton's* case (11) which, I think, has been overlooked was that the plaintiff probably had a remedy under his contract of service. Both LORD PORTER and LORD NORMAND appear to have thought that he would have had a greater prospect of success if he had sued his employers instead of the occupier. A complaint had been made to his employers' foreman about the condition of the staging as well as to the occupier's chargehand. There was ground for thinking that the employers were negligent in requiring the men to go on using the staging in its dangerous condition, and were responsible to the plaintiff accordingly. C Once this is realised, then the reason why the plaintiff failed to recover becomes clear. He ought to have sued his employers and not the occupiers. The majority of their Lordships thought that, if the plaintiff chose to sue the occupiers instead of his employers, he must be regarded, in proceedings against the occupiers, as free to avoid the danger, and he was disentitled, therefore, to sue them. This is shown by what LORD NORMAND said (*ibid.*, 11):

D "The sufferer must make up his mind whether to sue as an invitee or as an employee under his contract of service. He cannot, in my opinion, sue as an invitee and at the same time found on his contract of service as restricting his freedom to act on a warning of unusual danger given to him by the invitor."

E In cases where there is no contract of service, the question whether the plaintiff was free to avoid the danger depends on the circumstances of the case. LORD MACDERMOTT (*ibid.*, 16) gave an illustration where the plaintiff was not so free, the justice of which is, I think, beyond doubt.

F If knowledge or notice is only a bar in so far as the party is free to act on it, I ask myself in this case: Was the plaintiff in a position to act on her knowledge of the defective ceiling, so as to avoid the danger of it? She and her husband were housed by the defendants because they were homeless, or, at all events, had not enough room in which to live. They had nowhere to go, and the accommodation provided by the requisitioning authority was limited to their bare needs. Can anyone reasonably say that she was free to give up the use of the kitchen in this house simply because the ceiling had a crack in it and was bulged? G In my judgment, she was not free to avoid the danger. She had to stay there and live in her kitchen. Although she had notice of the danger, it does not disentitle her from recovering for the negligence of the defendants. An interesting parallel can be seen in the case to which we were referred by counsel for the plaintiff of *Porter v. Jones* (12). I agree, therefore, that this appeal should be dismissed.

H MORRIS, L.J.: I have reached the same conclusion. The defendants were not in a position to grant a tenancy, and it is clear that they did not grant a tenancy. A family was in need of accommodation, and, doubtless, other families were in similar need. The defendants considered the position of this family, which consisted not only of the plaintiff and her husband, but also of the children; they considered the accommodation they possessed and the means of the family, and, on the information before them, they came to the conclusion that they should give accommodation in premises which they had requisitioned.

It was possible for the family to make payment, and the amount of the payment was calculated having regard to the particular facts and the situation of the members of the family. It was necessary to make some agreement for the appropriate amount to be paid, and the agreement was made with the plaintiff's husband. In it the words used were that the defendants gave their licence and authority to occupy. It seems to me that the defendants were giving licence to the members of the family to enter on the rooms specified, and that they became licensees of the defendants. The position thereafter was that in the early part of 1951 the plaintiff noticed a state of affairs in regard to the ceiling in her kitchen, of which she gave notice. It was not for her to have the requisite knowledge to determine whether that state of affairs constituted a danger or not. When representatives sent by the defendants to examine the ceiling had looked at it, made some observation, and gone away, it was reasonable for the plaintiff thereafter to be of the opinion that she would be told if there was a state of danger. The representatives of the defendants had the material before them which enabled them to say that it was dangerous, and they had every opportunity to examine, to test, and to observe, and all the facts were within their knowledge. It seems to me, therefore, that there was ample material to support the view that the defendants, through their agents, knew of a danger, and that they were under a duty to warn their licensees of that danger, and that they failed to perform that duty. I, therefore, think that this appeal fails.

Appeal dismissed.

Solicitors: *William Charles Crocker* (for the defendants); *Pennington & Son* (for the plaintiff).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. SALISBURY AND AMESBURY JUSTICES. *Ex parte* GREATBATCH.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, J.J.),
May 12, 1954.]

Justices—Procedure—Right of accused to claim trial by jury for summary offence—Need for accused to be expressly informed of right—Consent by solicitor to summary trial on behalf of accused—Magistrates' Courts Act, 1952 (c. 55), s. 25 (3).

Where a person charged before justices with a summary offence is entitled to claim to be tried by a jury, he must be informed specifically of his right and asked whether he wishes to be so tried and it is not a compliance with the Magistrates' Courts Act, 1952, s. 25 (3), for justices merely to ask the accused whether he wishes to be tried summarily.

Per curiam: If the accused is represented by counsel or solicitor who, in his presence and on his behalf, elects for summary trial when told of the right to trial by jury, that election is binding on the accused unless he contradicts it at the time.

FOR THE MAGISTRATES' COURTS ACT, 1952, s. 25 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 32, p. 443.

Cases referred to:

- (1) *R. v. Cockshott*, [1898] 1 Q.B. 582; sub nom. *R. v. Cockshott, etc.*, *Southport J.J.*, *Ex p. Rickerby*, 67 L.J.Q.B. 467; 78 L.T. 168; 62 J.P. 325; 33 Digest 319, 345.
- (2) *R. v. Quinn. Ex p. Halstead*, (1943) (referred to 107 J.P. Jo. 459).

MOTION for order of certiorari.

On Nov. 24, 1953, the applicant, Sidney Colwell Greatbatch, appeared before the justices for the petty sessions division of Salisbury and Amesbury sitting at Salisbury charged with dangerous driving contrary to the Road Traffic Act, 1930,

s. 11. After evidence had been given, the applicant was convicted of the offence and fined £10 and ordered to pay £3 2s. 4d. costs. On an application for an order of certiorari to bring up and quash the conviction on the ground that there was

"want of jurisdiction by virtue of the disregard by the said justices of the form of procedure established by the Magistrates' Courts Act, 1952, s. 25".

the applicant by his affidavit alleged that the charge was not read out to him, that he was not asked to plead, and that he was not informed by the court of his right to be tried by a jury in accordance with the Magistrates' Courts Act, 1952, s. 25. It appeared that after the charge had been read out to the applicant the chairman asked him: "Do you wish to be tried summarily?" and that his solicitor answered for him that he did wish to be so tried, but that he was not informed at any time of his right to be tried by a jury.

R. C. H. Briggs for the applicant.

Rountree for the respondents.

LORD GODDARD, C.J., stated the facts and continued: The point that arises is a very short one. The offence of dangerous driving can be dealt with summarily or on indictment. A separate penalty is provided if it is dealt with on indictment and justices can, therefore, always send the case for trial if they think it deserves it. As the defendant is liable on conviction to six months' imprisonment on summary conviction, he has a right to claim trial by a jury. The case would formerly have fallen within the Summary Jurisdiction Act, 1879, s. 17, under which certain formalities had to be observed before the accused person was called on to plead. The law is now contained in s. 25 of the Magistrates' Courts Act, 1952, which is a consolidating Act, and does not really amend the law, although some sections are put in different language. Section 25 provides:

"(1) Where a person who has attained the age of fourteen is charged before a magistrates' court with a summary offence for which he is liable, or would if he were adult be liable, to be sentenced by the court to imprisonment for a term exceeding three months, he may, subject to the provisions of this section, claim to be tried by a jury, unless the offence is an assault or an offence under s. 1 of the Vagrancy Act, 1898. (2) Where under the preceding sub-section or any other enactment a person charged with a summary offence is entitled to claim to be tried by a jury, his claim shall be of no effect unless he appears in person and makes it before he pleads to the charge; and, where under any enactment the prosecutor is entitled to claim that the accused shall be tried by a jury, his claim shall be of no effect unless he makes it before the accused pleads to the charge."

So that, so far as the accused is concerned, the charge is *prima facie* a summary one, but if he appears, and only if he appears, he has the right to claim trial by a jury. Sub-section (3), which is the material provision in this case, provides:

"A magistrates' court before which a person is charged with a summary offence for which he may claim to be tried by a jury shall, before asking him whether he pleads guilty, inform him of his right and, if the court thinks it desirable for the information of the accused, tell him before what court he would be tried if tried by a jury and explain what is meant by being tried summarily; and shall then ask him whether he wishes, instead of being tried summarily, to be tried by a jury."

Nothing can be clearer than those words. They are taken from s. 17 (2) of the Act of 1879. That sub-section laid down a formula and put in inverted commas the exact question which the court was to ask, but it is substantially reproduced in s. 25 (3). The important words are: "inform him of his right" and the justices are to ask the accused whether he wishes to be tried by a jury instead of being tried summarily. I do not blame the justices in this case because no injustice was done as the applicant was in court represented by a competent

solicitor and on the chairman of the justices asking him: "Do you wish to be tried summarily?", his solicitor said for him that he did wish to be so tried.

Ever since *R. v. Cockshott* (1) this court has insisted on the provisions of s. 17, now s. 25, being strictly carried out, for the reason, among others, that according to the decision of WRIGHT, J., in that case—and following other higher authorities on matters relating to statute law—justices who did not put that question had no jurisdiction to try the case at all.

The proceedings in this case took place last November, and the defendant did not apply for leave to move for certiorari until February. I have no doubt that, by that time, the memories of the justices and their clerk—who will have had a great many cases to deal with in the interval—may be dim, but I think that it is clear from the affidavits which we have seen that this court ought to find that the question that was put to the defendant was: "Do you wish to be tried summarily?". I observe that the affidavits filed on the part of the respondents in this case all say: "Everything was done as we always do it; we do this in the ordinary way". Therefore, it is most essential that not only should the justices of the Salisbury and Amesbury Division but all other justices—and that is where the importance of this case lies—clearly remember that the question which has to be asked is not: "Do you wish to be tried summarily?" but "Do you wish, instead of being tried summarily, to be tried by a jury?". That is what the defendant is to be asked. No one would suppose for a moment that the solicitor in this case did not understand the position and I should think without doubt that he said to the applicant: "I hope the Bench will deal with the case", and as soon as he had the chance of electing to have the case dealt with summarily, he took it. But we must emphasise that all justices must follow the provisions which are laid down quite unequivocally in s. 25 (3). First, they must tell the defendant that he has a right to be tried by a jury, and, secondly, they must ask him whether he wishes to be tried by a jury. I do not think, provided that the question is asked whether he wishes to be tried by a jury, that any particular form of words need be used, but he must be asked whether he wishes to be so tried. As the evidence shows here that that question was not put to the applicant, and does not show that he was informed of his right to be tried by a jury, we reluctantly—because it is a technical point with little merit—must quash the conviction.

Another point was argued. When the justices said: "Do you agree to be tried summarily?", the question was answered by the solicitor who said: "Yes, my client accepts this court and pleads Not Guilty", and he said that in the presence of his client. It is said that the solicitor cannot answer the question, and some authority has been cited to us. There seems to have been an expression of opinion, obiter, in a case which is unreported, but is referred to in 107 J.P. Jo. 459, where it is said that in *R. v. Quinn, Ex p. Holstead* (2), CHAMBERS, J., said:

"The words have to be addressed to the accused, and an advocate cannot consent."

I do not agree with that. There is nothing said in s. 25 about who is to answer the question, and no answer need be made. If the defendant is asked if he desires to be tried by a jury and he does not answer, the case will proceed at once as a summary offence unless the justices, knowing that it is a very serious offence, make up their minds to commit for trial, in which case they would not have asked the question but would have treated the matter as an indictable offence. I can see no good reason why, when the proper question is asked, the solicitor or counsel in the presence of his client cannot answer the question, because, as I say, the statute does not make it obligatory on the defendant to answer. If he does not appear and he need not appear, it is not a case in which the defendant is bound to appear—the question would not be put at all. The defendant must appear himself if he claims trial by a jury, and he can

answer himself, but I can see no reason why his advocate in his presence cannot answer for him. He can, of course, contradict his advocate at once, but if he does not and the case proceeds by consent, shown by his silence, I cannot see any difficulty. We quash the order, however, on the ground that the defendant was not informed of his right to be tried by a jury, and the specific question: "Do you desire to be tried by a jury?", was not put.

A **HILBERY, J.:** I agree. Justices will not find themselves in any difficulty in this matter if they adopt the formula which was used under the Summary Jurisdiction Act, 1879, s. 17 (2), for all the years that that Act was in force. There is a form given there which, if it is followed, enables the justices to comply precisely with the requirements of s. 25 of the Act of 1952. The form appearing in s. 17 (2) was that the court should address the accused in the following manner:

B "You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury; do you desire to be tried by a jury?"

I agree that the order must be quashed for want of jurisdiction.

C **DONOVAN, J.:** I agree. It may well be that this applicant, represented as he was by a solicitor, knew that he had a right to be tried by a jury and that these proceedings are an after-thought following conviction. But, even so, that does not absolve a court of summary jurisdiction from complying with the provisions of the Magistrates' Courts Act, 1952, s. 25 (3). Those provisions require the justices inter alia to inform the accused of his right to be tried by a jury, and I think the conclusion to be drawn from all the affidavits is that that was not done here. All that was done—and, apparently, as a matter of practice—was to say to the accused: "Do you wish to be tried summarily?". That is asking him whether he wishes to be tried by the justices. It is not telling him that he has a right to be tried by a jury. If a man has a right to be tried by A, he is not told of that right by being asked if he wishes to be tried by B. It is important that the Act should be strictly followed in this respect, though I agree that no particular form of words need be used to state or explain the right of trial by jury.

E I also agree that, if an accused person is represented by counsel or solicitor and that counsel or solicitor on his behalf and in his presence elects that his client shall be tried summarily or by a jury, that election is effective, and individual election by the client is not essential.

F *Order of certiorari issued.*

Solicitors: *Beckingsales*, agents for *William Bache & Sons*, West Bromwich (for the applicant); *Taylor, Jelf & Co.*, agents for *Wilson & Sons*, Salisbury (for the respondents).

[*Reported by* MICHAEL MALONEY, ESQ., *Barrister-at-Law.*]

DAVIES v. HALL.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), April 30, May 3, 1954.]

Settled Land—Leasing powers of tenant for life—Reservation of "best rent"—Onus of proof—Lease for less than three years—Need for condition of re-entry—Settled Land Act, 1925 (c. 18), s. 42 (1) (ii), s. 42 (5) (ii), s. 110 (1).

A tenant for life granted to the defendant a weekly tenancy of premises to which the Rent Restrictions Acts applied. After the death of the tenant for life, the plaintiff, the sole surviving trustee of the settlement, in an action for possession of the premises, sought to raise a point that had not been pleaded, namely, that the tenancy had not reserved the best rent within the Settled Land Act, 1925, s. 42 (1) (ii), and that the onus of proving that the rent reserved was the best rent was on the defendant.

Held: since the point concerning the best rent had not been pleaded, it was not open to the plaintiff to raise it in argument: and, even if the point had been open to the plaintiff, the onus of proving that the rent reserved by the tenancy was the best rent was not on the defendant, who could rely on the provisions of the Settled Land Act, 1925, s. 110 (1).

Kisch v. Hawes Bros., Ltd. ([1935] Ch. 102), explained.

Per ROMER, L.J.: *semble*, s. 42 (5) of the Settled Land Act, 1925, is a comprehensive code in relation to leases for less than three years with the result that the requirement in s. 42 (1) (iii) as to re-entry in regard to longer leases is not introduced into those short leases.

FOR THE SETTLED LAND ACT, 1925, s. 42 (1), and s. 110 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 23, pp. 110 and 233.

Case referred to:

(1) *Kisch v. Hawes Bros., Ltd.*, [1935] Ch. 102; 104 L.J.Ch. 86; 152 L.T. 235; 31 Digest, Replacement, 523, 6450.

APPEAL by the defendant from an order of His Honour JUDGE BENSLEY WELLS at Marylebone County Court, dated Mar. 18, 1954.

The plaintiff, Walter Everett Davies, was the sole surviving executor and trustee of the will of Thomas Oliver, deceased, who died in 1930. At the date of his death Thomas Oliver was the lessee of a dwelling-house known as Trentishoe, 179, Oxford Gardens, North Kensington, W.10, to which the Rent Restrictions Acts applied, and by his will he devised and bequeathed the lease of the premises to his trustees on trust to permit his wife, Frances Eliza Oliver, to have the use and enjoyment thereof during her life and after her death on the trusts set out in the will. After the death of the testator, his widow, Mrs. Oliver, continued to reside in the dwelling-house until about the end of 1939, when she went to live elsewhere until her death on Feb. 27, 1953. A vesting assent relating to the dwelling-house was never executed in favour of Mrs. Oliver. Between December, 1946, and February, 1947, without the consent of the plaintiff and his co-trustees, Mrs. Oliver let a part, and later the whole, of the dwelling-house to the defendant, F. T. Hall, who went into possession of the same as a weekly tenant at a rent of 37s. 6d. per week which was subsequently increased to £2 15s. per week. In an action by the plaintiff for possession of the premises, the defendant claimed the protection of the Rent Restrictions Acts, 1920 to 1939, contending that the letting to him by the tenant for life, Mrs. Oliver, was a lawful letting.

After the evidence had been called the plaintiff submitted that there was no evidence that the letting had reserved the best rent within the Settled Land Act, 1925, s. 42 (1) (ii), and that the onus was on the defendant to show that the letting was at the best rent. This point had not been pleaded.

The county court judge held that in the circumstances the onus was on the defendant, and that, since the defendant had called no evidence, he must assume that the letting had not reserved the best rent. Accordingly, the letting was

not within the power of Mrs. Oliver as tenant for life to grant under the Settled Land Act, 1925, and the defendant's tenancy was not protected as against the plaintiff.

Duthie for the defendant.

M. J. Fox for the plaintiff.

A **SOMERVELL, L.J.**, stated the facts and continued: It is common ground that there was no indication in the pleadings of the point that there was no evidence that the letting was at the best rent and no question was put to the defendant, who gave evidence, as to the rent. The provision with regard to best rent is contained in the Settled Land Act, 1925, s. 42 (1), which provides:

B "Save as hereinafter provided, every lease—(i) shall be by deed, and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease; (ii) shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case".

C In sub-s. (5) there is another reference to best rent:

"A lease at the best rent that can be reasonably obtained . . . may be made . . . (ii) Where the term does not extend beyond three years from the date of the writing, by any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent".

D The learned judge held that he was bound by a statement in the judgment of FARWELL, J., in *Kisch v. Hayes Bros., Ltd.* (1) ([1935] Ch. 109, 110) to hold that the onus of showing that the lease reserved the best rent was on the defendant in the circumstances of this case, and that, as the defendant had called no evidence, he must proceed on the basis that the rent was not the best rent. I have come to the conclusion in the first place that this point is not and was not open to the plaintiff, because it was not pleaded. It seems to me plain that a matter of this sort must be raised in the pleadings by the party who seeks to raise it, because it is a question on which evidence would have to be called. I do not accept the suggestion that, wherever the onus may be, notwithstanding that the point was not raised on the pleadings the defendant must come into court with all the necessary evidence to show that all the conditions in the Act have been fulfilled.

F That would be enough to dispose of the case, but, as the learned judge based his decision on the statement in the judgment of FARWELL, J., to which I have referred, I would like to say a word about the passage, although there are some points raised in it which it is unnecessary for me to consider. I will read the headnote (*ibid.*, 102):

G "A tenant for life by deed granted a lease of certain premises to the defendants to take effect more than twelve months after its date. The grantor died, and her successor sued for possession of the premises. The defendants pleaded possession under Ord. 21, r. 21, but were allowed to amend their defence so as to rely on the lease granted to them by the plaintiff's predecessor and claim protection under s. 152 (1) of the Law of Property Act, 1925:—
H Held, that the plea of possession denied plaintiff's title, and therefore that was a forfeiture which entitled her to re-enter. Held, further, that assuming there had been no forfeiture, it was for the defendants to show that the lease granted to them was valid and within the power of the then tenant for life to grant. This they had failed to do, and the plaintiff was therefore entitled to the relief claimed".

On this question of best rent, the Settled Land Act, 1925, s. 110 (1), provides:

" On a sale . . . or other disposition, a purchaser dealing in good faith with a tenant for life or statutory owner shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life or statutory owner, and to have complied with all the requisitions of this Act "

From the argument as set out in the report it is plain that this point as to the best rent was taken with the other points. First of all, having said that the lease was, on the face of it, in contravention of the Settled Land Act, 1882, it was then said in argument by counsel (*ibid.*, 105):

" The defendants say the lease takes effect in equity, and it is for them to show that the rent reserved was the best rent "

The learned judge interposed (*ibid.*):

" The lease of 1919 was a lease which . . . is, on the face of it an invalid lease: the burden of proof is therefore on the defendants "

Then counsel for the defendants relied on the Settled Land Act, 1882, s. 54, which was the predecessor of s. 110 (1) of the Act of 1925. The learned judge, having decided the case on the grounds set out in the headnote, went on to consider whether the other defects alleged were covered by the Law of Property Act, 1925, s. 152 (1). He then said (*ibid.*, 109):

" . . . even assuming that [s. 152 applied], the section, in my judgment, does not assist the defendants, and for this reason. It is essential, in my judgment, for the defendants to prove that apart from the fact that the lease is to take effect more than twelve months after its date it is otherwise such a lease as Mrs. Ramus [the tenant for life] could properly have granted on Dec. 25, 1919, and in this respect s. 54 of the Settled Land Act, 1882, does not assist them "

I quite agree, substituting s. 110 of the Act of 1925 for s. 54 of the Act of 1882, that, if a party cannot bring himself within the Act, s. 110 (1) does not, *prima facie*, apply to the transaction. I think the passage in the judgment is difficult to follow and it may be that the various facts and admissions in argument so far as this particular point was concerned are not apparent either in the judgment or in the argument of counsel as reported. I think that it would be wrong to treat that sentence in the judgment of FARWELL, J., as of any general application. I think the facts must have been very special to put the onus on the defendant. *Prima facie*, if one had to consider the question under the Act, it would be proper to rely on s. 110 (1), and in any event it would be for the party who is attacking a disposition on this type of ground to produce at any rate a *prima facie* case to show that the disposition was defective. I think it right to say that because I think the learned county court judge regarded this decision as laying down some general principle as to the onus of proof in this class of case which, I am quite certain, FARWELL, J., did not intend to do. For these reasons, I would allow the appeal.

BIRKETT, L.J.: I am of the same opinion. I do not wish to add anything to what my Lord has said about the judgment of FARWELL, J., in *Kisak v. Haines Bros., Ltd.* (1). The learned county court judge states clearly in his judgment the one point on which he decided this case. He said:

" I am satisfied by the correspondence and other evidence put before me that the lease given by Mrs. Oliver to the defendant was within her powers as tenant for life under the Settled Land Act, 1925 (s. 41 and s. 42) except in one respect, viz.:—there is no evidence that the rent obtained from the defendant was the 'best rent'. I have no reason to think that the rent obtained was

not a perfectly fair and adequate rent, but there is no evidence at all before me with regard to the matter and in the circumstances I feel unable to say that I am satisfied that the 'best rent' was obtained . . . For this reason, and for this reason only, I have come to the conclusion that my judgment must be for the plaintiff."

A It is plain that this particular point was not pleaded. It seems singular that a learned county court judge should decide a case on one point when that point was not pleaded. Furthermore, from an examination of the note of the evidence, while "best rent" was certainly referred to by counsel in connection with the Settled Land Act, 1925, s. 110, it is clear that no evidence was tendered concerning it, and, most important of all, the submission about "best rent" was made for the first time when all the evidence was concluded. It is quite obvious that had B the defendant been forewarned that this was the crucial point of the case he could have come prepared to deal with it; but in the absence of any reference to it in the pleadings and having regard to the way the matter was raised, he clearly had no opportunity of doing so. This matter not having been pleaded, it was not open to the plaintiff to raise it. I agree, therefore, with the judgment which my Lord has delivered.

C ROMER, L.J.: I also agree. I have nothing to add on the question of the deficiency in the pleadings which, plainly, I think, disabled the plaintiff in this case from seeking to impeach the letting made by Mrs. Oliver, the life tenant, on the ground that it failed to reserve the best rent. Such a matter as that is clearly one of evidence and must be put in issue if anybody who is concerned to challenge the validity of a lease desires to attack it on that ground.

D This morning, counsel for the plaintiff suggested that the agreement to grant a tenancy by Mrs. Oliver was invalid on the face of it because it did not contain any provision for re-entry on failure of the tenant to pay the rent reserved. He relied on the terms of the Settled Land Act, 1925, s. 42, which prescribes the conditions on which a tenant may grant leases of the settled estate. Section 42 E (5) (ii) is the provision which applies to the present case because the tenancy which Mrs. Oliver granted was a weekly tenancy and, therefore, was for a term not extending beyond three years. Section 42 (5) provides:

F "A lease at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made—(i) Where the term does not exceed twenty-one years—(a) without any notice of an intention to make the lease having been given under this Act; and (b) notwithstanding that there are no trustees of the settlement; and (ii) Where the term does not extend beyond three years from the date of the writing, by any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent."

G Counsel says that notwithstanding those provisions the requirements which appear in s. 42 (1) nevertheless must be observed even in regard to tenancies for less than three years. One of those requirements is prescribed by s. 42 (1) (iii), that the lease

H "shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days."

He says that the tenancy granted by Mrs. Oliver did not contain any provision for re-entry on non-payment of the rent and, therefore, is invalid on the face of it.

The matter has not been very fully argued and no authorities have been brought to our attention on the point, but I should be inclined to take the view myself that s. 42 (5) is a comprehensive code in relation to leases for less than three years with the result that the requirement as to re-entry in regard to longer

leases is not introduced into those short leases. Indeed, in regard to weekly tenancies, it would not be apt to have such a provision for re-entry because the tenancy may be determined at any time on non-payment of rent at a week's notice. Be that as it may, for my part I can see no reason why, if in fact the agreement was open to criticism in that respect, the defect, if any, was not cured by the Law of Property Act, 1925, s. 152 (1). I do not think, therefore, there is anything in that point.

I will add only just one word on *Kisch v. Hawes Bros., Ltd.* (1). The Settled Land Act, 1925, s. 110 (1), which corresponds to the Settled Land Act, 1882, s. 54, applies only in favour of a lessee who deals in good faith with a tenant for life who has let the settled estate. In *Kisch's* case (1) FARWELL, J., held that that section did not apply in favour of the tenant because the lease, on the face of it, was outside the powers of the tenant for life to grant. I think FARWELL, J., was accepting the argument of counsel where he said ([1935] Ch. 105):

"Under the Settled Land Acts the tenant for life is a trustee and s. 54 of the Settled Land Act, 1882, does not assist the lessee where the lease on the face of it is in contravention of the Act."

It would follow from that that it would be of no avail to the tenant to cure the particular defect in that case, which arose from the fact that the lease was to take effect in possession more than twelve months after its date, if the lease was one which was invalid by reason of the best rent not having been reserved, because, although s. 152 (1) of the Law of Property Act might cure the particular defect to which I have referred, there would still remain the question whether it was a proper lease in the matter of rent. If it were challenged, as, indeed, it was, then the tenant could not rely on s. 110 of the Settled Land Act, 1925, because, as I have already said, it could not be said of him that he was a person acting in good faith, the lease, on the face of it, being an improper one. Therefore, if the rent were challenged on the ground of insufficiency, he would have to prove as a matter of fact that the rent in fact was a proper rent for the life tenant to receive. I do not think FARWELL, J., was going any further than that. Certainly I do not think that he was suggesting as a general proposition that where an attack is made on a lease which has been granted by a tenant for life for reasons other than insufficiency of rent, the lessee cannot rely on s. 110. In my opinion, he could do so, provided that he had acted in good faith. I think the learned county court judge put a rather wider interpretation on what FARWELL, J., said than that learned judge intended his words to bear. I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *P. R. Kimber* (for the defendant); *Ellis, Peirs & Co.* (for the plaintiff).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

S. L. DANDO, LTD. v. HITCHCOCK AND ANOTHER.

[COURT OF APPEAL (Lord Goddard, C.J., Denning and Birkett, L.J.J.), April 8, 1954.]

Rent Restriction—Possession—Personal occupation—“Tenant or his . . . manager . . . to reside on the premises”—Residence by manager.

A A landlord let a dwelling-house subject to the provisions of the Rent Restrictions Acts to a tenant on an agreement which provided that: “Either the tenant or his present manager [A.P.] is to reside on the premises and not to part with the possession of any part thereof”. The tenant did not reside in the dwelling-house, but his manager, A.P., resided there. A.P. subsequently became his partner. Following notice to quit, the landlords brought an action to recover possession of the house.

B HELD: the Rent Restrictions Acts afforded protection only to a tenant retaining possession of a house for personal occupation as his home (though including in an appropriate case occupation by his wife living apart from him), and not to one using it, even within the contemplation of the tenancy agreement, for residence by his agent, and the landlords were, therefore, entitled to possession.

C Dictum of LORD WRIGHT in *Hiller v. United Dairies (London), Ltd.* ([1934] 1 K.B. 61), and *Skinner v. Geary* ([1931] 2 K.B. 546), applied.

Wabe v. Taylor ([1952] 2 All E.R. 420), distinguished.

AS TO PERSONS PROTECTED AS STATUTORY TENANTS UNDER THE RENT RESTRICTIONS ACTS, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 334, 335, paras. 400, 401; and FOR CASES, see DIGEST Supps.

D Cases referred to:

(1) *Hiller v. United Dairies (London), Ltd.*, [1934] 1 K.B. 57; 103 L.J.K.B. 5; 150 L.T. 74; 31 Digest, Replacement, 660, 7618.

(2) *Reidy v. Walker*, [1933] 2 K.B. 266; 102 L.J.K.B. 424; 149 L.T. 238; 31 Digest, Replacement, 660, 7617.

E (3) *Wabe v. Taylor*, [1952] 2 All E.R. 420; [1952] 2 Q.B. 735; 2nd Digest Supp.

(4) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 31 Digest, Replacement, 659, 7612.

(5) *Cove v. Flick*, (C.A., Dec. 17, 1953). Not reported.

F APPEAL by the landlords from an order of His Honour JUDGE DAYNES, at High Wycombe County Court, dated Feb. 1, 1954, dismissing an action by the landlords for recovery of possession of a dwelling-house subject to the Rent Restrictions Acts on the ground that, under the tenancy agreement, the dwelling-house had been let to the tenant for use as a residence by himself or his manager, Austen Paynter; that it was so used by his manager; and that the tenancy was, therefore, protected by the Rent Restrictions Acts.

G *Desmond Neligan* for the landlords.
de Piro for the tenant.

DENNING, L.J.: In 1945 a Mr. Parker let to the tenant a house called the Fassetts Farmhouse, with 1½ acres of land. The agreement provided that:

H “Either the tenant or his present manager Austen Paynter is to reside on the premises and not to part with the possession of any part thereof”.

The tenant never himself resided on the premises, but he let his manager, Mr. Paynter, reside there, and subsequently a partnership was arranged between them.

In 1953 the interest of Mr. Parker in the premises was bought by a company called S. L. Dando, Ltd., the present landlords. They gave notice to quit to the tenant and so determined the tenancy, and they now seek to recover possession of

the premises. The tenant claims the protection of the Rent Restrictions Acts, not because he is living there himself, but because Mr. Paynter is living there. Mr. Paynter himself is only a licensee and has no protection against the tenant, but the tenant claims to be entitled to the protection of the Acts because he says that occupation by Mr. Paynter is equivalent to occupation by himself, and for this purpose he relies on the clause in the agreement which I have read.

In my opinion, the principle on which this case should be decided was stated by LORD WRIGHT in *Heller v. United Dairies (London), Ltd.* (1), where he said ([1934] 1 K.B. 61):

"If the rights under the Acts which are given to the statutory tenant are, as this court has held in several cases, purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted".

If the tenant were enabled by the clause in this agreement to claim the protection of the Acts, it would mean that a limited company by a like clause could obtain protection, and that would be contrary to the principle involved in *Heller's* case (1). So, also, if the tenant could by the clause obtain the benefit of the Acts in respect of this house, he might do so in a similar way for half a dozen houses, and he might be statutory tenant of half a dozen. And if the tenant died and his widow succeeded, she might claim the statutory tenancy. Such consequences can never have been intended by Parliament, and I do not think the clause in the agreement can be admitted to have such an effect. The clause is not carried over into the statutory tenancy because it is not consistent with the provisions of the Act. It is contrary to the principle that the tenant is only protected so long as he himself retains possession, which means so long as he himself remains in personal occupation.

Some reference was made to the husband and wife cases. It is well established that, if a husband deserts his wife and leaves her in the house, the statutory tenancy does not come to an end. That is because of the particular relationship of husband and wife. The husband continues to occupy by his wife. She has an irrevocable authority from him to stay there. It remains the matrimonial home, though he is not living there. Those cases are on a special footing, and do not apply to this case.

Furthermore, I can well see that the court would not allow the landlord to avoid the Acts by taking someone as a nominal tenant, well knowing that the real tenant was to be somebody else. The court would then look to the realities of the situation. But, subject to cases of that kind, the only person protected under the Rent Restrictions Acts is the tenant, and he is only protected so long as it is his home. As GODDARD, J., said in *Reidy v. Walker* (2) ([1933] 2 K.B. 272):

"... the Rent Restrictions Acts were intended for the protection of a person's home, not for the protection of some other rights which he may have".

This case seems to me to be an attempt to protect the tenant in respect of some other rights, certainly not of a right in respect of his home. In my judgment, this appeal should be allowed, accordingly.

BIRKETT, L.J.: I agree. I do not pretend that any cases under the Rent Restrictions Acts are easy, and there were times when I was much attracted by the argument of counsel for the tenant. The learned county court judge in a careful judgment cited certain county court cases which supported the view he took and said that he did not know that any of them had been adversely criticised. He relied on the decision in *Wabe v. Taylor* (3) to which I was a party, and quoted from the judgment I gave. That was a husband and wife case, and I think it is commonly conceded that the husband and wife cases are in rather a

special category. In *Wabe v. Taylor* (3) a deserted wife had remained in occupation of the house, and had continued to pay rent to the landlord, although the rent book contained the husband's name. The facts in the case were special and I summarised them in this way. In 1950 the plaintiff (the landlord) knew the facts. He knew the wife was in possession. He knew the husband was then in Leicester. He had lived two doors away for most of his life, and he knew the exact position when he bought the premises. His wife, Mrs. Wabe, who collected the rents, gave evidence that she said to the wife: "What name shall I put on the rent book?" and the wife said: "Mr. Taylor". And so Mr. Taylor appeared on the rent book. The defendant paid the rent and fulfilled all the obligations for all that time.

SOMERVELL, L.J., who delivered the leading judgment, said ([1952] 2 All E.R. 422):

"I think the same conclusion might be arrived at by reason of the facts that the landlord bought with full knowledge that the husband had deserted the wife and that he subsequently accepted the rent from the wife. It might well be said he accepted her occupancy as that of the tenant husband".

HODSON, L.J., said:

"The husband's name was in the rent book but the rent was always paid by the wife, and I think the landlord has accepted the occupancy of the wife as that of the husband throughout. On this ground also I think the judgment of the county court judge can be sustained".

I said exactly the same thing, but what I did was to quote the passage from MEGARRY'S THE RENT ACTS, 6th ed., p. 155, which I again quote below. The difficulties, obvious though they be, are in reconciling the husband and wife decisions with the principle in *Skinner v. Geary* (4) and all the cases that have followed since, which was, as stated by DENNING, L.J., that the protection which the Acts afford is to the tenant in his own home. It is a personal thing, although that is not laid down in the Rent Restrictions Acts. Since *Skinner v. Geary* (4) and the famous judgment of SCRUTTON, L.J., it has never been doubted that that is the principle that runs through the Acts. I, therefore, quoted this passage:

"Such decisions present obvious theoretical difficulties, but a satisfactory result can perhaps be supported (at all events between the original parties) on the ground that by their agreement the parties have made occupation by the daughters or the manager equivalent to personal occupation by the tenant".

I was clearly citing that passage in support of the view which I and the other members of the court took, that on the facts of that case the landlord had accepted the deserted wife's occupation as the occupation of the tenant.

I can only regret that it was not possible to cite *Cove v. Flick* (5) in the Court of Appeal in full to the learned county court judge, though counsel very properly mentioned it, having been present in court and heard some of the argument. No particular reference is made to it in the judgment. In *Cove v. Flick* (5), where *Wabe v. Taylor* (3) came under discussion, SOMERVELL, L.J., who delivered the leading judgment, said:

"*Wabe v. Taylor* (3) was the case of a deserted wife and, so far as that is concerned, her position was, of course, a very special one and cannot assist the defendant in this case . . . Certainly I think what was said in *Wabe v. Taylor* (3) ought not to be regarded as having any general application beyond the facts of the case as there stated in BIRKETT, L.J.'s judgment".

DENNING, L.J., referred to the same matter in his judgment and also to *Hiller v. United Dairies (London), Ltd.* (1), a case of a limited company and

their manager. As I understand them, that case and the limited company cases proceed on the footing that, having regard to the doctrine that the protection the Acts afford is a personal one, a limited company cannot come within it. As GODDARD, J., said (*Poidy v. Walker* (2) ([1933] 2 K.B. 272)): "... its occupation can never acquire this domestic quality" and as SLESSER, L.J., said (*Hiller v. United Dairies (London), Ltd.* (1) ([1934] 1 K.B. 63)): "... they are outside the Act". ROMER, L.J., said (*Core v. Flick* (5)) that originally the word "perhaps" was in the passage from *MEGARRY* which I cited (*supra*), but had been dropped in later editions, and he thought it might be well if it was restored, meaning that it was very doubtful, in his view, whether the principle applied in *Wabe v. Taylor* (3) to a husband and wife could really be extended.

The argument put before us here is that this is the very case to which SOMERVELL, L.J., referred when he said: "The sort of case contemplated by MR. MEGARRY in that sentence can be dealt with when it arises". *Wabe v. Taylor* (3) decided that the occupancy of a wife can be regarded as the occupancy of her husband, the tenant. Counsel for the tenant seeks to extend that and to say that, having regard to the clause in the agreement, the occupancy of Mr. Paynter was here the occupancy of the tenant. It is difficult to make that extension without coming into conflict with the decisions in *Skinner v. Geary* (4) and following cases, notably the judgment of LORD WRIGHT in *Hiller v. United Dairies (London), Ltd.* (1) ([1934] 1 K.B. 61). I agree with the judgment and the conclusion of DENNING, L.J.

LORD GODDARD, C.J.: I agree. The Rent Restrictions Acts are intended and designed to protect tenants and tenants only. That there has been an inroad into that principle in the cases of husband and wife is, no doubt, true. I cannot help thinking that in those cases the shadow of the old common law doctrine that husband and wife are one in law has, possibly, consciously or unconsciously, affected the courts. But I do not think, with all respect to those decisions, that we ought in any way to enlarge them. The Acts put very considerable difficulties in the way of landlords, and circumscribe their legal rights to a very great extent. I do not think we ought by decisions to add to those difficulties or to go further than the declared object and policy of the Acts require, i.e., to protect tenants, and I think it cannot be denied that that means tenants who live in these houses. If a personal tenant does not live in the house, never intends to live in the house, and declares that his intention is never to live in the house, I can see no reason at all why his tenancy should be protected to enable him to keep in the house a manager or a partner or anyone else whom it may be convenient to have there. For these reasons I would allow the appeal.

Appeal allowed.

Solicitors: *Berrymans*, agents for *Allan James & Co.*, High Wycombe (for the landlords); *Capel Cure & Clarke* (for the tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re ST. MARY'S, TYNE DOCK.

[DURHAM CONSISTORY COURT (The Chancellor (Hylton-Foster, Esq., Q.C.)),
December 21, 22, 1953, February 1, April 12, 1954.]

Ecclesiastical Law—Ornaments—Aumbry—Tabernacle—Sanctuary gong and bells—Candlesticks—Incense—Confessional table and chair—Crucifix—Processional crucifix—Third Holy Table—Stations of the Cross—Statue of Virgin and Child.

By a petition dated Feb. 27, 1953, the incumbent and others petitioned for a faculty for the introduction of a statue of the Virgin Mary and the Child Jesus. By a further petition dated July 10, 1953, they sought a faculty for the introduction of certain articles and a confirmatory faculty for the retention of certain other articles.

HELD: (i) a tabernacle was an illegal ornament not authorised by the ornaments rubric, and must be removed with a ciborium therein contained.

(ii) an aumbry was not an illegal ornament and could be retained, reservation of the Sacrament having been sanctioned by the bishop.

Observations of CHANCELLOR VAISEY in *Re Altofts, Parish of* (July 4, 1941) and of CHANCELLOR ASHWORTH in *Re St. Mary the Virgin, Swanley* (Dec. 19, 1946), applied.

(iii) a sanctuary gong and sanctuary bells were illegal ornaments and must be removed.

Elphinstone v. Purchas (1870) (L.R. 3 A. & E. 66), applied.

(iv) the use of more than two candles on the Holy Table was not necessarily illegal and in the circumstances a faculty would be granted for the retention of six candle holders on the Table.

Re St. Saviour's, Walthamstow ([1950] 2 All E.R. 812) and *Re St. George's, Southall* ([1952] 1 All E.R. 323), applied.

(v) the ceremonial use of lights was illegal, but those candles required for light or for other than ceremonial use could be retained: *Martin v. Mackenochie* (1868) (L.R. 2 P.C. 365), applied; portable candle holders used solely for ceremonial purposes must be removed.

(vi) the ceremonial use of incense was illegal, but a thurible and an incense boat were susceptible of lawful use and could be retained, the bishop having sanctioned some use of incense.

(vii) there being no evidence of compulsory confession or of superstitious reverence in connection with the confessional table or chair, these could be retained.

(viii) the crucifixes on the tabernacle, on the confessional table, above the pulpit, and on a small Holy Table in the north aisle, were decorations, and as there was no evidence that they were or were likely to be abused by superstitious reverence, they could be retained.

(ix) the attachment of a figure to the processional cross made it a processional crucifix, which was illegal, and the figure must, therefore, be removed.

(x) it was within the power of a consistory court to authorise a third Holy Table in a proper case: *St. Margaret's, Tooting Park* (1924) (40 T.L.R. 687), applied; in the present case, on the ground of practical convenience, a third Holy Table could be retained.

(xi) the fourteen pictorial representations known as Stations of the Cross were not intrinsically illegal, and could, in the circumstances, be retained until further order.

Re St. Peter, St. Helier, Morden, & Re St. Olave, Mitcham ([1951] 2 All E.R. 53), applied.

(xii) the proposal to introduce a statue of the Virgin Mary and the Child Jesus was objected to by a substantial body of the church-going

parishioners, whose objections were an important consideration: *Wimbledon (Vicar & Churchwardens) v. Eden, Re St. Mark's, Wimbledon* ([1908] P. 167), applied, and no faculty would be granted for its introduction.

AS TO ILLEGAL ORNAMENTS, see HALSBURY, *Hailsham* Edn., Vol. 11, pp. 786-793, paras. 1445-1456; and FOR CASES, see DIGEST, Vol. 19, pp. 435-450, Nos. 2762-2947.

Cases referred to:

- (1) *Kensit v. St. Ethelburga, Bishopsgate Within (Rector)*, [1900] P. 80; 19 Digest 446, 2892.
- (2) *Darcy v. Hinde*, [1901] P. 95; *subsequent proceedings*, [1903] P. 221; 19 Digest 437, 2768.
- (3) *Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard*, [1927] P. 289; *subsequent proceedings*, [1928] P. 69; Digest Supp.
- (4) *Re St. Mary the Virgin, Swanley*, (Dec. 19, 1946). Unreported.
- (5) *Re St. Hilary, Cornwall, Roffe-Silvester v. King*, [1938] 4 All E.R. 147; [1939] P. 64; 159 L.T. 546; Digest Supp.
- (6) *Re Altofts, Parish of*, (July 4, 1941). Unreported.
- (7) *Re West Ilsley, Parish Church of*, (1952). Unreported.
- (8) *Elphinstone v. Purchas*, (1870), L.R. 3 A. & E. 66; 7 Moo. P.C.C.N.S. 17 (17 E.R. 7); *subsequent proceedings* sub nom. *Hebbert v. Purchas*, (1871), L.R. 3 P.C. 605; 7 Moo. P.C.C.N.S. 468 (17 E.R. 177); 40 L.J. Eccl. 33; 25 J.P. 452; *subsequent proceedings*, P.C., (1872), L.R. 4 P.C. 301; 9 Moo. P.C.C.N.S. 54 (17 E.R. 434); 19 Digest 227, 36.
- (9) *St. John the Evangelist, Clerdon (Vicar & Churchwardens) v. All Having Interest*, [1909] P. 6; 19 Digest 446, 2883.
- (10) *Re St. Saviour's, Walthamstow*, [1950] 2 All E.R. 812; [1951] P. 147; 2nd Digest Supp.
- (11) *Re St. George's, Southall*, [1952] 1 All E.R. 323; 3rd Digest Supp.
- (12) *Summer v. Wic.*, (1870), L.R. 3 A. & E. 58; 39 L.J. Eccl. 25; 21 L.T. 766; sub nom. *Winchester (Bp.) v. Wic.* 34 J.P. 180; 19 Digest 439, 2812.
- (13) *Martin v. Mackenochie*, (1868), L.R. 2 P.C. 365; 5 Moo. P.C.C.N.S. 500 (16 E.R. 603); *subsequent proceedings*, (1869), L.R. 3 P.C. 52; 6 Moo. P.C.C.N.S. 274 (16 E.R. 729); 39 L.J. Eccl. 11; 21 L.T. 512; 34 J.P. 71; *subsequent proceedings*, P.C., (1870), L.R. 3 P.C. 409; 7 Moo. P.C.C.N.S. 239 (17 E.R. 91); 19 Digest 440, 2814.
- (14) *St. Michael, Bromley*, (1908), 25 T.L.R. 95; 19 Digest 438, 2780.
- (15) *St. Margaret's, Porteth Park*, (1924), 40 T.L.R. 687; 19 Digest 441, 2824.
- (16) *Re St. Peter, St. Helier, Morden, & Re St. Olave, Mitcham*, [1951] 2 All E.R. 53; [1951] P. 303; 2nd Digest Supp.
- (17) *Wimbledon (Vicar & Churchwardens) v. Eden, Re St. Mark's, Wimbledon*, [1908] P. 167; 19 Digest 438, 2788.

PETITION for a faculty.

By a petition dated Feb. 27, 1953, the incumbent, the churchwardens and fifty-eight other petitioners applied for a faculty

"to introduce a carved wood statue of the Virgin Mary and the Child Jesus, measuring three feet high, into the Lady Chapel at the east end of the north aisle of"

the church of St. Mary, Tyne Dock, South Shields. By a petition dated May 26, 1953, one Elsie Collingwood and ten members of the parochial church council and other parishioners and inhabitants of the parish sought a faculty for the removal of thirty articles, *alleging, inter alia*, in the petition:

"4. That the articles set out in the first part of the schedule hereto have been . . . introduced without a faculty and are illegal and have been illegally introduced. 5. That the articles set out in the second part of the schedule hereto have been so introduced without a faculty as aforesaid and

have been illegally introduced. 6. That the article set out in the third part of the schedule hereto was introduced into the . . . church following the grant of a faculty on July 30, 1951, but is likely to become the object of superstitious use and superstitious reverence and regard . . .

The schedule hereinbefore referred to.

A First Part.

(a) One tabernacle . . . surmounted by a crucifix . . . (b) One ciborium . . . placed in the tabernacle . . . (c) One paschal candle holder . . . (d) One humeral veil . . . (e) One holy water stoup . . . (f) One water sprinkler . . . (g) One confessional table and chair . . . with a crucifix . . . (h) One thurible . . . (i) One incense boat . . . (j) One sanctuary gong . . . (k) Two small sanctuary bells . . . (l) One sanctuary lamp . . . in front of the Communion Table. (m) One sanctuary lamp . . . outside of the aumbry . . . (n) One cruet of holy oil.

Second Part.

C (o) Fourteen Stations of the Cross . . . (p) Six candle holders . . . on the Communion Table. (q) Two candle holders . . . on the credence . . . (r) One crucifix . . . on the south wall of the sanctuary . . . (s) One figure . . . on the processional cross . . . (t) One crucifix . . . above the pulpit . . . (u) One crucifix . . . on the small Holy Table at the east end of the north aisle . . . (v) One crucifix . . . on the east window sill of the vestry . . . (w) One crucifix . . . on the north wall of the church hall . . . (x) One small Holy Table . . . at the east end of the south aisle. (y) Two standard candle holders . . . in the vicinity of the font. (z) Two oak candle holders . . . on the font. (aa) Two portable candle holders for the use of acolytes . . . (bb) Two covered portable candle holders for outside use . . . (cc) One aumbry . . . on the north wall of the sanctuary.

E Third Part.

(dd) One small Holy Table at the east end of the north aisle."

By a further petition dated July 10, 1953, the incumbent and churchwardens sought (i) a faculty for the introduction of the articles referred to in Miss Collingwood's petition, paras. 6 (c) (o) and (aa), and (ii) a confirmatory faculty for the retention of the articles, inter alia, referred to in Miss Collingwood's petition, paras. 6 (g) (j) (k) (l) (p) (q) (s) (t) (x) (y) (z) and (cc). After citation in each case, there followed an act on petition in opposition. It was agreed between the parties that the issues arising on the three petitions be tried together. The hearing took place in Durham on Dec. 21 and 22, 1953, and in London on Feb. 1, 1954. The incumbent and his co-petitioners are referred to as "the petitioners". Miss Collingwood and her co-petitioners are referred to as "the opponents".

G *E. Garth Moore* for the petitioners.
Ruttle for the opponents.

Cur. adv. vult.

H Apr. 12. **THE CHANCELLOR** read the following judgment. As objection appears to be taken to certain services and in particular to the Holy Week services conducted by the present incumbent, I think it right to say that it is no part of the duty of this court in the exercise of its faculty jurisdiction to put a stop to any services. For that purpose other proceedings are appropriate. If the court has heard evidence as to those services it has done so only for the help which such evidence can give when issues as to the likelihood of superstitious reverence are raised and for its bearing on the use made of the articles in dispute. With regard to the articles referred to in the pleadings which are already in the church, it is admitted (save as to two as to which faculties are claimed and as to a further fourteen as to which it is claimed that no faculty is required) that they have been

illegally introduced without a faculty. Accordingly, it is right to record that only as to four can the present incumbent be held responsible for their introduction as the remainder were introduced before his incumbency began in May, 1945.

I turn to the matters in dispute. For convenience I refer to the incumbent and his co-petitioners as "the petitioners" and to the parties opposing the petitions of the incumbent as "the opponents". To help to identify the several articles I use the lettering given to them in Miss Collingwood's petition. First as to the tabernacle (a). The opponents want it removed. The petitioners oppose its removal but have not asked for a confirmatory faculty. It has been the practice in this church for many years to reserve the Blessed Sacrament. At one period the Sacred Elements were reserved in a cupboard or aumbry in the north wall of the sanctuary. In or about 1947 a tabernacle was installed and since its installation it has been habitually used for reservation in place of the aumbry. This tabernacle was introduced without a faculty. It consists of a steel safe about eighteen inches high and twelve inches wide, is situated in the centre of the back of and above the principal Holy Table, and is built into the reredos. It is surmounted by a small crucifix and a sanctuary lamp is suspended and kept burning above it. The bishop by letter dated Apr. 6, 1953, has sanctioned the practice of reservation in the church and intimated that he does not disapprove of reservation in the tabernacle. It has been repeatedly held that such a tabernacle is an illegal ornament. In *Kensit v. St. Ethelburga, Bishopsgate Within (Rector)* (1) there is a dictum of Dr. TRISTRAM, Q.C., that it is clearly an illegal church ornament. In *Darey v. Hindle* (2) he ordered the removal of two tabernacles objected to on the ground inter alia that they were illegal ornaments not authorised by the ornaments rubric. Sir LEWIS DIBBIN, Dean of Arches, in *Capel St. Mary, Suffolk (Rector & Churchwardens) v. Packard* (3) held of a tabernacle over the altar used for the reservation of the Sacrament that it was an illegal ornament. To the like effect is the decision of CHANCELLOR ASHWORTH in *Re St. Mary the Virgin, Swanley* (4).

None of these authorities is strictly binding on this court, but the court ought to follow them unless sufficient reasons appear for not doing so. Counsel was unable to cite any authority where a faculty for the introduction or retention of a tabernacle had been granted in a contested suit. It was submitted that a tabernacle is not an ornament but merely an aumbry with central or eastern position or part of the furnishings of the Holy Table. This contention appears to me to be inconsistent with authority and I am unable to accept it. I hold also that on the evidence of the incumbent as to the use which he makes of it during services that the tabernacle in this church is an ornament which is used "pro quocumque apparatu seu instrumento". No evidence was called with a view to establishing that tabernacles were ornaments of the church in general use in 1549. Attention was directed to LEMPRIERE'S COMPENDIUM OF THE CANON LAW, 1903, p. 139, where it is stated that: "In the thirteenth century the English custom was to reserve in a tabernacle". I do not doubt that reservation of the Blessed Sacrament in a hanging pyx or occasionally in a tabernacle over the altar was the practice in English churches prior to the Reformation, but that practice is not an indication of what happened thereafter, nor is it safe to assume that the meaning of the word tabernacle at this period is restricted to its meaning at the present time. I was also referred to WALLCOTT'S WESTMINSTER where (p. 58) there is an extract from the churchwardens' accounts recording a payment in 1541 to Roger Weston "for taking down of Our Ladye's Tabernacle at Rouneyval and for the setting up thereof in the Trinity Isle in St. Margaret of Westminster", and to the references to tabernacles in the SURREY INVENTORIES (pp. 126, 131, 132 and 133). In view of the pre-Reformation practice it is not surprising that tabernacles are found in the inventories. I do not find in these references material sufficient to cause me not to follow the authorities referred to. I hold, accordingly, that the tabernacle is an illegal ornament not authorised by the

ornaments rubric. If it is not, then the bishop's sanction cannot save it, for consent of the bishop cannot render an illegal church ornament legal. It is submitted on the authority of *Re St. Hilary, Cornwall, Roffe-Silvester v. King* (5) that the court has a discretion to refuse to authorise the removal of even an illegal ornament, but on a consideration of the whole of the circumstances, and in particular that the tabernacle was illegally introduced and that I am satisfied on the evidence that reservation in the tabernacle is objected to by a substantial body of parishioners, I am not in the exercise of my discretion prepared to refuse a faculty for its removal. Accordingly, it must be included in the faculty for removal and with it the ciborium (b). The sanctuary lamp in front of the Communion Table in its present situation will be inappropriate. In view of my conclusion as to the aumbry I do not authorise its removal from the church.

As to the aumbry (cc) different considerations, in my opinion, apply. In the first place, it is merely a small cupboard with a shelf inset in the north wall of the sanctuary and I hold that an aumbry of this kind is not an ornament. Secondly, the bishop has by the letter referred to authorised reservation in this church. In *Re Altofts, Parish of* (6), CHANCELLOR VAISEY in the consistory court of Wakefield said:

"If I am told that the Sacred Elements are to be reserved in a church with the sanction or at any rate not contrary to the directions or express wishes of the bishop (that is a fact to which I am bound to pay attention) I regard it as my duty as chancellor of the diocese and as such custodian of all churches in it to see that such reasonable steps are taken to secure the Sacred Elements which are in point of fact to be reserved in the church from anything in the nature of desecration or profanation. If I were to refuse this application it might well be that the vicar was driven to house the consecrated bread and wine in some unworthy place as a cupboard in the vestry and in my view I am fully justified in permitting the construction of this aumbry . . . and direct that it may continue to be part of the furnishing and fitting out of this church until further order".

In *Re St. Mary the Virgin, Swanley* (4) CHANCELLOR ASHWORTH said:

" . . . it is well known that in many dioceses faculties are issued for aumbries and if the practice is contrary to the law it is most desirable that the true position in regard to them should be established . . . This question was raised, but not fully answered, in *Re St. Hilary, Cornwall, Roffe-Silvester v. King* (5). The deputy Dean of Arches refused to give any ruling in respect of cases where the Sacrament was reserved without the sanction of the bishop, but he went on to state that his observations related to the submissions made on the facts of that case and were not directed in any way to other cases when the Sacrament is reserved with the approval of the bishop and application is made to a consistory court for provision to be made for its proper and decent reception . . . he said this ([1938] 4 All E.R. 163): 'I see no ambiguity whatever in the chancellor's judgment. He has made it clear that his judgment does not preclude the vicar at some future time from applying to him for a faculty authorising an aumbry, and, while it will be open to any person interested to oppose that application, it cannot be on the ground that, by reason of the judgment given in this case, the matter is res judicata. Neither the chancellor nor this court has prejudged any such application, nor do I intend to express or indicate any view as to how such an application, if it is made, should be entertained'. Although the deputy dean left the question open I regard the absence of any condemnation of aumbries as important and it is at least true to say that there is nothing in that case which prevents me from granting the faculty now sought in respect of the aumbry. Indeed my reading of the deputy dean's words is that by implication they justify the course which I propose to take."

These two judgments were followed by CHANCELLOR GUILLUM SCOTT in the consistory court of Oxford in *Re West Ilsley, Parish Church of* (7).

In view of these authorities and of the fact that the bishop has here sanctioned reservation I think it right in the circumstances of this case to refuse a faculty for the removal of the aumbry and to grant a confirmatory faculty for its retention until further order. It may be that some adaptation of the existing aumbry will be necessary and the incumbent spoke of a need to consider another situation. I say nothing to prejudice in any way the consideration of any application to the court in this connection should one be made. For the petitioners it was argued that reservation is lawful in this church on the ground that the practice is forbidden neither by the Book of Common Prayer nor the Thirty-Nine Articles and has in this case been expressly authorised by lawful authority, namely, the bishop. For the opponents it was contended that the practice of reservation is wholly illegal in the Church of England, that in that church there is no *jus liturgicum*, and that the bishop has no power to set aside or alter what is prescribed in the Book of Common Prayer. In deference to the careful arguments of counsel I record their contentions, but as I have reached a conclusion as to the proper orders with regard to the tabernacle and the aumbry it is unnecessary for the purpose of this judgment to decide the issue raised. In the circumstances I am unable to suppose that it would assist either the parties to this litigation or the diocese that I should express any view about it and I do not.

As to the sanctuary gong (j) and the two sanctuary bells (k) it is true that they have been in the church for at least twenty-five years. But the opponents are entitled to have the law applied to them. They are illegal ornaments: *Elphinstone v. Purchas* (8) followed in principle in *St. John the Evangelist, Clerdon* (Vicar & Churchwardens) v. *All Having Interest* (9); *Capel St. Mary, Suffolk* (Rector & Churchwardens) v. *Packard* (3) and must be included in the faculty for removal.

I come now to the six candle holders (p) which are in use on the principal Holy Table. There are indications that they have been there for more than thirty years. Of the witnesses called for the opponents only two made special mention of them and two expressly disclaimed any objection to them. The use of more than two candles is not necessarily illegal: *Re St. Saviour's, Wallthamstow* (10); *Re St. George's, Southall* (11). Each case depending on its own circumstances, I grant in my discretion a confirmatory faculty for their retention. This conclusion should not be regarded as an encouragement to like applications in future or as a precedent necessarily to be followed in other cases. The traditional and recognised use in the Church of England being two altar lights only, any application for the introduction of more than two must be considered with extreme care. As to the remaining candle holders (c) (q) (y) (z) (aa) and (bb) it was submitted that the ceremonial use of lights is illegal, a proposition abundantly supported by authority: *Sumner v. Wix* (12); *Elphinstone v. Purchas* (8); *Capel St. Mary, Suffolk* (Rector & Churchwardens) v. *Packard* (3). But, as was said (L.R. 2 P.C. 387) in *Martin v. Mackenochie* (13), there is a clear and obvious distinction between the presence in the church of things inert and unused and active use of the same things as a part of the administration of a sacrament or of a ceremony. The candle holders (c) (q) (y) and (z) are all objects susceptible of lawful use and I am bound to notice that the bishop has by his letter of July 20, 1953, sanctioned the use of (c). In the circumstances I grant in relation to (c) a faculty in the terms sought and in relation to (q) (y) and (z) a confirmatory faculty, in each case until further notice. As to the portable candle holders (aa) and (bb), it is pleaded by amendment that the set (aa) is illegal in itself and there is undisputed evidence of ceremonial use. Both the sets (aa) and (bb) were unlawfully introduced without a faculty. There is no suggestion that they are wanted for light or for other than ceremonial use. They must be included in the faculty for removal.

From the evidence it is clear that incense has been used ceremonially. The ceremonial use of incense is illegal: *Sumner v. Wix* (12); *Capel St. Mary, Suffolk*

Durham Consis. Ct.] *Re ST. MARY'S, TYNE DOCK* (HYLTON-FOSTER, Esq., Q.C.) 345
(*Rector & Churchwardens*) v. *Packard* (3); *Re St. Hilary, Cornwall, Roffe-Silvester*
v. *King* (5), but the thurible (h) and the incense boat (i) are susceptible of lawful
use and the bishop by his letter of July 20, 1953, has sanctioned some use of
incense. In the circumstances I decline a faculty for their removal.

A It is conceded that there is no evidence of compulsory confession or of
superstitious reverence in connection with the confessional table and chair (g).
They were admittedly introduced without a faculty, but in view of the submission
and apology made by the petitioners I am sure that a confirmatory faculty until
further order may properly be granted.

B The crucifixes, one (part of (a)) on the tabernacle, one (part of (g)), and those
lettered (t) and (u) are decorations. On the whole of the evidence I do not
think that any of them has been or is in the circumstances of the present case
likely to be abused by superstitious reverence and I grant a confirmatory faculty
for their retention until further order. The opponents want the crucifix (v) on
the south wall of the sanctuary to be removed and the petitioners do not object
to its removal. It will be included in the faculty for removal. It is common
ground that the crucifix (w) is outside the faculty jurisdiction and no order is
made about it. The figure (s) has been attached without a faculty to a processional
cross kept in the chancel and makes of it a processional crucifix. No attempt
C was made to contend that such an ornament is legal. The figure must be included
in the faculty for removal. That faculty will be complied with by leaving in the
church the processional cross without the figure attached.

There is nothing to support the allegation that the Holy Table in the north
aisle (dd) is or is likely to become an object of superstitious reverence. It was
introduced pursuant to faculty and I decline a faculty for its removal. The
D history of the Holy Table (x) in the south aisle is not satisfactory. A faculty
was granted in 1951 pursuant to a petition for the introduction of a Holy Table
expressly to replace that then standing in the north aisle. No application was
made for a third Holy Table nor was any communication made to the court as
to what should be done with the Holy Table replaced by the new one introduced
pursuant to faculty. The incumbent has used the Holy Table so replaced as a
E third Holy Table either in the south aisle or in the nave. His explanation is
that he did not know how else reverently to dispose of it as the faculty was silent
as to its disposal. The petitioners ask for a confirmatory faculty. There is
nothing to support the allegation that this Holy Table has been or is likely to be
an object of superstitious reverence. There is evidence that it does serve a
F useful purpose as a portable Holy Table in particular at children's services as
there is not space enough for all the children to be conveniently placed in the
north aisle. The practice has, I think, changed in degree since a faculty was
refused in *St. Michael, Bromley* (14) and it is within the power of a consistory
court to authorise a third Holy Table in a proper case: *St. Margaret's, Torteth*
Park (15). After a full consideration of all the circumstances I think it is right
to authorise it in the present case on the ground of practical convenience.
G Accordingly, I grant a faculty until further order for its introduction to the east
end of the south aisle and for its removal thence from time to time to the nave
and for the placing on it as may be required all or any of the following ornaments,
namely, two candlesticks and a brass cross.

H The next matter is a set of fourteen pictorial representations known as Stations
of the Cross (y). It was submitted that such a set is intrinsically illegal. That
contention was considered and rejected by CHANCELLOR GARTH MOORE in
Re St. Peter, St. Helier, Morden & Re St. Olave, Mitcham (16). His judgment is
not binding on this court, but I respectfully agree with his reasons and his
conclusion and follow it. In any event the plea is not open to the opponents on
their pleading. I have thus to consider if in the circumstances of the present
case it is right to have some or all of the representations removed and in particular
those without scriptural authority. The set of representations has been in use in
this church during Holy Week for more than a quarter of a century. Only two

of the witnesses called for the opponents specifically objected to them. I have heard evidence of the devotions conducted before them and it does not lead me to the conclusion that they are or are likely to become objects of superstitious reverence. I note that the incumbent has undertaken to comply with the directions of the bishop in the matter and that the bishop by his letter of Jan. 16, 1954, has asked him to "omit the Hail Mary which you have hitherto said with the people at two or three of the stations". I do not wish to burden this inordinately long judgment with a review of all the matters which have influenced me. Not without hesitation on a consideration of all the circumstances I think that all the fourteen representations may safely be allowed to be introduced during Holy Week subject to the safeguard, against any change occurring in the future, of a grant until further order only. Accordingly, I grant a faculty in the terms sought.

The holy water stoup (e) is not in the church. It is in the vestry and is a small and inconspicuously situated object. The incumbent said that he kept it full solely in case a visiting clergyman should wish to use it. A witness called for the opponents with a long experience of the church had never known it to be used. The principle "*de minimis non curat lex*" should, I think, be applied. I am not satisfied that any illegality attaches to the cruet of holy oil (m). The humeral veil (d) is not a matter for the faculty jurisdiction. No order is made as to these three objects.

I turn to the proposed statue. It is unobjectionable, in my view, on aesthetic grounds. On the other hand, it is large, being about three feet in height. The figure of the Blessed Virgin Mary wears a species of crown. In position the statue would be on a level with and about a yard from the top of the Holy Table in the north aisle. Young children worship in the church. The parochial magazine for December, 1953, gives notice of a "Children's Mass" at 9 a.m. on Thursdays. The children are the juniors of the church day school between the ages of seven and a half and twelve years. The "Hail Mary" is taught in Sunday school and there is evidence that the girl guides and the brownies (listed among the church organisations) say it. The suggestion is that the statue would be likely to become an object of superstitious reverence. I do not decide this matter because whatever arguments may be advanced on this ground I should not think it right in the exercise of the court's discretion to allow the introduction of the statue. With five crucifixes authorised and some banners I cannot find that in the absence of the statue the petitioners will be unreasonably starved of visual aids to devotion. Signatures were collected to a petition against the proposal. Without full knowledge of the circumstances in which the several signatories came to sign I do not attach any importance to the petition itself. I am, however, satisfied by the evidence called before me that a substantial body of church-going parishioners sincerely and ardently object to its introduction, and especially in the case of an article purely decorative in character such objections are important: *Wimbledon (Vicar & Churchwardens) v. Eden, Re St. Mark's, Wimbledon* (17). This is not a case of a mere possibility that the statue, if introduced, might cause offence to someone attending the church. All the witnesses called for the opponents were emphatic in their objection. The proposal has, I fear, become so much a matter of controversy that the statue, if introduced, would be a cause of offence to many for whom the church is provided and would tend to keep alive that unhappy discord which all must wish to have brought to an end as soon as possible. Accordingly, I decline a faculty for the introduction of the statue. The faculty for the removal will follow the design of that in *Darcy v. Hyde* (2) and will allow abundant time for all to be done in orderly and seemly fashion.

Order accordingly.

Solicitors: *Trollope & Winckworth* (for the petitioners); *Ralph W. T. Lubbock & Co.*, Newcastle-upon-Tyne (for the opponents).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

W. LUSTY & SONS, LTD. v. MORRIS WILKINSON & CO.
(NOTTINGHAM), LTD.

[CHANCERY DIVISION (Lloyd-Jacob, J.), March 8, 1954.]

A Design—Action to restrain threats—Counterclaim for infringement—Counterclaim by plaintiffs for cancellation of registration—Threats admitted at trial—Right of defendants to open case on question of infringement—Registered Designs Act, 1949 (c. 88), s. 26 (2).

B In an action under the Registered Designs Act, 1949, s. 26, to restrain the defendants from threatening the plaintiffs with proceedings for infringement of the copyright in a registered design, the plaintiffs alleged that letters written to them by or on behalf of the defendants constituted threats within the meaning of s. 26. By their defence the defendants denied the threats, and, alternatively, they pleaded justification, and counterclaimed for relief for infringement of their copyright in the registered design. By their defence to the counterclaim the plaintiffs alleged that the registered design was invalid and asked for cancellation of the registration. At the trial, when
C counsel for the plaintiffs was opening the case, counsel for the defendants admitted that a letter written on behalf of the defendants amounted to a threat within s. 26, and claimed the right to open the counterclaim.

HELD: counsel for the plaintiffs was entitled to continue his opening on the issue of threats and the form of order which should result from the admissions that had been made, but, as the substantial matter before the court, by reason of the defendants' admissions, was the issue raised by the counterclaim, viz.,
D infringement of the copyright in the registered design, counsel for the defendants was entitled to open on the questions relating to infringement.

Dictum of BRETT, L.J., in *Thomson v. South Eastern Ry. Co.* (1882) (9 Q.B.D. 328), applied.

E FOR THE REGISTERED DESIGNS ACT, 1949, s. 26, see HALSBURY'S STATUTES, Second Edn., Vol. 17, p. 741.

Cases referred to:

- (1) *Lewis Falk, Ltd. v. Jacobowitz*, [1944] Ch. 64; 113 L.J.Ch. 136; 170 L.T. 262; 61 R.P.C. 116; 36 Digest, Replacement, 1002, 3501.
- (2) *Pontifer v. Jolly*, (1839), 9 C. & P. 202; 173 E.R. 802; 6 Digest 362, 2389.
- F (3) *Thomson v. South Eastern Ry. Co., South Eastern Ry. Co. v. Thomson*, (1882), 9 Q.B.D. 320; 51 L.J.Q.B. 322; 46 L.T. 513; Digest, Practice, 979, 5114.
- (4) *Pearson v. Holden*, (1948), 65 R.P.C. 424; 2nd Digest Supp.

G ACTION, under the Registered Designs Act, 1949, s. 26, to restrain the defendants from threatening to bring proceedings against the plaintiffs for infringement of the copyright in a registered design, No. 865,135, in respect of woven-fibre chairs. The plaintiffs alleged that the threats were contained in letters written by the defendants, their patent agents, and their solicitors, to the plaintiffs, their patent agents, and their solicitors. By their defence, the defendants traversed the plaintiffs' allegations, and, alternatively, they pleaded justification, and
H counterclaimed for relief for infringement of their copyright in the registered design. By their defence to the counterclaim the plaintiffs alleged that the registered design was invalid for lack of novelty and counterclaimed for cancellation of the registration.

At the commencement of the trial, as counsel for the plaintiffs began to open the case, counsel for the defendants admitted that the letters relied on by the plaintiffs as constituting threats were written by or on behalf of the defendants and that one of the letters contained a threat of proceedings. He then submitted

that he was entitled to open the counterclaim. On behalf of the plaintiffs it was contended that the question of validity could not be separated from that of infringement: that, as the onus in regard to validity rested on them, they were entitled to begin; and that they could not be deprived of that right by admissions made at the beginning of the trial. The report deals only with the preliminary issue as to the right to begin.

Mould, Q.C., and S. I. Levy for the plaintiffs.

Shelley, Q.C., and Russell-Clarke for the defendants.

LLOYD-JACOB, J.: At quite an early stage in these proceedings it becomes necessary to give a ruling as to the manner in which the future conduct of the case shall be determined. Counsel for the plaintiffs was in process of opening his case on the pleadings as they stand when counsel for the defendants intervened and conceded on behalf of the defendants that the letters relied on as constituting threats were written by the defendants and that one of them amounted to a threat within the meaning of the Registered Designs Act, 1949, s. 26. In those circumstances, as I understand the matter, the plaintiffs would be entitled to invite me to enter judgment for them on the claim, though that judgment, of course, would not be effective until the matters raised in the remainder of the pleadings fell to be considered. Accordingly, counsel for the defendants invites me to direct that the right to continue to open the matter arising on the rest of the action, namely, the counterclaim, the defence to the counterclaim, and the plaintiffs' further claim, should rest on him.

Counsel have directed my attention to a number of authorities, and it is, perhaps, as well that I should review them quite shortly. Precisely the same point appears to have fallen for decision before MORTON, J., in *Lewis Falk, Ltd. v. Jacobowitz* (1), the only difference being, as I understand it, that the admission as to the responsibility for the letters and the fact that the letters constituted a threat were conceded in the pleadings and not at the Bar. Counsel for the plaintiffs invites me to regard that as a sufficient differentiation to justify me in arriving at the contrary conclusion. He referred me to *Pontifer v. Jolly* (2), a decision of ALDERSON, B. That case has not been very fully reported, but it appears to indicate that for the purpose of that action the defendant had relied on four grounds of defence, two, at least, of which could properly have formed the subject-matter of a counterclaim. When the action came on for hearing the defendant made admissions as to the first two grounds, and claimed to have the right to begin, a right which could only properly vest in him if the court was prepared to treat the remaining paragraphs in the defence as substantial paragraphs in a counterclaim. ALDERSON, B., indicated that he was not prepared to do so, and I apprehend for the very good reason that the court would not exercise its discretion to permit amendments of the pleadings of that character merely for the purpose of assisting a party to procure such advantage as that which exercising the right to begin might be thought to give him.

In the view which I take of the matter, that case is not really an authority which helps me in the present case, and I find far greater guidance from an extract from the judgment of BRETT, L.J., in *Thomson v. South Eastern Ry. Co.* (3), which is quoted in the judgment of WYNN-PARRY, J. (65 R.P.C. 426), in *Pearson v. Holden* (4). In the *Thomson* case (3) the renowned lord justice puts the matter in perfectly simple form. He says (9 Q.B.D. 328) that the duty falling on the court is to consider

"what is the fair mode of trying that which is shown to be the substantial matter . . ."

Having regard to the admissions offered by counsel for the defendants in the present case, the "substantial matter" before the court is the determination of the issue in the counterclaim, viz., whether or not the plaintiffs have infringed the registered design. In those circumstances I think my duty is to indicate that

counsel for the plaintiffs has complete freedom to conclude his opening, so far as concerns the claim, and to direct my attention (if he thinks it useful at this stage) to the appropriate order that should follow from these admissions, but that, in so far as any question arises about infringement, that is a matter on which counsel for the defendants would be entitled to open.

Solicitors: *Gouldens* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *J. A. Simpson & Coulby*, Nottingham (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

QUEEN'S BENCH DIVISION.

PRACTICE NOTE.

Case Stated—Form—Size of paper—Foolscap.

May 5. At the opening of an appeal in the Divisional Court, LORD GODDARD, C.J., said that Special Cases for the use of the court should be prepared on foolscap, and not on brief, paper, as this was more convenient for the court, and he hoped that in future this would be done.

F.G.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

PRACTICE DIRECTION.

Divorce—Maintenance of wife—Ancillary relief—Application out of time—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 44 (1).

In future applications under r. 44 (1) of the Matrimonial Causes Rules, 1950, for leave to apply for ancillary relief out of time may be made to a registrar ex parte on affidavit. Thereupon the registrar will decide whether to give leave forthwith or to require a summons to be issued and served on the respondent, the summons to be returnable before a registrar or a judge as he may direct.

B. LONG,
Senior Registrar.

May 21, 1954.

BRITISH TRANSPORT COMMISSION v. WORCESTERSHIRE COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, J.J.), May 7, 1954.]

Case Stated. Quarter sessions—Application to quarter sessions for declaration negating or limiting right of way—Case stated under Baines' Act—National Parks and Access to the Countryside Act, 1949 (c. 97), s. 31 (1) —Quarter Sessions Act, 1849 (c. 45), s. 11.

Section 31 (1) of the National Parks and Access to the Countryside Act, 1949, which gives an objector to a provisional map prepared under s. 30 (1) of that Act a right to apply to quarter sessions for certain declarations negating or limiting a right of way shown on the map to be made, confers an original jurisdiction on quarter sessions and is not an appeal, and, therefore, s. 11 of the Quarter Sessions Act, 1849, does not apply, and the High Court has no jurisdiction to hear a Special Case purported to be stated by consent of the parties under that section in relation to an application under s. 31 (1) of the Act of 1949.

AS TO APPEAL FROM QUARTER SESSIONS BY WAY OF SPECIAL CASE, see HALSBURY, Hailsham Edn., Vol. 21, pp. 739-745, paras. 1280-1292; and FOR CASES, see DIGEST, Vol. 33, p. 448, Nos. 1584-1588.

FOR THE NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT, 1949, s. 31, see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 573.

SPECIAL CASE stated for the opinion of the High Court by consent of the parties under an order of PEARCE, J., pursuant to the Quarter Sessions Act, 1849, s. 11.

In accordance with the National Parks and Access to the Countryside Act, 1949, s. 30 (1), the respondents, Worcestershire County Council, prepared a provisional map, and caused notice of its preparation and of places where copies could be inspected to be published in the LONDON GAZETTE and in newspapers circulating in Worcestershire. The appellants, the British Transport Commission, objected to the inclusion in the map of a certain way crossing a railway and sought a declaration by quarter sessions under s. 31 (1) (a) of the Act. Both parties agreed to proceed under the Quarter Sessions Act, 1849, s. 11, notice of application having been given to quarter sessions under the National Parks and Access to the Countryside Act, 1949, s. 31 (1).

Before the hearing of the case, a preliminary point was argued whether the Divisional Court had jurisdiction to hear the case.

Sir Frank Soskice, Q.C., and King-Hamilton, Q.C., for the appellants.

Widgery for the respondents.

LORD GODDARD, C.J.: In this case the British Transport Commission and the Worcestershire County Council have purported to state a Case by consent for the opinion of this court under s. 11 of Baines' Act, the Quarter Sessions Act, 1849.

In 1949 the National Parks and Access to the Countryside Act was passed, and certain fairly elaborate procedure was laid down by Part IV of that Act which obliges county councils to prepare and publish maps showing public rights of way within their district. Footpaths, bridle ways, and so forth, have to be marked and shown, and, as I gather, though I have not been through the whole of the sections of the Act, once the final map becomes effective, if I may use the expression, in the sense that no further application to the court or anything can be done, it will be conclusive as to the existence of public rights of way within the county. The scheme of the Act seems to be that, first, a draft map is to be prepared by the county council who will have obtained documents—I daresay ancient terriers and maps, conveyances, and so forth—which they must, under s. 29 (2), disclose to any landowner whose land is likely to be affected.

When the council have made the draft map and given notice of its preparation provisions of the Act become effective relating to objections to matters included in or omitted from the map, and then, by s. 29 (5) in certain circumstances a person aggrieved by the determination of the county council can appeal to the Minister of Local Government and Planning. When all the appeals or objections to the draft map have been disposed of, the county council publish what is called a provisional map, which is the important map from the landowner's point of view because, if a right of way is shown over his land and he does not get a declaration in his favour that the public path does not exist, the public path will exist for all time. The provision which enables him to get a declaration is contained in s. 31 (1) of the Act:

"At any time within twenty-eight days after the publication of a notice under sub-s. (1) of the last foregoing section, the owner, lessee or occupier of any land shown on the map to which the notice relates, being land on which the map shows a public path, or a road used as a public path, may apply to quarter sessions for a declaration . . ."

Then the sub-section sets out the various declarations that quarter sessions can make, and by sub-s. (2):

"Provision may be made by or under regulations made by the Secretary of State—(a) for prescribing the court of quarter sessions to which applications under this section are to be made or for requiring such applications to be made to a committee, being either an existing committee or a committee specially constituted for the purpose as may be prescribed by the regulations, of such court of quarter sessions as may be so prescribed; (b) for the form and manner in which such applications are to be made, and the persons who are to be entitled to be parties to the hearing of any such application; (c) as to the publication or service of notice of proposals to make such applications; (d) for the awarding of costs in any proceedings under this section."

I cannot think of anything more emphatic than sub-s. (2) to show that this is not an appeal. It is an original jurisdiction. Quarter sessions never had this jurisdiction before. The nearest approach, I suppose, was the jurisdiction under which quarter sessions can act in matters relating to the closing of highways under the Highway Act, 1835, but this is obviously a new jurisdiction which is conferred on quarter sessions and empowers quarter sessions to make declarations.

In 1849 Baines' Act, as it is called, was passed to deal with quarter sessions generally, and, of course, at that time the administrative local government work of quarter sessions was very great because, until the Local Government Act, 1888, the justices of the county conducted the whole of the county business other than that done by guardians and overseers of the poor. Section 11 of that Act provides:

". . . At any time after notice given of appeal to any court of quarter sessions against any judgment, order, rate, or other matter, [with certain exceptions] for which the remedy is by such appeal, it shall be lawful for the parties, by consent, and by order of any judge of one of the superior courts of common law at Westminster, to state the facts of the case in the form of a Special Case for the opinion of such superior court, and to agree that a judgment in conformity with the decision of such court, and for such costs as such court shall adjudge, may be entered on motion by either party at the sessions next or next but one after such decision shall have been given."

The object of that was this. When appeals from decisions of courts of summary jurisdiction were taken, whether they were rating appeals or appeals against such things as orders of removal or orders adjudging a settlement, the common form was to go to quarter sessions. Very often the facts were largely agreed, or

quarter sessions had to find the facts, and then quarter sessions used to give their judgment subject to a Case. Then the Case would come before the Queen's Bench to be argued. But this section is an endeavour, I think, to omit one hearing of the appeal, that before quarter sessions. Of course, these administrative tribunals and orders and so forth, which are now so frequently met with, were not known in the days when Baines' Act was passed. It is clear that Baines' Act deals only with appeals. It is equally clear, to my mind, that the procedure which is created by s. 31 (1) of the National Parks and Access to the Countryside Act, 1949, is not an appeal; it is an original jurisdiction. Quarter sessions can, of course, if the matter comes before them as a matter of their original jurisdiction, state a Case on a point of law for the opinion of this court, but they can do that by virtue of the terms of the commission which gives justices the power to consult the judges. I am quite satisfied that the jurisdiction given by s. 31 of the Act of 1949 is an original jurisdiction and s. 11 of Baines' Act cannot apply and we have no jurisdiction.

HILBERY, J.: I, too, am of the opinion that we have no jurisdiction, and that s. 11 of Baines' Act does not apply. The situation which has arisen here can be very shortly stated. I think the Act of 1949 makes it quite plain that the jurisdiction given to quarter sessions is an original jurisdiction, and recognised as being an original jurisdiction. In short, the National Parks and Access to the Countryside Act, 1949, s. 27 (1), imposed a duty on the local authority, the council of every county in England or Wales, to make a survey in the county and prepare a draft map showing what they found to be footpaths, bridle ways, or rights of way in the county. They were required to consult with the councils of county districts and parishes in the area under their authority as to the arrangements to be made for the provision by the councils of information for the purposes of the survey, and a draft map had to be made and notice of its preparation given. Objections could be made to that map, and, on the objections being made, the surveying authority could determine or modify the particulars contained in the draft map and the statement accompanying it, either by the deletion of a public path or by the addition of a right of way so that it would be so shown. If an objection was duly made to the authority about their having done that, the authority were empowered by s. 29 (4) (b) to appoint a person to hear both parties and decide the objection, that is, whether to maintain or revoke the determination which had been made, and notice of that decision had to be served on the person by whom the representation or objection had been made. If that person was still aggrieved by a decision to omit or delete a way from the map, s. 29 (5) expressly gave him a right of appeal to the Minister. The Minister determines the objection in accordance with the provisions of s. 29 (6), and the county authority is then required to publish a provisional map. When that provisional map is published, unless, of course, objection is made to it, it becomes the final and conclusive evidence of the existence of those bridle ways or public rights of way. But if, on the publication of that provisional map, a person still objects to what it contains, probably as affecting his land or his rights, s. 31 (1) of the Act gives him a right to make an application to quarter sessions to have certain declarations made. The section expressly uses the words "apply for a declaration". It does not anywhere use the word "appeal", though it is noticeable from what I have already said that, where there has been a hearing and determination by a person appointed by the county council, the word "appeal" is used, and it is an appeal to the Minister. Here it is not an appeal to quarter sessions which s. 31 (1) gives, but the party is empowered to apply to quarter sessions for a declaration which can be made by quarter sessions. Undoubtedly, quarter sessions then will have determined a matter which was before them. It may well be that then, as my Lord has pointed out, they may be asked to state a Case and the matter can come before this court. To supplement those

observations I have made, I would only add that, by s. 31 (2), it is expressly enacted that:

A "Provision may be made by or under regulations made by the Secretary of State— (a) for prescribing the court of quarter sessions to which applications under this section are to be made or for requiring such applications to be made to a committee, being either an existing committee or a committee specially constituted for the purpose as may be prescribed by the regulations, of such court of quarter sessions as may be so prescribed; (b) for the form and manner in which such applications are to be made, and the persons who are to be entitled to be parties to the hearing of any such application; (c) as to the publication or service of notice of proposals to make such applications; (d) for the awarding of costs in any proceedings under this section."

B It appears to me to be quite plain that this was intended to be an original jurisdiction conferred on quarter sessions and that s. 11 of Baines' Act, therefore, has no application. I agree that we have no jurisdiction to hear this Special Case.

C DONOVAN, J.: I add a few words only in view of the importance of the point. I agree that the application to quarter sessions under s. 31 (1) of the Act of 1949, cannot properly be called an appeal within the meaning of s. 11 of Baines' Act. The application to quarter sessions is for the purpose, among other things, of a declaration that no particular right of way existed: see s. 31 (1) (a). It is not an appeal against any judgment or order or anything ejusdem generis. I think it is worth while contrasting the language of s. 31 (5) of the Act of 1949, as has already been done, with s. 29 (5) of the same Act where expressly a right of appeal is given against "a determination of the surveying authority."

E What is urged in this case comes really to this, that, in substance, the proceedings would be just the same in their nature as if they were called an appeal. They are an objection to what someone lower down in this administrative hierarchy has decided. That may be so, but it is not enough. The Act of 1949 itself draws the distinction between proceedings by a person aggrieved by an order or determination and a person who simply thinks a map is wrong. It calls the first an appeal, and the second an application for a declaration, a distinction which recognises the legal difference between the two.

F I think it is also worth while pointing out the conclusion which may be drawn from reg. 6 of the Public Rights of Way (Applications to Quarter Sessions) Regulations, 1952, which reads:

"The provisions of s. 5 of the Quarter Sessions Act, 1849 (which relates to the costs of appeals to quarter sessions), shall apply to any such application as aforesaid as if the application were an appeal to which that section applied."

G Clearly, if this were an appeal, reg. 6 would be unnecessary.

For these reasons, I agree that we have no jurisdiction to entertain this Special Case.

Solicitors: *M. H. B. Gilmour*, Solicitor, British Transport Commission (for the appellants); *Sharpe, Pritchard & Co.*, agents for *W. R. Scurfield*, clerk of the county council, Worcester (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re BRACE (*deceased*). GURTON v. CLEMENTS AND OTHERS.
[CHANCERY DIVISION (Vaisey, J.), May 5, 6, 1954.]

Will—"Any possessions I may have".

Will—Condition—Certainty—Condition subsequent—Devise and bequest to one daughter "on condition that she will always provide a home" for another daughter.

By his will, dated Mar. 19, 1950, the testator, after appointing an executor and directing payment of his debts and funeral expenses, declared: "I give and bequeath unto my daughter [I.C.] . . . my house at . . . together with the contents of same and any possessions I may have, on condition that she will always provide a home for my daughter [D.M.B.] at the above address." There was no residuary gift. The testator died on Aug. 8, 1953. The estate comprised (a) the freehold house mentioned in the will, (b) some furniture and personal effects, (c) cash on deposit at a bank, (d) proceeds of an insurance policy, and (e) arrears of a pension.

Held: (i) the words "any possessions I may have" included the whole of the testator's estate.

Fleming v. Burrows (1826) (1 Russ. 276), applied.

(ii) the phrase "to provide a home" was not susceptible of any such clear and definite interpretation as would enable the court to say what it meant and what obligations it involved, and, therefore, if the words "on condition that she will always provide a home for my daughter" were regarded as a condition subsequent, they were void for uncertainty: *Re Richardson* ([1904] 2 Ch. 777), distinguished; but, in the absence of an express gift over in the event of non-compliance, the words, despite their form, should be construed as being merely precatory, rather than as a condition subsequent; and, on either construction, I.C. was entitled to the whole of the testator's estate absolutely, free from any condition.

AS TO UNCERTAINTY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 219-222, paras. 274-277; and FOR CASES, see DIGEST, Vol. 44, pp. 440-444, Nos. 2667-2687.

Cases referred to:

- (1) *Fleming v. Burrows*, (1826), 1 Russ. 276; 4 L.J.O.S. (Ch. 115; 38 E.R. 107; 44 Digest 742, 6000.
- (2) *Re Richardson*, [1904] 2 Ch. 777; 73 L.J.Ch. 783; 91 L.T. 775; 40 Digest 732, 2629.
- (3) *Re Talbot-Ponsonby's Estate*, [1937] 4 All E.R. 309; Digest Supp.
- (4) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.
- (5) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.
- (6) *Fillingham v. Bromley*, (1823), Turn. & R. 530; 37 E.R. 1204; 44 Digest 442, 2675.
- (7) *Clavering v. Ellison*, (1859), 7 H.L.Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; 44 Digest 440, 2667.
- (8) *Re Gape's Will Trusts*, [1952] 2 All E.R. 579; [1952] Ch. 743; 3rd Digest Supp.
- (9) *Re Sandbrook*, [1912] 2 Ch. 471; 81 L.J.Ch. 800; 107 L.T. 148; 44 Digest 444, 2686.
- (10) *Re Ermonth (Viscount)*, (1883), 23 Ch.D. 158; 52 L.J.Ch. 420; 48 L.T. 422; 44 Digest 441, 2668.
- (11) *Bromley v. Tryon*, [1951] 2 All E.R. 1058; [1952] A.C. 265; 3rd Digest Supp.

ADJOURNED SUMMONS to determine, inter alia, (i) whether, on the true construction of the will of Thomas Sampson Brace, deceased, the gift of the contents

of the freehold house situate at and known as No. 25 Apton Road, Bishop's Stortford, Hertfordshire, and "any possessions" that the testator might have included the whole of his residuary personal estate; and (ii) whether the condition that the first defendant, Irene Edith Clements, should always provide a home for the second defendant, Doris Mary Brace, at the above address was valid, or was void for uncertainty or for any other reason.

A The defendants were the testator's five daughters.

McMullen for the plaintiff, the executor.

Raymond Walton for the first defendant, Mrs. Irene Clements.

W. F. Waite for the second defendant, Miss Doris Mary Brace.

Balcombe for the third, fourth and fifth defendants.

B VAISEY, J.: The testator, Thomas Sampson Brace, described in his will as "of 25 Apton Road, Bishop's Stortford, Hertfordshire", made that will on Mar. 19, 1950, and, after appointing the plaintiff, Walter George Bobs Curton, to be his executor and directing that all his debts and funeral expenses should be paid as soon as conveniently might be after his decease, declared:

C "I give and bequeath unto my daughter, Mrs. Irene Clements, of 25 Apton Road, Bishop's Stortford, Herts, my house at 25 Apton Road, Bishop's Stortford, together with the contents of same and any possessions I may have, on condition that she will always provide a home for my daughter Doris Mary Brace at the above address".

D The testator died on Aug. 8, 1953, and his said will was duly proved by the plaintiff on Sept. 14, 1953. The testator was a widower and had issue five children, namely, Irene and Doris Mary, already referred to, Eva, Netta and Nellie, all of whom are defendants in these proceedings. Irene (referred to hereinafter as Mrs. Clements), Eva, Netta and Nellie are married. Doris Mary is a spinster of about thirty-eight years of age. She has been mentally afflicted since early childhood, and appears in these proceedings by the Official Solicitor as her guardian ad litem. She has no means of any kind. Mrs. Clements, both before and after her marriage, which took place in 1940, resided with the testator at No. 25 Apton Road, which was also the home of Doris Mary. For many years Mrs. Clements looked after the testator and Doris Mary, and I understand that she intends to continue to act towards Doris Mary with the same kindness and consideration as hitherto, whatever may be the legal effect of the testator's will.

E The testator's estate consisted of (a) the house No. 25 Apton Road, which is freehold and of an estimated value of £1,500; (b) some furniture and personal effects worth about £50; (c) cash on deposit at a bank £210 1s. 1d.; (d) the proceeds of an insurance policy—£20 3s. 2d.; and (e) arrears of a pension—£1 15s. 3d. The first question which arises is what is meant by the words "any possessions I may have". In my judgment, they include all the items which I have enumerated, so that Mrs. Clements is entitled to the whole of the testator's estate, and for this *Fleming v. Burrows* (1) is sufficient authority. I will make a declaration accordingly.

H The more difficult question arises as to the validity and meaning of the condition that Mrs. Clements is to provide a home for Doris Mary. The condition is, of course, a condition subsequent, and it is applicable, not only to the house, but to the whole and every part of the estate. The question is whether, according to the true construction of the will, Mrs. Clements has no more than a conditional property, not only in the house, but in the various moneys which go to her with it, or whether she takes it all absolutely, treating the conditional words as merely hortatory and precatory, and expressive of the testator's expectation and belief that she will carry out his declared wishes. The latter alternative is not easily justified by the words, and the real difficulty, to my mind, is

whether the condition is phrased with sufficient clarity and certainty to enable the court to give effect to it as a valid and binding condition subsequent.

I confess to feeling a grave doubt whether the conception of one person, A., providing a home for another, B., is susceptible of any such clear and definite interpretation as to enable anyone to say what it means or what obligations it imposes. Obviously, the provision of a home would involve giving shelter from the elements, but how about board and lodging, clothing, etc., and, if these things, food, clothing, and so forth, have to be provided, on what scale or by what standard is the obligation to be discharged? Another way of stating the difficulty is to ask whether providing B. with a home includes or implies maintaining him. I cannot read "provide a home for" as equivalent to "maintain and provide a home for"; if those had been the words, I might not have felt any difficulty.

Re Richardson (2) is, at first sight, very like the present case, and was cited to me as almost, if not quite, conclusive of the matter. But, unfortunately, the question of the certainty or uncertainty of the condition was never argued in that case and there are some substantial differences between the two cases. The headnote to *Re Richardson* (2) reads ([1904] 2 Ch. 777):

"A testatrix gave her residuary estate, in the events which happened, (i) to her niece C. on condition that she resided in the testatrix's house during the life of the testatrix's sister M., and provided there a home for M. so long as she wished; (ii) in the event of C. not complying with the condition, to another niece upon the like condition; (iii) in the event of neither niece complying with the condition, upon trust for M. for life with other trusts over on her death. At the date of the testatrix's death M. was a lunatic not so found, confined in an asylum, and was not expected to recover her faculties. Upon a summons by C. under the Settled Land Acts:—Held, that C. was a person having the powers of a tenant for life under the Settled Land Act, 1882; that the condition as to providing a home was void so far as it prevented C. from exercising her power of sale; and that she was entitled to sell the house and keep the proceeds absolutely".

In the first place, it is obvious that, as the sale was about to be effected, it did not matter in that case whether the condition was good or bad. But the second point to which I wish to call attention is that the words which I have read from the headnote are incomplete, and that, under the provisions of the will, the niece was required to provide "there", i.e., at the house in question, "a home free of cost or charge of any kind". Those words certainly give much more guidance as to what is meant by "providing a home" than do the colourless words which we find in the present will. The other important difference between the cases is that in *Re Richardson* (2) there is a definite and plainly expressed gift over. In the present case there is no gift over, and that seems to me to point strongly to the conclusion that the testator never contemplated anything in the nature of a forfeiture of estate or interest. If the condition in the will were treated as binding, Mrs. Clements would not be able to spend one penny of the money in the bank, nor would she be able to deal with any of the testator's furniture as her own. That seems to me a very unlikely intention to attribute to the testator. The absence of a gift over, in my opinion, points strongly to the conclusion that the words were not intended to be anything more than precatory.

What is meant by the expression "provide a home", without any reference, as there was in *Re Richardson* (2), to costs and expenses? It is, I think, an expression which has a certain general significance applicable in various contexts, and having in each case a very different meaning. Of a negligent mother, for example, it may be said: "She does not really provide a home for the children," in the sense that she allows them to run loose. To "provide a home" is not like providing a shelter and allowing a person to reside there. "Home" is a word, in my judgment, of an extremely wide and varied significance.

A I was referred to a long series of cases which have dealt in recent years with the difficult question of conditions subsequent. The first in order of date is *Re Talbot-Ponsonby's Estate* (3), before CROSSMAN, J., in 1937, in which the condition was that the devisee of the estate was to make the same his home. For my part, I should have thought that that was an extremely vague expression, but it is, in my view, an expression of far greater certitude than to say that a person is to provide a home for someone else. If the owner of an estate is to make the estate his home, it is obvious that he is to reside there in the ordinary way and to treat the place as his ordinary place of residence. I may observe that *Re Talbot-Ponsonby's Estate* (3) was cited in cases before higher authority [e.g., *Sifton v. Sifton* (4)], and I have grave doubt whether, having regard to those cases, it could now stand.

B In *Sifton v. Sifton* (4) the judgment of the Privy Council was delivered by LORD ROMER, and the crux of the matter was, I think, summed up in the quotations from earlier cases which appear in that judgment. It is a case which reminds one of the necessity for extreme caution in framing conditions subsequent, and I want to refer to some wise words of LORD WRIGHT in *Clayton v. Ramsden* (5). LORD WRIGHT, who agreed with most, but not all, of the statements made by the other learned Lords, began his speech with these words ([1943] 1 All E.R. 19):

“ My Lords, a testator who wishes to leave an estate or interest subject to a defeasance clause must be very careful or his lawyers must be very careful how the clause is expressed. LORD ELDON, L.C., in *Fillingham v. Bromley* (6) (Turn. & R. 536) said: ‘ There is great difficulty in saying that a forfeiture was incurred, when the court cannot see clearly what it was the testator meant ’. Later LORD CRANWORTH more precisely in *Clavering v. Ellison* (7) (7 H.L.Cas. 725), said that: ‘ . . . where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine ’. The matter was treated by LORD CRANWORTH as one to be decided as it were in vacuo, simply on the construction of the clause. He said (*ibid.*, 726): ‘ . . . the question is . . . whether you can predicate on reading the will, what it was that was to defeat the vested estate ? ’ ”

F In the present case the testator has tried to leave an estate or interest subject to a defeasance clause, and I ask myself: Has he been “ very careful ” how the clause is expressed ? To use the words of LORD ELDON, L.C., in *Fillingham v. Bromley* (6): Is the court able to see clearly what it was the testator meant ? For the reasons which I have already indicated in part, I do not think that the testator has made his meaning clear.

G In *Re Gape's Will Trusts* (8) the will, to put it shortly, required the beneficiaries to “ take up permanent residence in England ”, and there was a gift over if the condition was not complied with. The Court of Appeal held that the clause was sufficiently precise and definite to give it validity. SIR RAYMOND EVERSHED, M.R., said ([1952] 2 All E.R. 581):

H “ It is quite clear to me that, in the passage from the judgment in *Sifton v. Sifton* (4) ([1938] 3 All E.R. 445) which I have cited [and which was to the effect that the event contemplated should be one which could be “ precisely and distinctly ” ascertained], LORD ROMER was merely re-stating in his own language the principle which PARKER, J. [in *Re Sandbrook* (9) ([1912] 2 Ch. 477)] and FRY, J. [in *Re Viscount Esmouth* (10) (23 Ch.D. 164)] had stated. In other words, it is not necessary that the words of the condition should be of such a character that the question whether or not forfeiture has occurred, or will occur, can be ascertained, not only with certainty, but with perfect ease. Sometimes, no doubt, it is difficult to say whether,

having regard to the particular events which have happened, the forfeiture has, according to the true construction of the document, been incurred. But that aspect of the matter is not essential to the validity of the condition, as is, I think, illustrated by *Bromley v. Tryon* (11). That was a case of a shifting clause in a will whereby certain interests in settled estates were determined on the happening of some rather complex events."

The Master of the Rolls then cited a passage from the speech of LORD SIMONDS, L.C. ([1951] 2 All E.R. 1066), in *Bromley v. Tryon* (11) in reference to that clause. A

Reading the words of the Master of the Rolls with care, I agree, with great respect, that it may often be a matter of some difficulty to ascertain whether a forfeiture has occurred, but the trouble which I feel in the present case is that I do not know what the original condition means. It is not a question of endeavouring to find out whether the forfeiture has occurred. The first question which B has to be decided is: What has the beneficiary, in this case Mrs. Clements, to do to protect her estate? The expression "provide a home" is not only extremely vague, but is one to which it is impossible to attach any intelligible signification. It is not a question of a difficult expression, but a question, I think, of an unintelligible one. I agree that a man may be said to be providing a home for someone when he feeds him, gives him board and lodging, entertains him, and gives him pocket money. In such a case a home is provided to the fullest extent. But what if the pocket money is stopped, what if the food is reduced, what if the person for whom the home is to be provided is compelled to wear shabby clothes while the person who is required to provide the home is handsomely dressed? All those questions seem to me to introduce an element of uncertainty into the conception of "providing a home", which is, in my view, D an expression to which no real attention can be paid in so far as it is alleged to create legal obligations.

Bromley v. Tryon (11) was, as SIR RAYMOND EVERSHED, M.R., pointed out in *Re Gape's Will Trusts* (8), a case of some complication, but the only real difficulty was what was meant by "the bulk" of a settled estate, where the estate was subject to alterations in size, character and value, and might be partly land and partly capital moneys. The House of Lords came to the conclusion that the expression meant anything over half, and that, accordingly, the clause which they had to consider was not void for uncertainty. Although the speech of LORD SIMONDS, L.C., serves to remind us that the principles of *Sifton v. Sifton* (4) and *Clayton v. Ramsden* (5) must be applied with caution, I do not think that there is anything in the speech or in the decision which helps one in the present case to construe an unintelligible condition subsequent. At the conclusion of his speech LORD SIMONDS, L.C., said ([1951] 2 All E.R. 1066): F

"In deference to the argument of learned counsel who sought to illustrate the alleged obscurity of the relevant words by reference to the facts of the present case, I will only add this. It does not follow because the words of a defeasance clause are sufficiently clear to give the clause validity, that there may not be cases in which its application is difficult, and I apprehend that, if there is a real doubt, the court will show the same favour to a vested estate in applying the clause as it does in construing it. But in the present case I do not find in the facts as proved, whether as illustrative of the difficulty of construction or of application, anything which would lead me to a conclusion G favourable to the appellants. I have said that the main argument on invalidity was directed to the words 'or the bulk thereof.' Some reference was also made to the expressions 'within the scope of the limitations herein-before contained' and 'shall by any means whatsoever become actually entitled'. But I am wholly unable to see any sort of ambiguity in those words, though the result of them may be capricious." H

I do not think that anyone could say that the expression "provide a home" for

a person, in a condition subsequent, was free from ambiguity. It is, in my opinion, of no ascertainable significance.

A In *Clayton v. Ramsden* (5), in the course of the argument, I remember that one of their Lordships said that a condition subsequent must never be a condition in which a standard has to be applied. Once one tries to introduce standards into a condition subsequent, one will find oneself in a difficulty. I have often thought of those words. If one is required to apply a standard and is not told what standard to apply, the condition is not one which can be properly imposed. In the present case, when one considers the words "provide a home", one has to ask: What sort of a home? How comfortable is it to be? Is it to be a mere shelter from the elements? Whether it is to be a place where the person for whom the home is to be provided feeds with the family, or, so to speak, eats his meals below, one cannot tell, as the requirement is entirely unqualified. In *Re Richardson* (2) JOYCE, J., had, at any rate, the guidance that the person for whom the home was to be provided was to have it "free of cost or charge of any kind". I agree that, even with that guidance, there was a good deal to be worked out, e.g., whether she was to have her clothes provided. In the present case, however, there are no words of guidance, and I feel bound to hold that the condition is void for uncertainty.

C There are one or two other points, but I do not propose to enlarge on them at any length. Nowadays, some allowances are made for assisting persons afflicted as this unfortunate woman, Doris Mary, is, and it may be a matter of some importance to know whether or not she has a legal right to maintenance under the terms of the will. I think it should be made clear that I do not see that I can do anything other than hold the condition void. Even if it were valid, if Mrs. D Clements chose to grant a lease of the property to her husband, it is, I suppose, admitted that her rights would become indefeasible. I cannot, however, believe that the testator ever contemplated that Mrs. Clements, the eldest daughter, would not be able to handle any of his money or treat as her own one stick of his furniture, and that she would have to live in constant anticipation of some elaborate inquiry being instituted as to whether or not she was complying with the legal condition. In the absence of an express gift over, the proper way of construing these words, I think, is to regard them as precatory and as a guide to what the testator's aim and object was in choosing this particular daughter as the recipient of his bounty, although the words themselves, I agree, are not in the form of a request, but are drafted as a condition. For the reasons which I have attempted to explain, I think that they must be construed as not a condition, although in form that would appear to be their result. Accordingly, I shall declare that Mrs. Clements takes the whole of the estate absolutely, free from any condition.

Order accordingly.

Solicitors: *Barlow, Lyde & Gilbert*, agents for *H. Stanley T'ee*, Bishop's Stortford, Herts (for all parties other than the second defendant): *Official Solicitor* (for the second defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

STOCKBRIDGE MILL CO., LTD. v. CENTRAL LAND BOARD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), May 6, 7, 1954.]

Town and Country Planning—Development value—Determination—Appeal to Lands Tribunal—Evidence—Admissibility—Values agreed in cases of comparable land—Town and Country Planning Act, 1947 (c. 51), s. 60 (1) — Lands Tribunal Act, 1949 (c. 42), s. 1 (3) (d).

Claimants to a payment for depreciation of land values under the Town and Country Planning Act, 1947, s. 60 (1), appealed to the Lands Tribunal against the determination by the Central Land Board of the development value of lands in Hornby, Lancashire. On the hearing of the appeal the board sought to tender in evidence a schedule of eleven claims under Part VI of the Act of 1947 which were alleged to have been negotiated by the district valuer of the Inland Revenue Department on behalf of the board and to have been agreed with third parties in respect of land in Hornby and district, which, the board contended, was comparable land. The claimants objected that such evidence was inadmissible and their objection was upheld by the tribunal.

Held: claims concerning comparable land and agreed between the Central Land Board and third parties were admissible evidence, and the award of the Lands Tribunal must be remitted to the tribunal for consideration.

Norwich Assessment Committee v. Pointer ([1922] 2 K.B. 47, 471), applied.

FOR THE LANDS TRIBUNAL ACT, 1949, s. 3 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 322.

FOR THE LANDS TRIBUNAL RULES, 1949, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 12, p. 157.

Cases referred to:

(1) *Mason v. Central Land Board*, (1952), 3 P. & C.R. 391.

(2) *Norwich Assessment Committee v. Pointer*, [1922] 2 K.B. 47; *affd.* C.A., 91 L.J.K.B. 891; 86 J.P. 149; sub nom. *Pointer v. Norwich Assessment Committee*, [1922] 2 K.B. 471; 128 L.T. 48; 38 Digest 582, 1162.

APPEAL by the Central Land Board against an order of the Lands Tribunal dated Dec. 17, 1953.

The Central Land Board determined the development value of four pieces of land, amounting to seven and three-quarter acres, at Hornby, Lancashire, which was the property of the Stockbridge Mill Co., Ltd. at £1,230. The owners appealed to the Lands Tribunal under the Town and Country Planning Act, 1947, s. 60, and the Lands Tribunal Act, 1949, s. 1 (3) (d), and the tribunal increased the development value of the land to £1,920. During the hearing of the appeal, the Central Land Board sought to tender in evidence a document which comprised a schedule of eleven claims under Part VI of the Town and Country Planning Act, 1947, alleged to have been negotiated by a district valuer of the Inland Revenue Department on behalf of the Central Land Board and to have been agreed with persons other than the Stockbridge Mill Co., Ltd., in respect of lands in Hornby and district, i.e., in respect of what the board contended was comparable land. The company objected that evidence of these claims was inadmissible and the objection was upheld by the tribunal.

J. P. Ashworth for the Central Land Board.

Wingate-Saul for the claimants, the Stockbridge Mill Co., Ltd.

SOMERVELL, L.J.: This is a Case stated by the Lands Tribunal under the Lands Tribunal Act, 1949, s. 3 (4), in a matter under the Town and Country Planning Act, 1947. The claimants, the Stockbridge Mill Co., Ltd., appealed to the Lands Tribunal against a determination by the Central Land Board of the development value of an interest in land. The Case is stated on the question

of the admissibility of certain evidence. The development value under the Act is the difference between the present user with minor modifications, which is called the restricted value, and the unrestricted value as if the Act had not been passed. At the time when the Act was passed, although there have been modifications since, that was the basis of the claim which could be put forward to share in what has been called the global sum. Under the rules applicable to evidence before the Lands Tribunal (the Lands Tribunal Rules, 1949 (S.L., 1949, No. 2263), r. 10 (iii), as amended by the Lands Tribunal (Amendment) Rules, 1951 (S.L., 1951, No. 2004)), certain documents, if it is sought to tender them in evidence, have to be sent to the registrar of the court and to the other side. One of the documents which was sent in the present case was a

“Schedule of eleven claims under Part VI of the Town and Country Planning Act, 1947, alleged to have been negotiated by Mr. T. A. Collins (in his capacity as district valuer Inland Revenue) on behalf of the Central Land Board and to have been agreed with persons other than the appellants, in respect of lands in Hornby and district”,

and also lands in other districts which are set out. This was objected to as inadmissible, the objection was upheld, and a Case was stated on that issue.

The Lands Tribunal has had this question before it in *Mason v. Central Land Board* (1) when similar evidence had been tendered. It was objected to and that objection was upheld. The tribunal said (3 P. & C.R. 394):

“There can be no doubt that such proved facts as are relevant to an issue can be received in evidence in chief, and that these may include rents, sale prices, and the like, in transactions relating to comparable lands which took place prior to the material date; furthermore, particulars of any valuations agreed to by the opposing party in the case would be receivable as being in the nature of admissions. But none of the particulars which were included in Mr. Woollaston's rejected documents were said to be admissions by Mr. Mason. The particulars were of valuations which were of the nature of admissions by persons not parties to this case and that could not be a ground for admitting them as evidence in chief, although they might well have been admissible in re-examination if the cross-examination of Mr. Woollaston had taken a certain line.”

The tribunal went on to say—quite justly—that evidence of this kind in regard to comparable transactions or assessments in respect of comparable land is often of very little value for reasons which I will give later. That is the view the tribunal has taken and we are asked to consider whether it be right or not.

Subject to one exception which might be made, I think the issue has been decided in principle by a previous decision of this court, viz., *Norwich Assessment Committee v. Pointer* (2). It was there decided that on an appeal to quarter sessions by a person who alleges that he has been over-assessed in respect of his premises, evidence of the rateable value of other similar premises in the same union is in point of law admissible, and whether in any particular case such evidence will be of any value when admitted must depend upon the circumstances and the degree of closeness with which the two sets of premises resemble one another. There was also a point, which does not arise here, whether notice should have been given to the occupiers whose assessments were said to be comparable and, therefore, relevant. One of the points which had been made in the Divisional Court and was also made in the Court of Appeal was that, although evidence of actual rents paid for comparable premises was admissible, the assessments, which were sought to be brought in in that case, were not admissible. BANKES, L.J., who had some doubt on the matter, said ([1922] 2 K.B. 476):

“But although evidence of the rateable value of such other premises is in the majority of cases of but little value, I agree with the deputy recorder and

the Divisional Court that it cannot as matter of law be regarded as inadmissible."

SCRUTTON, L.J., agreed with that. ATKIN, L.J., said (*ibid.*, 477) that in the first place the assessments could be regarded as admissions against the assessment committee—in that case it was the ratepayer who was introducing them—but he said (*ibid.*):

"And secondly, it may be the only way in which you can get at the rent at which the appellant's premises are worth to let by the year . . . it seems impossible to say that the rateable value of the former houses, [the comparable houses] which contain precisely the same accommodation, is not admissible as evidence of the rent which the hypothetical tenant would pay for the house last built."

These determinations by agreement of development value seem to be in the same position in law, and I think the point which counsel for the company took in the first part of his argument, having regard to the decision in *Pointer's* case (2), goes plainly to weight and not to admissibility. He said, for instance, that many of those concerned would regard the claim based on development value as something like a windfall and would not bother very much about the amount. That may be true with regard to some of the smaller sums, but there might well be a case where there was a large claim which had been dealt with at great length and in great detail between surveyors and so on. We, however, are asked to decide whether these determinations are inadmissible as such. Counsel also said, and I think quite rightly, that in some cases what the party is interested in is the difference between the two values and that the surveyor or other person acting for the claimant would not spend very long arguing about the absolute amount of the restricted value if he found that the surveyor for the board who had put that value higher was equally prepared to put the unrestricted value higher. That goes to weight, I think, and not to admissibility.

There was one point which, I think, I should say a word about. That is that the rating and valuation list is a public document and, therefore, if the rating authorities sought to rely on what they had agreed to be the rateable value of comparable houses, the other side would be able to look at the list and see if they could produce some comparable cases which might help their own case. The register in which these development values are to be found is not a public document. Again, I think that that goes to weight and not to admissibility. I think that it may well be that if the Central Land Board, having produced what they suggested were certain comparable figures, were unwilling to let the claimant see whether there might not be some other figures which he wished to say were comparable, the court might well disregard altogether the figures which they sought to produce. Equally, if, having produced figures of this kind in a number of cases, they did not produce them in a particular case it may well be that an adverse inference would be drawn against them if they put any difficulty in the way of the claimant looking at the register. I do not think that that affects the question of admissibility. Once one comes to the conclusion—and I think it is plainly right in principle—that actual transactions are admissible if sufficiently comparable, then agreed figures must also be admissible if the subject-matter of the agreed figures is comparable land. Of course, it is open to a claimant to show that these figures are not really comparable and throw little light on the actual problem. In the present case, the tribunal had the figures before it for the purpose of considering admissibility. I am not suggesting for a moment that the tribunal allowed them to influence it, but it was quite satisfied that there was sufficient other evidence to enable it to decide this case. I think the tribunal indicates—for what reason it does not matter, but, possibly, because of the distance of this land from some of the land alleged to be comparable—that this evidence would not have given any real help in this case. It does not follow that such evidence might not give another tribunal assistance in another case.

A We were asked by counsel for the company to say on that aspect of the matter that, having decided the legal issue, we should not remit the award. I do not think we can do that. I think, having decided the point of law, we must remit the award. On the other hand, counsel for the Central Land Board indicated that what he was interested in was the point of law, and I think he felt the force of the argument that it appeared as if, in this case, the evidence rejected would not have affected the tribunal's mind. It may be that, although the case has to be sent back, it will be disposed of without any further costs and without further hearing and argument. For these reasons, I think this point of law must be answered in the affirmative.

B **BIRKETT, L.J.:** I am entirely of the same opinion. It is important to keep in mind, I think, that the only issue to be decided by this court is the question of admissibility and considerations affecting the weight and cogency of the evidence are not material for our consideration. I can see that many of the matters which have been raised in this court by counsel for the company affected the mind of the tribunal when deciding this issue. If one is to give in evidence figures relating to other land the subject of agreement between the district valuer on behalf of the Central Land Board and other landowners, at first sight C one would say that that evidence must be considered with great care and great circumspection. But, of course, it does not touch the question of admissibility. As I see it, the ground on which the tribunal proceeded was that the schedule of the claims was not admissible, quite apart from its cogency or weight, because it was not relevant.

D I think myself that we are bound in this case by the decision of the Court of Appeal—if I may say so, one of the strongest Courts of Appeal—in *Norwich Assessment Committee v. Pointer* (2). Although the question in that case was concerned with evidence of a different subject-matter, viz., the rateable value of other similar premises in the same union, it was submitted in that case that such evidence was not admissible on much the same grounds as it was submitted in this case that the evidence was not admissible. In the Divisional Court, **SALTER, J.** ([1922] 2 K.B. 54), gave expression to his doubt largely based on many of the considerations urged by counsel for the company in this case. In the Court of Appeal, **BANKES, L.J.**, said (*ibid.*, 476):

F "The deputy recorder admitted the evidence, but says he attached no weight to it, and one of the questions that we are asked is whether he was right in so disregarding it. But that is not a question of law at all; it is a question as to the weight of evidence, and that is a matter with which we have nothing to do . . . But the reason why [this class of evidence] has been discouraged is not because it is inadmissible, but because there are so many circumstances to be taken into consideration that comparisons of that kind are practically valueless."

G **ATKIN, L.J.**, said (*ibid.*, 477):

H "If the objection is to the incorrectness or unfairness of the valuation of the objector's premises, it seems to me plain that it is open to him to say that their valuation is incorrect or unfair because certain other premises, which correspond very closely to his, are assessed at a different value, subject to this, that if he is going to complain that those other premises are assessed too low he must give the occupier notice of the intended objection . . . When the assessment committee are considering the rent which the hypothetical tenant would give for the appellant's premises, any evidence which is relevant to that question is in law admissible, and it must depend on the circumstances of the case whether evidence of the rateable value of premises which are said to be in approximately the same position as the appellant's premises is worth admitting or not. It is a question of degree. I confess I

do not quite appreciate the view taken by SALTER, J., that while you may give evidence of the actual rent paid for the other premises you may not give evidence of their rateable value. In my opinion evidence of the rateable value must be admissible, and for two reasons."

Then comes the passage which my Lord has already cited (*ibid.*, 477).

Counsel for the Central Land Board relied on the Lands Tribunal Rules, 1949, and in particular r. 31 (4) (iii). It is to be observed that the whole of r. 31 deals generally with expert evidence and counsel for the company reminded us of the extraordinary width of the questions which the tribunal has on occasion to deal with. For example, in r. 31 (2) there are references to claims for compensation in respect of minerals or disturbance of business. The rule deals with the number of witnesses who should be called, the restriction on the number to be called, the special circumstances in which more than one may be called, and, if evidence relating to other land is to be given, the necessity of giving notice, and so on. He relied further on r. 32 referring to the power which is given to the tribunal to view the land in question and comparable land. I do not think counsel's argument is advanced very far merely by a consideration of the rules. I think his stronger ground is the general law as laid down in the Court of Appeal. The weight and cogency is not a question for us and I observe that the tribunal in this case said:

"The evidence of the opinions of value of the expert witnesses called before me by the appellants and by the respondents respectively, when considered in the light of the other evidence received and of my own inspection of the land and its neighbourhood, would be adequate to enable me to arrive at a proper determination as to the development value of the said interest in land."

I can conceive of cases where the tribunal would say: "Well, we cannot say that this evidence is inadmissible. Strictly it is admissible, but it is going to give very little assistance to us in the determination of this case". The parties would thereupon, probably, dispense with it.

For these reasons I agree with the judgment which my Lord has already delivered.

ROMER, L.J.: I also agree. The only issues which were before the Lands Tribunal to determine were, first, the restricted value of the hereditaments in question, and, secondly, the unrestricted value of those hereditaments. Counsel for the company, quite rightly, said that no evidence should be admitted unless it was relevant to one or other or both of those issues. He conceded, and rightly, that evidence of sales of comparable land effected in the district would be admissible; and, indeed, it is clear to me that evidence of contracts for sale which for some reason or other had not been carried to completion would be equally admissible, provided that the land was comparable. It is said that this case is different because here the several claims which were put forward were the result of an agreement between a third party and the Central Land Board itself. I can see no principle on which it can be excluded for that reason, although, of course, it would be a matter of weight to which the tribunal would have regard in assessing the value of the evidence. It is to be observed further that if the occupiers managed to secure claims of this character which the board possess, the occupiers could themselves, I think, put them in as admissions by the board if they thought they were likely to help their own case. For these reasons, and those which my brethren have given, I am clearly of opinion that these settled claims are admissible in evidence, and, indeed, I think that to hold the contrary would be to run counter to the reasoning both of this court and the Divisional Court in *Pointer's* case (2). It is, of course, plain that the question as to what weight, if any—and I advisedly say "if any" because some

of the claims may be of no assistance—is to be attached to the claims is one solely and exclusively for the tribunal itself. I agree with the order which my Lord has proposed.

Appeal allowed.

Solicitors: *Treasury Solicitor; Vizard, Oldham, Crowder & Cash*, agents for *Clark, Oglethorpe & Sons, Lancaster* (for the claimants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

AMMAR v. AMMAR.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), May 12, 1954.]

Legal Aid—Costs—Assisted person resident abroad—Costs of attendance at court—Prior approval of Law Society—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 3 (4)—Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I., 1954, No. 166), reg. 23 (1).

The wife filed a petition for divorce on the ground of the husband's cruelty. The husband was resident in Cyprus, and, having obtained a civil aid certificate, he filed an answer in which he denied the charges of cruelty and cross-prayed for a decree of restitution of conjugal rights. On an application by the husband to have his evidence taken before a special examiner in Cyprus on the ground that his means did not enable him to come to England,

HELD: the husband was a vital witness in the present case and the duty of forming an impression of the weight of his evidence could not be delegated to a special examiner, and, therefore, his application would be refused; the expenses incurred by the husband in attending court would normally be allowable on a taxation under the Legal Aid and Advice Act, 1949, sched. III, art. 4 (1): ruling of *HAVERS, J.*, in *Gibbs v. Gibbs* ([1952] 1 All E.R. 962), applied; as he lived in Cyprus, his solicitor could apply under the Legal Aid (General) (Amendment No. 1) Regulations, 1954, reg. 23 (1), for the prior approval of the Law Society so as to obtain an absolute assurance that the expense of his attendance would be allowed on taxation; and, that assurance having been obtained, the solicitor could apply under para. 33 of the Legal Aid Scheme, 1950, to the area committee for an immediate payment to enable the husband to travel to England to attend.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 12 (3) (a) (i), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 548.

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, reg. 3 (4), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, p. 204.

Cases referred to:

- (1) *Gibbs v. Gibbs*, [1952] 1 All E.R. 942; [1952] P. 332; 3rd Digest Supp.
- (2) *Harbin v. Gordon*, [1914] 2 K.B. 577; 83 L.J.K.B. 322; 109 L.T. 794; 42 Digest 213, 2375.

SUMMONS adjourned into court.

Seuffert for the husband.

Baskerville for the wife.

SACHS, J.: This is an application by a husband to have his evidence taken before a special examiner in Cyprus where he resides. That application is opposed by the wife. The parties were married in 1949 in London at a time when the husband was domiciled in Egypt. In the same year the parties went to the husband's home in Cyprus. Later in the year, the wife came to London and the husband followed. Early in 1950 the husband returned to Cyprus and has remained there. The wife, on the other hand, continued to live in England. In April, 1952, the wife filed a petition in this court alleging cruelty. The husband defended the suit, although he did not himself come here from Cyprus for that

purpose. On Dec. 17, 1952, SIR REGINALD SHARPE, Q.C., sitting as a special commissioner in divorce, held that the court had no jurisdiction, the wife not having been ordinarily resident in England for the three years immediately preceding the presentation of the petition, within s. 18 (1) (b) of the Matrimonial Causes Act, 1950, and, further, that, in any event, she had failed to establish her charges of cruelty. In May, 1953, sufficient time having elapsed to bring the wife within s. 18 (1) (b), she filed the petition with which the court is now concerned, and in it she includes charges which repeat, but are not confined to, the charges made in the previous petition. I should mention that the views of the commissioner, expressed without jurisdiction on certain of the charges, constitute no estoppel. The husband, by his answer to this petition, denies the cruelty and asks for a decree for restitution of conjugal rights.

Having read the above allegations and being mindful of the matters which are in issue on the cross-prayer, it seems to me that there could not frequently be a case in which it is more essential for a respondent husband to be present in court if justice is to be done between the parties. A great deal must necessarily depend on the impression the court obtains of the weight of the husband's evidence as assessed when he gives it and when he is cross-examined thereon. In the above circumstances the court would be most reluctant to allow a husband who was in a position to come to this country from Cyprus to give his evidence before a special examiner. The duty of forming an impression of the weight of his evidence cannot be delegated to such an examiner.

The sole ground on which the husband applies to have his evidence taken before a special examiner relates to his lack of means and, thereby, of his ability to come to this country. The husband is an assisted person and has obtained a civil aid certificate under the Legal Aid (General) Regulations, 1950, reg. 3 (4), made pursuant to the Legal Aid and Advice Act, 1949, which relates to persons resident outside Great Britain. Accordingly, I must, and do, assume that before this certificate was granted the machinery for investigating the husband's means was used and was effective. If so, it would follow that his means are such as would warrant this certificate being granted and that the allegation that he is unable to find the money to come to this country is probably accurate. There is in the affidavits filed no suggestion that, if money were available, he would be either unwilling or unable to come here for the purpose of the trial.

There thus arises the question: What is the proper course to pursue in a case where the husband, an assisted person, is outside Great Britain and can properly assert that justice might be denied to him if his evidence is not put before the court, but through lack of means he is unable to attend there, and the wife can properly object that justice might be denied her if the husband's evidence were adduced otherwise than by being given orally before a trial judge who could watch the effect of cross-examination. It is on this question that counsel for both sides at the conclusion of the argument asked that the application be adjourned into court as one raising points of general interest.

The first point that arises is whether the expenses of the husband attending court in such a case are allowable on a taxation under the Legal Aid and Advice Act, 1949 sched. III, art. 4 (1), which provides that the costs are to be taxed

"... according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested ..."

That point was considered in *Gibbs v. Gibbs* (1) where HAVERS, J., following *Harbin v. Gordon* (2), ruled ([1952] 1 All E.R. 962) that such expenses are normally allowable as costs on such a taxation. With that ruling I respectfully agree. I adopt it as my own, and propose to proceed on the footing that it is right. In the present case the husband is clearly a vital witness. The only unusual aspect of the matter is that he lives in Cyprus, but on the facts of the present case that aspect in no way alters the position that his presence in court is vital. What,

then, is the effect of the legal aid system ? The legislature having by s. 12 (3) (a) (i) of the Act of 1949 and the Legal Aid (General) Regulations, 1950, reg. 3 (4), made thereunder, provided that legal aid be available to persons resident abroad it is clear that it was intended that to those eligible for such assistance justice should not be denied. It must be assumed that it was envisaged that costs of some magnitude might be incurred in attaining that end, and that it was realised that those costs might well fall on the legal aid fund. The present case is one in which it is proper that this should happen.

The next point which arose was whether there exist provisions which could in a proper case ensure that the husband would without doubt be entitled to his expenses and also that those expenses be provided in advance of his journey. If not, the object of granting him legal aid might well be frustrated as he would be in the position of merely having a potential right to reimbursement of expenses which he had not the requisite means to disburse. Fortunately, there came into force on Apr. 27, 1954, the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I., 1954, No. 166), reg. 23 (1), by which reg. 14 of the regulations of 1950 was amended to read as follows:

“(6A) Where it appears to the assisted person’s solicitor necessary for the proper conduct of the proceedings for any act to be done, but that the act is either unusual in its nature or involves unusually large expenditure, he may request the appropriate area committee to obtain the Law Society’s prior approval of the act, and, where such prior approval has been obtained, no question as to the propriety of the act shall be raised on taxation as between solicitor and client in accordance with the provisions of sched. III to the Act.”

That new regulation is specifically designed to meet contingencies such as arise in the present case. It enables the assisted person to obtain from the area committee an absolute assurance that the expenses will be allowed on taxation. Once that assurance has been obtained the solicitor to the assisted person could invoke para. 33 of the Legal Aid Scheme, 1950, which reads as follows:

“(1) A solicitor acting for an assisted person may apply to the appropriate area committee for the payment of a sum on account of disbursements incurred or to be incurred in connection with the proceedings to which such person’s certificate relates. (2) On considering such application the area committee may authorise the immediate payment to such solicitor out of the legal aid fund of the amount applied for or of such other sum as they consider appropriate in the circumstances”.

In this way the machinery of the Legal Aid Act puts, as it intended, the assisted person in the same position as a person who has adequate, but not extravagant, means with which to defend himself in the courts of this country in accordance with normal practice here and also ensures that he may assert his rights here. Any husband having such adequate means would, undoubtedly, travel to England, first, to defend himself against attacks such as are being made on this husband, which he has so far successfully resisted, and, secondly, to assert his own claims.

It follows that in the present case it is not necessary to deny justice to either party and that an order for the examination of the husband before a special examiner should be refused. If the husband wishes to attend court, the legal aid machinery is available by which the means for his attendance can be adequately provided. If, on the other hand, he does not wish to attend court, there is no reason why an order should be made to which the wife can properly object. The application is, accordingly, dismissed. In view of the expense which may fall on the legal aid fund I assume that in all the circumstances a careful further check of the husband’s financial situation will be obtained by the appropriate committee of the Law Society.

Application dismissed.

Solicitors: *Paisner & Co.* (for the husband); *Bischoff & Co.* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law]

WATT v. HERTFORDSHIRE COUNTY COUNCIL.

[COURT OF APPEAL (Singleton, Denning and Morris, L.JJ.), May 6, 7, 1954.]

Fire Brigade—Injury to fireman—Liability of fire authority—Injury by jack insecurely placed in vehicle.

London Transport Executive lent a jack to the defendants' fire station, to be on call in case of need, but it was in fact rarely used. It stood on four wheels, two of which were castored, and it weighed between two and three hundredweight. Only one vehicle at the station was specially fitted to carry it. While that vehicle was properly out on other service, the station received an emergency call to an accident in which a woman had been trapped under a heavy vehicle two or three hundred yards away. The officer in charge ordered the jack to be loaded on a lorry, which was the only other vehicle there capable of carrying it and on which there was no means of securing it. On the way to the scene of the accident with a number of firemen employed by the defendants and the jack, the driver of the lorry had to brake suddenly and the jack moved inside the lorry and injured one of the firemen.

HELD: the defendants were under no duty to have a vehicle specially fitted to carry the jack available at all times; the risk taken was such as would normally be undertaken by a member of the fire service and was not unduly great in relation to the end to be achieved; and, therefore, the defendants were not liable for damages for negligence to the fireman.

Decision of BARRY, J. ([1954] 1 All E.R. 141), affirmed.

Cases referred to:

(1) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 34 Digest 202, 1657.

(2) *Daborn v. Bath Tramways Motor Co., Ltd. & Trecoor Smiley*, [1946] 2 All E.R. 333; 2nd Digest Supp.

APPEAL by the plaintiff against an order of BARRY, J., dated Dec. 16, 1953, reported [1954] 1 All E.R. 141, dismissing an action for damages for negligence on the ground that it had not been shown that the defendants had been guilty of negligence towards the plaintiff, a fireman in their employment. The plaintiff had been injured through the moving of a heavy jack in a lorry in which he was being conveyed to an accident and which was not specially adapted for carrying the jack or provided with means of securing it.

Baker, Q.C., and H. B. Grant for the plaintiff.

Viscount Hailsham, Q.C., and Roland Brown for the defendants.

SINGLETON, L.J.: The plaintiff was employed in the fire service under the control of the defendants and he was stationed at Watford. He had a serious accident on July 27, 1951, as a result of which he brought this action, claiming damages for negligence. His case is that the defendants undertook to exercise the care which they owed to him and to other men employed in the fire service, and he gives particulars of negligence. There are always firemen on duty at the fire station at Watford, and on July 27, 1951, an emergency call was received there to the effect that there had been an accident and that a woman was trapped under a heavy vehicle about two hundred or three hundred yards away. In view of the nature of the emergency the officer in charge, Sub-officer Richards, gave directions that two teams of men should go out, and he himself went with the first team. It was clear that there might be need for lifting apparatus of some kind, and at the fire station there was a jack capable of raising heavy weights. The jack did not belong to the fire service. It was the property of London Transport Executive, whose practice it is to lend out jacks of this kind to various fire stations, and, perhaps, to other bodies, so that they can be on call in case of need. Thus, the jack was on loan to the defendants at this fire station.

It is only on rare occasions that there is an emergency call requiring the services of a jack of this kind. The plaintiff had been in the fire service in Hertfordshire since 1939, and he had only known of one emergency call on which a jack was required.

A The defendants had an Austin vehicle fitted to carry this jack. The fire station at Watford is not a large one, and it had not a great many vehicles. The Austin vehicle was the only one fitted to carry the jack, but it was not kept purely for that purpose. It had other services to perform during part of the week, and on this day it was properly out on other service. The jack stands on four small wheels, two of which are castored, which means that they may turn all the way round the circle. There was at the fire station only one vehicle on which the jack could be carried in the absence of the Austin vehicle, a Fordson lorry, B and before leaving with his team Sub-officer Richards told the leading fireman in charge of the second team, of which the plaintiff was a member, to take the jack on the lorry. Consequently, the five men in the second team lifted up the jack, which weighed between two and three hundredweight, and put it on to the flat Fordson lorry, which had boards at the sides and a tailboard. They got on the lorry themselves, two in the front seat, and three sitting in the body. The plaintiff was in the forward part of the body on the right-hand side, and the other C two men there were, perhaps, a little further back and on the other side, and they held the jack somehow. Obviously there might be movement of the jack in the lorry, for there were no means of securing it, no place on which anything could be tied, and no built-in system which would prevent movement. There was, therefore, a risk. The men knew what they were doing. They started their journey, which was only two hundred or three hundred yards. But on the way D something happened to cause the driver to apply his brakes suddenly, the jack moved inside the lorry, the plaintiff's leg was caught, and he was injured.

In these circumstances he claimed that the defendants, his employers, were negligent in that they

E " (a) failed to load or secure the said lifting jack in such a way that it could not become dislodged; (b) loaded the said lifting jack in such a way that they knew or ought to have known it was likely that if the said lorry pulled up suddenly the same would become dislodged and cause injuries to any person riding on the back of the said lorry; (c) permitted and/or caused the plaintiff to ride on the back of the said lorry on to which the said lifting jack had been loaded as aforesaid; (d) caused or permitted the said jack to be F transported on the said lorry which as the defendants knew or ought to have known was not provided with clips straps or other suitable means to secure the same; (e) failed to provide any or any adequate supervision of the loading of the said jack on to the said lorry " ;

G and it was claimed that the plaintiff's accident was due to negligence, and that he was entitled to recover damages against the defendants.

H BARRY, J., heard the action, and on Dec. 16, 1953, he gave judgment in favour of the defendants, holding that it was not shown that they had been guilty of any negligence towards the plaintiff or towards their other employees. I am in complete agreement with his judgment. The fire service is a service which must always involve risk for those who are employed in it, and, as counsel for the plaintiff pointed out, they are entitled to expect that their equipment shall be as good as reasonable care can secure. An emergency arose as often happens. Mr. Richards, the sub-officer who had given the order, was asked in re-examination:

" From your point of view you thought it was a piece of luck, with this unfortunate woman under the bus, that the Fordson was available and you could use it ? A.—Yes. It is recognised in the service that we use our initiative at all times, and in doing so any reasonable step you take is

considered satisfactory if it is a question of saving life. You have to make a sudden decision."

It is not alleged that there was negligence on the part of any particular individual, that the driver was negligent in driving too fast, or that Sub-officer Richards was negligent in giving the order which he did. The case put forward by counsel for the plaintiff in this court is that, as the defendants had a jack, it was their duty to have a vehicle fitted in all respects to carry that jack, from which it follows, I suppose, that it is said a vehicle must be kept at the fire station at all times, or that, if there is not one, the lifting jack must not be taken out. Indeed, counsel claimed that, in the case of such an occurrence as this, if there was no vehicle fitted to carry the jack, the sub-officer ought to have telephoned to the fire station at St. Albans and arranged that they should attend to the emergency. St. Albans is some seven miles away, and it was said an extra ten minutes or so would have elapsed if that had been done. I cannot think that is the right way to approach the matter. There was a real emergency. The woman was under a heavy vehicle. These men in the fire service thought they ought to go promptly, and thought they ought to take a lifting jack, and they did so. Most unfortunately this accident to the plaintiff happened.

The duty owed by employers has been stated often. LORD HERSCHELL in *Smith v. Baker & Sons* (1) said ([1891] A.C. 362):

"It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

The employee in this case was a member of the fire service, who always undertake some risk, though, according to counsel for the plaintiff, not this risk. Is it to be said that, if an emergency call reaches a fire station, the person in charge has to ponder on the matter in this way: Must I send out my men with the lifting jack in these circumstances, or must I telephone to St. Albans, seven miles away, to ask them to undertake the task? I suppose he must think about his duty, but what would a reasonable man do placed as he was? Would the reasonably careful head of the station have done anything other than that which Sub-officer Richards did? I think not. Can it be said, then, that there is a duty on the employers here, the defendants, to have a vehicle built and fitted to carry this jack at all times, or, if they have not, not to take the jack for a short journey of two or three hundred yards? I do not think that will do.

ASQUITH, L.J., in *Daborn v. Bath Tramways Motor Co., Ltd. & Trevor Smithey* (2) said ([1946] 2 All E.R. 336):

"In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk."

The purpose to be served in this case was the saving of life. The men were prepared to take that risk. They were not, in my view, called on to take any risk other than that which normally might be encountered in this service. I agree with BARRY, J., that, on the whole of the evidence which was given, it would not be right to find that the defendants as employers were guilty of any failure of the duty which they owed to their workmen. In my opinion, the appeal should be dismissed.

DENNING, L.J.: It is well settled that in measuring due care one must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this. One must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency, there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk, and I am glad to say there have never been wanting in this country men of courage ready to take those risks, notably in the fire service.

In this case the risk involved in sending out the lorry was not so great as to prohibit the attempt to save life. I quite agree that fire engines, ambulances and doctors' cars should not shoot past the traffic lights when they show a red light. That is because the risk is too great to warrant the incurring of the danger. It is always a question of balancing the risk against the end. I agree with my Lord that this appeal should be dismissed.

MORRIS, L.J.: I also agree. The accident in this case came about as a result of a somewhat unusual concatenation of circumstances. There had for a long time been no call for the use of the jack. Any such call, according to the evidence, was extremely rare. It so happened that a call came at a time when the Austin vehicle which would normally have carried the jack was otherwise engaged. I do not think it can be said to have been unreasonable to have had the Austin vehicle for use in the way that was arranged. Had the fire station been larger, had there been unlimited resources, unlimited space, and an unlimited number of vehicles, then it may be that another fitted vehicle would have been available. But that was not reasonably practicable or possible. When the call for the jack came, Mr. Richards had to decide what to do, and I do not think that it would have been in accordance with the traditions of the fire service if he had said that he could do nothing other than call on St. Albans. What he decided to do was in accordance with the practice of the fire service. Mr. Bottin, the assistant chief officer in the London Fire Brigade, speaking of the provision of jacks, pointed out that in London there are twenty-nine sets of lifting gear, one being provided for every two stations. He said in evidence:

"Q.—Can you always undertake that that one vehicle will be available for the transport of a jack? A.—No. Q.—In your view is it reasonably practicable for a fire service to adapt all of its vehicles for the transport of jacks? A.—No. I would not think it was reasonable. Q.—You have been a station officer, have you not? A.—I have. Q.—Supposing you found yourself in charge of a station, and supposing the equipment available was not that most suitable for the purpose but you found that human life was in danger and you might save it by adopting a method not entirely suitable, what in your view would be your duty as a station officer? A.—I have had that experience, and I did not hesitate to get the equipment there as quickly as possible."

As I have said, I think Mr. Richards acted in accordance with the traditions of the service, and I cannot for one moment think that the employers could be held responsible as having failed in the performance of their duties. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Denis Hayes*, agent for *F. S. Ellis & Co.*, Watford (for the plaintiff); *Berrymans* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. McNALLY.

COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Havers, J.J.),
May 24, 1954.]

Criminal Law—Trial—Plea—Plea of guilty—Withdrawal—Application before sentence pronounced—Discretion of court.

The question whether or not a prisoner should be allowed to withdraw a plea of Guilty before he is sentenced is entirely a matter of discretion for the trial judge, but, once judgment has been pronounced, a plea cannot be withdrawn.

R. v. Sell (1840) (9 C. & P. 346) and *R. v. Plummer* ([1902] 2 K.B. 339), referred to; *R. v. Blakemore* (1948) (33 Cr. App. Rep. 49), not followed.

Cases referred to:

- (1) *R. v. Blakemore*, (1948), 33 Cr. App. Rep. 49; 2nd Digest Supp.
- (2) *R. v. Sell*, (1840), 9 C. & P. 346; 173 E.R. 863; 14 Digest 257, 2581.
- (3) *R. v. Plummer*, [1902] 2 K.B. 339; 71 L.J.K.B. 805; 86 L.T. 836; 66 J.P. 647; 14 Digest 257, 2582.

APPEAL against conviction and sentence.

The appellant, Thomas McNally, was convicted at Manchester Assizes of warehouse breaking and larceny and housebreaking and larceny, and was sentenced to seven years' imprisonment. On arraignment on Mar. 2, 1954, he pleaded Guilty. Three other prisoners with whom the appellant was indicted pleaded Guilty, but one, Stubbs, pleaded Not Guilty. The appellant had pleaded Guilty when before the magistrates. On Mar. 17, 1954, Stubbs was tried and convicted. After he had been sentenced, the appellant was put up for sentence, and he then said he wished to change his plea and plead Not Guilty. He gave no grounds for wishing to do so, and JONES, J., refused his application.

T. R. Fitzwalter Butler for the appellant.

Sir Noel B. Goldie, Q.C., and *S. Smith* for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: We take this opportunity of stating firmly what is the position with regard to a prisoner who desires to change his plea. If he has pleaded circumstances from which the court can see that there is no question of mistake, the court is not bound to allow him to withdraw his plea. If, however, it appears that there are sound grounds for the application as, for instance, where a prisoner charged with receiving stolen goods pleads Guilty and later says: "I received them, but I did not know they were stolen", the matter is entirely in the discretion of the learned judge. The most that can be said in the present case is that the learned judge did not say to the appellant: "On what grounds do you want to withdraw your plea?", but it is obvious that he had no grounds. In his notice of appeal he does not suggest that he had any grounds, nor has his learned counsel been able to tell the court of any.

The question whether or not a plea can be withdrawn is entirely one for the learned judge who is not bound to allow a plea to be withdrawn once it has been made. If the court came to the conclusion that there was a question of mistake or misunderstanding, or that it would be desirable on any ground that the prisoner should be allowed to join issue, no doubt, the court would allow him to do it. But we think that we ought to say that we do not think *R. v. Blakemore* (1) ought to be followed. That was a case in which BYRNE, J., in, as he said, wholly exceptional circumstances, allowed a plea to be withdrawn after judgment. Once the sentence has been pronounced there is no power in the court to allow the plea to be withdrawn: see *R. v. Sell* (2) (9 C. & P. 348). In *R. v. Plummer* (3) it was stated plainly in the judgment of WRIGHT, J., that a plea cannot be changed after judgment. In the present case, it is true, the appellant asked to withdraw his plea before judgment was given. The learned judge might have sentenced him

directly he pleaded Guilty, but he did not do so. He waited till he had heard the whole facts of the case, and he then came to the conclusion that there was no ground for interfering. We are satisfied that the learned judge exercised his discretion, and, accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *P. B. Dingle*, town clerk, Manchester (for the Crown).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

SAPSFORD v. SAPSFORD AND FURTADO.

B [HAMPSHIRE ASSIZES (Karminski, J.), March 17, 18, 19, 22, 1954.]

Divorce—Adultery—Masturbation of co-respondent by respondent.

C Semble: adultery is committed where there is mutual sexual intercourse, which need not amount to full penetration providing both the man and the woman play what may be described as their normal role. Mere masturbation of the one by the other does not come within the ambit of mutual sexual intercourse.

AS TO ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-665, paras. 972-978; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 311, 312, Nos. 2591-2605.

Cases referred to:

- D (1) *Rutherford v. Richardson*, [1923] A.C. 1; 92 L.J.P. 1; 128 L.T. 399; 27 Digest, Replacement, 592, 5536.
 (2) *Thompson (otherwise Hulton) v. Thompson*, [1938] 2 All E.R. 727; [1938] P. 162; *affd.* C.A., [1938] 4 All E.R. 1; [1939] P. 1; 107 L.J.P. 150; 159 L.T. 467; 27 Digest, Replacement, 464, 4001.

E PETITION by the husband for dissolution of the marriage on the ground of the wife's adultery with the co-respondent. By her answer the wife denied that she had committed adultery, and cross-prayed for a decree of dissolution, alleging that the husband had treated her with cruelty. KARMINSKI, J., found the wife's charges of cruelty not proved and dismissed the prayer of her answer. This report deals only with the issue as to adultery.

F *Willett* for the husband.
A. C. Munro Kerr for the wife.
Phillimore, Q.C., and *G. B. Best* for the co-respondent.

G KARMINSKI, J.: I have no doubt whatever that on a number of occasions the wife masturbated the co-respondent. That, of course, is an act of sexual familiarity which on any view of marriage can hardly be thought to be consistent with the duties of a wife towards her husband, but I am not concerned with that. I have to decide whether or not the behaviour between the co-respondent and the wife amounted to adultery. Nobody has yet attempted to define adultery, and I do not propose to rush in where wiser men have not. I am, however, content to say that I do not think it can be said—nor, indeed, in the end was it argued—that manual satisfaction by itself can amount to adultery. On the other hand, it has been said many times that an act of adultery need not be such a complete act of intercourse as is required to consummate a marriage, or, put in the more guarded Latin of the canonists and civilians, adultery need not be a “vera copula”.

The matter has arisen in cases where everything has pointed to an inference of adultery, but the woman concerned has proved to be, or, at any rate, to have the appearance of, a *virgo intacta*. Such a case was *Rutherford v. Richardson* (1), where there was evidence that the woman named as intervener was at all material

times a virgin. In the course of his speech in the House of Lords, VISCOUNT BIRKENHEAD discussed the position which arose from the virginity of the woman named, and said ([1923] A.C. 11):

"The evidence of the doctor was cautious and guarded. It seems, however, to establish that there had been no penetration and, in the doctor's opinion, that the appearance of the organs was such as he did not think was consistent with an effective attempt at penetration. Some suggestion was made in argument in this House that this condition, even though inconsistent with penetration, was not inconsistent with some lesser act of sexual gratification. If there were evidence of such an act, it cannot be doubted that, whatever view may have been taken in past ages in the ecclesiastical courts, a decree based upon adultery might issue."

If I understand those words, LORD BIRKENHEAD had in mind what had occurred in that particular case where there had been, at any rate, an attempt at sexual intercourse—that is, by the introduction of the male organ into the female—but for one reason or another the attempt had not fully succeeded. A similar state of affairs was considered by LANGTON, J., in *Thompson (otherwise Hulton) v. Thompson* (2). There the wife had obtained a decree on the grounds of the husband's adultery with a young woman, but the King's Proctor had intervened on the production of medical evidence that the woman in question was a virgin. There was some difficulty, as I understand the report, because of the uncertainty of the identification of the woman named by the gynaeceologists called, but, as I understand the judgment of LANGTON, J., he proceeded on the assumption that the two medical men had identified the woman named, and came to the conclusion on the evidence, which was, briefly, that the husband and the woman named had shared a bedroom over quite long periods in the country, that they had committed adultery, although the woman had the signs of virginity. The way he put it in his judgment was this ([1938] 2 All E.R. 732):

"I am regretfully forced to the conclusion that the respondent and the intervenor in this case have had mutual intercourse, amounting to adultery in law."

Now, mutual intercourse, in my view, means that there has to be intercourse in which both the man and the woman play what may be described as their normal role, and that mere masturbation by itself cannot come within the ambit of mutual intercourse. If, therefore, I came to the conclusion that masturbation was all that had taken place here I should be bound to find, I think, on the authorities, that no adultery had taken place. The older authorities and some of the text book writers have also discussed the matter, although not, I think, in very clear terms, but the element of intercourse—of copulation—is always present in their definitions. In the well-known text-book by PROFESSOR ESMEIN, *LE MARIAGE EN DROIT CANONIQUE*, published in France in 1891 (p. 90), in discussing the relief given for adultery he describes adultery in the Latin words "fornicatio carnalis", and I think by the use of those words he was contemplating a carnal union between a man and a woman. Adultery, of course, is fornication when both parties to the fornication are married, and the physical act, I think, is the same in both adultery and fornication.

[His Lordship referred to the medical evidence and continued:] The position can be fairly summarised as follows. At the present moment, and probably for a number of months past, the co-respondent is and has been incapable, and, if he had been capable of sexual intercourse, owing to his state of health, he might even have died in the attempt, but, going back to the spring of 1952 and the ensuing months, I am not satisfied, nor, indeed, I think, are the doctors, that he was then incapable. It may be, indeed, I think it is very probable, that he had great difficulty in achieving a satisfactory coitus—that is, coitus satisfactory both to himself and to the woman. I have to decide whether, on

the one hand, there was a complete act of sexual intercourse or a less successful attempt, or, on the other, whether there was nothing of the kind and mere masturbation. This task has been made difficult by the absence of the co-respondent, but, having given the matter a good deal of thought, I have come to the conclusion that the co-respondent did commit adultery with the wife. So far as the complete success of the act of intercourse I am not, for the reasons given, bound to estimate them, but, applying the well-known passage of LORD BIRKENHEAD ([1923] A.C. 11), to which I have already referred, I have no doubt that, if whole penetration was not achieved, some lesser act of sexual intercourse was performed. I prefer, however, if I may respectfully do so, to use the phrase used ([1938] 2 All E.R. 732) by LANGTON, J., in *Thompson (otherwise Hulton) v. Thompson* (2). I find as a fact that the wife committed with the co-respondent and the co-respondent with the wife, such mutual intercourse as amounts in law to adultery. That being so, I find the contents of the petition proved, and pronounce a decree nisi on the grounds of the wife's adultery with the co-respondent.

Decree nisi.

Solicitors: *Williamson, Hill & Co.*, agents for *Pengilly & Ridge*, Weymouth (for the husband); *Vandercom, Stanton & Co.* (for the wife and the co-respondent).
[Reported by CONRAD OLDHAM, Esq., Barrister-at-Law.]

ELLERBY v. MARCH (VALUATION OFFICER).

D [COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), May 10, 1954.]

Rates—Lands Tribunal—Valuation officer—Jurisdiction to hear—Appeal by ratepayer from decision of local valuation court—No cross-appeal by valuation officer—Notice by valuation officer of intention to appear on hearing of appeal—Application by valuation officer for assessment directed by local valuation court to be increased—Local Government Act, 1948 (c. 26), s. 48 (4), s. 49 (1)—Lands Tribunal Act, 1949 (c. 42), s. 1 (3) (e)—Lands Tribunal Rules, 1949 (S.I., 1949, No. 2263), r. 9 (1), r. 38 (4).

On an appeal by a valuation officer against the objection of a ratepayer to his proposal to increase the assessment of a hereditament from £27 gross value and £20 rateable value to £140 and £113, respectively, the local valuation court directed that the hereditament should be entered in the valuation list at a gross value of £100 and a rateable value of £80. The ratepayer gave notice of appeal to the Lands Tribunal, under the Local Government Act, 1948, s. 49 (1), and the Lands Tribunal Act, 1949, s. 1 (3) (e), the grounds of appeal being that part of the property was exempt from rates under the Local Government Act, 1929, s. 67, and, alternatively, that the assessment was excessive. The valuation officer then gave notice, under the Lands Tribunal Rules, 1949, r. 9 (1), of his intention to appear at the hearing of the appeal, stating the grounds on which he relied. The tribunal held that, in the absence of a cross-appeal by the valuation officer, they had no jurisdiction to consider his application for the values proposed by him to be entered in the valuation list. On an appeal by the valuation officer,

H HELD: the provision in the Local Government Act, 1948, s. 49 (1), that the appellate court (then the county court, but now the Lands Tribunal by virtue of s. 1 (3) (e) of the Act of 1949) "may give any directions which the local valuation court might have given" was limited by the words of s. 48 (4) of the Act, and, accordingly, the directions which the tribunal could give were "such directions . . . as appear to [the tribunal] to be necessary to give effect to the contention of the appellant [before the tribunal] if and so far as that contention appears to [the tribunal] to be well founded"; r. 9 (1) of the rules of 1949 was to be read in conjunction with r. 38 (4), and, so read,

the rules were in accordance with the provisions of s. 48 (4) and s. 49 (1) of the Act, as construed by the court, and the tribunal were not empowered by r. 9 (1) to consider and decide on any valuation which might be brought before them by persons other than an appellant; and, therefore, at the hearing of the ratepayer's appeal, there being no cross-appeal by the valuation officer, the tribunal had no jurisdiction to entertain the valuation officer's application to increase the assessment directed by the local valuation court.

FOR THE LOCAL GOVERNMENT ACT, 1948, s. 48 (4) and s. 49 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 20, pp. 250, 251; and FOR THE LANDS TRIBUNAL ACT, 1949, s. 1 (3) (e), see *ibid.*, Vol. 28, p. 319.

FOR THE LANDS TRIBUNAL RULES, 1949, r. 9 (1) and r. 38 (1), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 12, pp. 161, 172.

CASE STATED by the Lands Tribunal under the Lands Tribunal Act, 1949, s. 3 (4).

The ratepayer, Charles M. Ellerby, was the owner and occupier of a hereditament which, until June, 1952, was described in the valuation list for the Dartford Rural District as "house and premises" and assessed at a gross value of £27 and a rateable value of £20. On June 20, 1952, the valuation officer, E. J. March, made a proposal for the alteration of the valuation list in respect of the hereditament by substituting "workshops, garages, stores, tanks, house and land" for the previous description and increasing the assessment to £140 gross value and £113 rateable value, on the ground, *inter alia*, that buildings at the rear of the house had not been included in the valuation list. The ratepayer objected, and the valuation officer appealed against the objection to the local valuation court for West Kent, under the Local Government Act, 1948, s. 41 (6) (a). On Sept. 25, 1952, the valuation court directed that the valuation list be altered by the substitution of the description proposed by the valuation officer for the previous description and that the values of the hereditament be inserted therein at £100 gross value and £80 rateable value. On Oct. 13, 1952, the ratepayer gave notice of appeal to the Lands Tribunal, under the Local Government Act, 1948, s. 49 (1), and the Lands Tribunal Act, 1949, s. 1 (3) (e), on the grounds that the buildings were exempt from rates under the Local Government Act, 1929, s. 67, and, if not so exempt, that the assessment was excessive. On Nov. 12, 1952, the valuation officer gave notice, under the Lands Tribunal Rules, 1949, r. 9 (1), of intention to appear at the hearing of the appeal before the tribunal, stating that the grounds on which he intended to rely were that the buildings were not exempt from rates under s. 67 of the Act of 1929 and that the values ascribed to the hereditament in his proposal were not excessive and should be inserted in the valuation list. The tribunal held that they were entitled to consider only the formal appeal before them, which was by the ratepayer, and, accordingly, that they had no jurisdiction to increase the assessment made by the local valuation court. Being of opinion that the buildings were not exempt from rates under s. 67 of the Act of 1929, they confirmed the decision of the local valuation court. The valuation officer appealed, contending, *inter alia*, that under s. 49 (1) of the Act of 1948 the Lands Tribunal (who became the appellate court in place of the county court under s. 1 (3) (e) of the Act of 1949) had jurisdiction to make any order which the local valuation court could have made at the hearing before them.

Maurice Lyell, Q.C., for the valuation officer.
Rowe, Q.C., and *Amies* for the ratepayer.

SOMERVELL, L.J., stated the facts, and continued: The question raised by this case is whether, the only appeal being by the ratepayer, it was open to the Lands Tribunal to hear and consider evidence led by the valuation officer with a view to increasing the assessment directed by the local valuation court. The

tribunal held that they were not entitled to increase the assessment, and that they were entitled to consider only the formal appeal before them which was by the ratepayer who contended that the assessment should be reduced below that directed by the local valuation court. The question on this appeal is whether the tribunal were right in law or whether, as counsel for the valuation officer contended, they had jurisdiction under the Local Government Act, 1948, to entertain an application by the valuation officer that the assessment should be as high as he had proposed although he had not appealed.

The Local Government Act, 1948, s. 49 (1), provided that appeals from a local valuation court should be to the county court. When the Lands Tribunal was set up under the Lands Tribunal Act, 1949, s. 1 (1), the tribunal was substituted, by s. 1 (3) (e) of the Act, for the county court, there being no actual amendment to or alteration of the words in s. 49 (1) of the Act of 1948. I do not find it necessary to refer in detail to the sections dealing with the procedure at different stages, as I think that the point which we have to determine is made sufficiently clear by s. 48 and s. 49 of the Act of 1948. Section 48 deals with the procedure where there is a notice of appeal to a local valuation court and provides, by sub-s. (3), who may be heard, viz.:

“(a) the appellant; and (b) the valuation officer, when he is not the appellant; and (c) the owner or occupier . . . when he is not the appellant; and (d) the rating authority . . . when that authority is not the appellant . . .”,

and a fifth class which we need not consider. Section 48 (4) reads:

“After hearing the persons mentioned in the last preceding sub-section, or such of them as desire to be heard, the local valuation court shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the court to be well founded, and the valuation officer shall incorporate in the list as settled, or, as the case may be, cause to be made in the list, such alterations as are necessary to give effect to those directions”.

Section 49 (1) provides:

“Any person who, in pursuance of the last preceding section, appeared before a local valuation court on the hearing of an appeal and is aggrieved by the decision of the court thereon may, within twenty-one days from the date of the decision, appeal to the county court for the county court district in which the hereditament in question is situated . . . and the court, after hearing such of the persons as appeared as aforesaid as desire to be heard, may give any directions which the local valuation court might have given”.

Taking the facts as stated in the present Case, the local valuation court could have done anything from directing that the assessment should remain as it was, viz., £27 gross value and £20 rateable value, to accepting the alteration proposed by the valuation officer, viz., £140 gross value and £113 rateable value. Therefore, it is submitted that, however limited the ambit of the appeal might be in this or other cases, the last words of s. 49 (1) of the Act of 1948 confer a statutory jurisdiction, which must not be restricted by any procedural conditions precedent, to hear and determine all the issues which were raised and raisable before the local valuation court. I have come to a clear conclusion that the words of s. 49 (1) do not mean that. I think that their natural meaning is to be found by referring back to s. 48 (4), which sets out the directions which the local valuation court might have given. They are:

“such directions . . . as appear to them to be necessary to give effect to

the contention of the appellant if and so far as that contention appears to the court to be well founded . . . ”

I think that in s. 49 (1) one has to read in that limitation, substituting, of course, for the appellant before the local valuation court, the appellant before the Lands Tribunal, which is now the appellate court. That, in my opinion, is the natural meaning of the words of s. 49 (1), but, if there be any ambiguity, I think that it falls to be resolved by a consideration of the procedure with regard to this matter in the past and to legal proceedings in general, in the first place, and, in the second place, by considerations of convenience.

The general principle followed by all courts and tribunals is that they deal with matters which parties bring before them, and it would be quite exceptional to find them dealing with matters which parties have not brought before them. Matters are brought before them in some formal document such as a statement of claim, or, in the case of an appellate tribunal, a notice of appeal. I would have needed very clear words to satisfy me that it was intended that an appellate court should deal with issues other than those which an appellant brought before it. I realise that, where one is dealing with quantum, there would be no great difficulty in giving the words of s. 49 (1) the construction for which the valuation officer contended. I fully accept also that this is a proper matter to be brought before this court, and that, when the new valuation list becomes operative, there may well be cases where a decision in this case in the valuation officer's favour might be of benefit to the ratepayers who have not put in notices of appeal. But, subject to a point on the Lands Tribunal Rules, 1949, to which I shall refer later, I think that, where one is dealing with matters other than merely a question of quantum, or where, as in the present case, there was an issue in addition to that of quantum, grave inconvenience might arise if one accepted the construction for which the valuation officer contended. Suppose that in the present case, the local valuation court having reduced the amount for which the assessment should be raised to that which he had originally proposed or some figure higher than that directed by the court: his notice of appeal would give no indication that any issue other than that of quantum was involved, and it would, in my opinion, be most inconvenient if the ratepayer, without serving any notice of appeal, was entitled, on the hearing of the valuation officer's appeal, to argue the issue that the hereditament should be in whole or in part de-rated.

That inconvenience, it is said, is dealt with by the Lands Tribunal Rules, 1949. Counsel for the valuation officer submitted that, if the wider construction, which, I think, the tribunal were right in rejecting, were right, then r. 38 (4) of the rules of 1949 is *ultra vires*. That rule reads:

“ On an appeal against the decision of a local valuation court, the tribunal shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to the tribunal to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the tribunal to be well founded ”.

Counsel for the valuation officer further submitted that any rule which purported to say that matters outside what I will call the first appeal could be raised in a second appeal only if a notice were served within the prescribed time would also be *ultra vires*. On the other hand, r. 9 (1) provides:

“ Every person upon whom a copy of the notice of appeal is served shall, if he intends to appear on the hearing of the appeal, give written notice of his intention to do so stating . . . (ii) the grounds on which he intends to rely: (iii) whether he does or does not propose to call an expert witness to give evidence in support of any valuation.”

In the present case, the valuation officer, acting on that rule, gave notice that he was going to ask the tribunal to increase the assessment. It was contended

on his behalf that that would prevent any inconvenience such as I have referred to. I think that r. 9 (1), which is drafted in very general terms, might look as if it were based on the wider construction. On the other hand, it has to be construed and read in the light of r. 38 (4). Although the point does not directly arise in this case, if r. 38 (4) were *ultra vires*, as counsel for the valuation officer contended, and if it was sought to rely on r. 9 (1) as meaning that there must be a notice before a matter outside the ambit of the actual appeal could be raised, then I should have thought that r. 9 would also have to be held to be *ultra vires*. On the view which I take, however, both rules are in accordance with the provisions of the Act. In the last paragraph of the Case, the Lands Tribunal set out the issues clearly, and they came to the conclusion which, in my opinion, is the right one on the question of construction.

B BIRKETT, L.J.: I am of the same opinion. I should like to add a few words with regard to the argument of counsel for the valuation officer on the construction of s. 49 (1) of the Local Government Act, 1948. When he first opened this appeal, he presented the point for decision in these words:

C “When an appeal comes from the local valuation court to the Lands Tribunal, do the Lands Tribunal re-hear it and make any order which the local valuation court could have made?”

D When it was presented in that form I was in some measure attracted by the argument which he put forward because, undoubtedly, the local valuation court in this case could have given a decision on the proposal of the valuation officer to increase the gross value to £140 and the rateable value to £113. Counsel for the valuation officer contended that one could not exclude the concluding words of s. 49 (1), namely, that the court (now the Lands Tribunal)

“... may give any directions which the local valuation court might have given.”

E In support of his contention he submitted that, if the concluding words of s. 49 (1) were intended to have the same meaning as the words in s. 48 (4), the same words would have been repeated, and that, as different words had been used, they must be given a particular meaning. He contended that the words in s. 49 (1) bore the wider meaning, viz., that the tribunal might do all that the valuation court might have done. After consideration, I am of opinion that the true construction of the sub-section is as stated by my Lord. The Lands Tribunal dealt with the argument in this way:

F “We agree that the jurisdiction which the county court originally had has been transferred to the Lands Tribunal and that it can do on appeal what the county court was entitled to do. Had the valuation officer appealed against the decision of the local valuation court we have no doubt that we are vested with jurisdiction to assess the hereditament in accordance with the proposal, if we came to the conclusion that the proposal was justified; **G** but in our opinion we were faced with the question: What were the directions which the local valuation court might have given?”

They then proceeded to say what my Lord has already said, that these directions were stated in the Local Government Act, 1948, s. 48 (4). I agree that the appeal should be dismissed.

H ROMER, L.J.: I also agree. It seems to me that, were it not for two points, the argument which counsel for the valuation officer addressed to us in this case could scarcely have been presented at all. The first point arises out of the words in s. 49 (1) of the Act of 1948:

“... may give any directions which the local valuation court might have given”.

Counsel's suggestion with regard to that is that the county court, and now the

Lands Tribunal, could make an order having the same range and scope as that which the local valuation court could have made at the hearing before them. I think, however, that that argument is subject to a fallacy in that it treats the appellant before the tribunal as being the same person as appeared as appellant before the local valuation court. That is not so or may not be so. I think all that s. 49 (1) means is that the tribunal shall have the same powers, *mutatis mutandis*, as the local valuation court would have on an appeal before them. I would only add that it seems to me to be an almost impossible conception that an appellate court should treat an appeal as though it had been brought by someone other than the appellant and (in the absence of a cross-appeal) adjudicate on matters which the appellant himself had not brought before it. The truth, I think, is that the words "may give any directions", and so on, are merely a compendious way of incorporating into s. 49 (1), in relation to an appellant before the tribunal, the directions which a local valuation court is empowered to give under s. 48 (4) in relation to an appeal which is brought before them.

The second point arises from the language of the Lands Tribunal Rules, 1949, r. 9 (1). One of the things which a party who intends to appear on the hearing of an appeal must do is to give written notice of intention stating, among other things, whether he does or does not propose to call an expert witness to give evidence in support "of any valuation" [r. 9 (1) (iii)]. If one takes that language by itself, it might appear to mean that the tribunal are to consider and decide on any valuation which may be brought before them by persons other than the appellant. But that rule, as SOMERVILLE, L.J., pointed out, has to be read in conjunction with r. 38 (4) which makes it plain that that is a wrong way of interpreting r. 9 (1). Counsel for the valuation officer suggested that r. 38 (4) was *ultra vires*, but I am quite satisfied that that is not so because, as I think, it puts on s. 49 (1) of the Act a meaning which, in my opinion, is plainly the right one and quite in accordance with the language in which the legislature expressed itself. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Knuck & Richardson*, agents for *T. G. Baynes & Sons, Dartford* (for the ratepayer).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

STEVENS v. STEVENS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.),
May 13, 14, 1954.]

Court of Appeal—Transcripts of proceedings in court below—Sufficiency of notes of trial judge—Omission from the transcript of part of evidence—R.S.C., Ord. 66A, r. 3 (1), (2).

In view of the cost of preparing a transcript of all the evidence in a long case it is desirable that, whenever appropriate, advantage will be taken by the parties of the provisions of R.S.C., Ord. 66A, r. 3, which are: “(1) If the judge intimates that in the event of an appeal his note will be sufficient, the shorthand note of the evidence need not be transcribed for the purposes of an appeal. (2) If the parties agree or the judge is of opinion that the evidence or some part of the evidence of any witness or witnesses would, in the event of an appeal, be of no assistance to the Court of Appeal, the shorthand note of such evidence need not be transcribed for the purposes of an appeal.”

Divorce—Practice—Reconciliation—Judge seeing parties individually and separately in his room during trial.

Except in matters relating to infants and custody it is not desirable that a judge, at any stage of the trial, should see the parties separately, not only from their legal advisers, but from each other. If a judge desires to see the parties apart from their legal advisers he should see them together.

AS TO EVIDENCE IN THE COURT OF APPEAL, see HALSBURY, Hailsham Edn., Vol. 26, p. 123, para. 243; and FOR CASES, see DIGEST, Practice, pp. 798-801, Nos. 3612-3650.

Case referred to:

(1) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest, Replacement, 350, 2899.

APPEAL by the wife against a decision of His Honour JUDGE REWCASTLE, sitting as a commissioner in divorce, dated Nov. 6, 1953.

The husband was of English and the wife of French-Swiss nationality. The wife petitioned for dissolution of the marriage on the ground of the husband's cruelty. The husband was in a bad state of health and his cross-examination had to be interrupted and the court adjourned so that he could rest. During the adjournment the commissioner indicated to counsel the desirability of effecting a reconciliation, and for that purpose he saw the wife and the husband separately and without their legal advisers. No reconciliation having been effected, the commissioner found at the conclusion of the case that the charge of cruelty had not been proved, and he dismissed the petition. The wife appealed. The appeal came on for hearing on May 13, 1954, when the Court of Appeal adjourned the case to enable the members of the court to read the transcript of the shorthand note of the evidence.

Elson Rees for the wife.

Perrett for the husband.

SIR RAYMOND EVERSLED, M.R.: Before I give my judgment in this case I wish to refer to R.S.C., Ord. 66A, which is not, I believe, always borne in mind. That order came into force on Aug. 21, 1940, and provided for the taking of what is called an “official shorthand note” of trials in the High Court, the payment of the fees required for taking the notes being paid out of public funds. R.S.C., Ord. 66A, r. 4, provides:

“(1) Any transcript [of the evidence or judgment] required for the

Court of Appeal shall be paid for by the appellant in the first instance, and the costs thereof shall, unless the Court of Appeal otherwise directs, be costs in the appeal . . .”

Sub-rules (2) and (3) provide for special cases of hardship where the court is entitled to say that the costs of providing transcripts shall be at the public expense

that provision having, of course, been made before the legal aid scheme came into operation: see the Legal Aid (General) Regulations, 1950, reg. 14 (3). A But Ord. 66A, r. 3, provides:

“(1) If the judge intimates that in the event of an appeal his note will be sufficient, the shorthand note of the evidence need not be transcribed for the purposes of an appeal. (2) If the parties agree or the judge is of opinion that the evidence or some part of the evidence of any witness or witnesses would, in the event of an appeal, be of no assistance to the Court of Appeal, the shorthand note of such evidence need not be transcribed for the purposes of an appeal.” B

The taking of a shorthand note and its transcribing are skilled operations, and the costs of preparing for the Court of Appeal the necessary transcripts of the evidence in a trial which had lasted many days are not inconsiderable. A party who is not affluent may find the burden of those costs severe. Still, it seems to me sometimes to be assumed that, in all cases in which there is an appeal on questions of fact, the whole of the evidence must be transcribed as a matter of course. I am carefully avoiding making any special mention of legal aid cases. It is a principle of the legal aid scheme that a legally aided litigant shall, so far as possible, be in exactly the same position as what is called a *divers* litigant. Therefore, in his case, the same course is followed, and a transcript is made. I venture to call attention to Ord. 66A, r. 3 (1) and (2), and to express the hope that advantage will, whenever appropriate, be taken of those sub-rules to save the considerable costs of transcribing the evidence, to which are added the costs occasioned by the extended character of the hearing in the Court of Appeal when these transcripts have to be read. C D E

One powerful reason why we took the special course in the present case of adjourning (with the consent of the parties and for the convenience of everybody, including the parties) to read the whole of the transcript of the evidence was because, had it been necessary for this transcript to be read, it is clear that the present case could not have been finished by the mid-day adjournment today. If it had not been so finished, the case would have had to go over possibly for a long period. That special circumstance is to be emphasised, because I am far from saying that it would be right, as a common practice, for the court to adjourn to read the transcript. If that were done, it might be thought that the court, having read the evidence and conferred privately together, had reached the conclusions from which it would be difficult to move them, and that the decision had been reached, not on argument addressed in open court, but on what had happened behind closed doors. F G

I agree with the learned commissioner that the present case is unusual and pathetic. Both parties plainly were highly strung. The husband, in addition to a naturally nervous disposition, had suffered severely from what was called shell shock, and he was in a deplorable condition at the time of the hearing. In addition to that, the two parties were of different nationalities, the husband being an Englishman and the wife a French-Swiss. It seems to me that the pull, so to speak, of their environment in Lausanne may have had a material bearing on the break down of the marriage. It is obvious also that the learned commissioner, finding the case, in his own words, pathetic, tried it with great care and was in the end concerned to see whether or not, after all, the marriage could be saved—an instinct not only natural, but the more laudable since there has H

A been issue of the marriage three small boys. Counsel for the wife has asked us to say that, as a matter of fact, the judge was wrong in holding, as he did, that the wife failed to make out her case of cruelty. It was because of this ground of complaint that it was necessary to read the whole of the transcript of the evidence. Having carefully read the whole of the transcript and the correspondence, I can see no possible ground on which the Court of Appeal, not having seen the witnesses, would be justified in saying that, contrary to the commissioner's impression of them and their credibility, a case of cruelty is proved.

B I pass, therefore, to the second matter which counsel for the wife has raised. The wife gave her evidence and was cross-examined and re-examined, further cross-examined and further re-examined. She was then supported by two other witnesses, and her case concluded somewhere during the latter part of the second day. Thereupon, the husband went into the witness-box, was examined by his counsel, and at the end of the day for a short time he was cross-examined by counsel for the wife. Judging from what I read in the shorthand note, the commissioner, even at that stage, was more than a little anxious about his condition and suggested he might sit down, an invitation which the husband did not accept. On the third day, after the cross-examination had been resumed C for a relatively short period, it became plain that the husband would require a rest. Thereupon, the court adjourned, resumed for a short period, and adjourned again. During one of these adjournments, the learned commissioner appears to have seen the two counsel and indicated to them the desirability, if possible, of effecting a reconciliation. I think counsel would, as I understand it, have gladly assisted to that end, if, and so far as they thought it, practicable. D Then, with the consent of counsel, the learned commissioner saw, individually and separately and without the presence of any of their legal advisers, the wife and the husband. Having done that, I understand he again saw counsel, and, finally, he saw the wife for the second time. At the end of that second interview E the wife (according to her counsel, and, I think, counsel for the husband agrees) was seen to emerge from the commissioner's room in tears, whereas she had retained, I gather, a phlegmatic composure during her examination and cross-examination in court. At some stage (and counsel for the wife's recollection is that it was on the second occasion when the commissioner saw counsel for the husband and himself) the commissioner intimated in unmistakable terms that, having heard as much of the evidence as I have indicated, he was clearly of opinion that he could not grant the relief which the wife by her petition sought. F The commissioner having expressed that view, suspicion is understandable that, when the wife went again to the commissioner's room and came out in tears, she may have been given to understand by the commissioner that, her husband being ready for a reconciliation, if she was not similarly ready herself, it would be all the worse for her, because she was not going to get a decree. Counsel for the wife did not suggest that the commissioner used any improper G pressure, and he has not—this must be stated plainly—said that the commissioner was guilty of any irregularity in his conduct of the case. Counsel has said, however, that the effect of the commissioner seeing individually and separately the wife and the husband inevitably led, in the mind of his foreign client, to the suspicion which I have mentioned.

H I am bound to say that, in cases of this kind, excluding matters relating to infants and custody, which are always in a class entirely by themselves, it is not desirable that a judge, at any stage of the trial, should see the two parties individually and separately, by which I mean separately not only from their legal advisers but from each other. For, however regular, discreet, and proper the judge may be—and one may assume that he will be—the losing party will always be liable to feel that something occurred when the judge was seeing either that party or the other, the one behind the back of the other, and not in open court, which affected the judge's conclusion, and it is, of course, of the

essence of our system of administration of justice that whatever be done should be done openly and not, as is said, behind closed doors, and particularly that there should not be communications passing between the judge and one party of which the other knows nothing. I see that, in a case of this very special kind, where the petitioner's case has been concluded and where the judge has got so far in the case that he feels clear in his own mind that he will not be able to grant the relief which the petitioner seeks, he might well say to himself: "No harm can be done and it is just possible some good may emerge". Without intending to reflect in any way adversely on the obviously patient conduct of the present case by the commissioner, I think it better that, if a judge or commissioner desires—as he well may, to effect a reconciliation—to see the parties apart from their legal advisers, he should see them together. As I have said, in the present case the wife is not English by birth, and this incident may have caused a suspicion to arise in her mind of the way in which the commissioner dealt with the case, which is unhappy and unfortunate.

I am satisfied, however, that the commissioner, having heard the witnesses, was amply entitled to conclude, as he did, that the wife had failed to establish her case. The result is that the petition rightly was dismissed, and, in my judgment, there is no ground on which we could disturb that finding. For these reasons, I think this appeal fails and must be dismissed.

JENKINS, L.J.: I agree.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Adrian de Fleury, Gassman & Co.* (for the wife); *Hunters* (for the husband).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

GRAND JUNCTION CO., LTD. v. BATES AND ANOTHER.

[QUEEN'S BENCH DIVISION (Upjohn, J., sitting as a judge of the Division).
May 11, 12, 1954.]

Landlord and Tenant—Lease—Forfeiture—Relief—Relief to under-lessee—

“Under-lessee”—Charge by way of legal charge—Relief to chargee against forfeiture—Law of Property Act, 1925 (c. 20), s. 87 (1), s. 146 (4).

A A, the lessee of a dwelling-house, lawfully assigned to B his lease, which contained a covenant not to use the premises for immoral purposes and a provision for re-entry on breach of covenant. By deed of even date with the assignment, B for full consideration granted to A a charge by way of legal mortgage on the premises to secure repayment of £1,150 with interest. B was later convicted of permitting the premises to be used as a brothel. The lessors served on B a notice under the Law of Property Act, 1925, s. 146 (1), and later issued a writ for possession against A and B. A counterclaimed for relief against forfeiture under s. 146 (4) of the Act of 1925, on the footing that he was an under-lessee within that provision.

B HELD: notwithstanding that A's charge was not a mortgage by sub-demise, he was, by virtue of s. 87 (1) of the Act of 1925, entitled to “the same protection, powers and remedies . . . as if . . . a sub-term less by one day than the term vested in the mortgagor had been . . . created” in his favour, and, therefore, he was entitled to protect his charge by applying for relief under s. 146 (4) as if he were an under-lessee.

Dictum of HARMAN, J., in *Re Good's Lease* ([1954] 1 All E.R. 277), applied.

C FOR THE LAW OF PROPERTY ACT, 1925, s. 87 (1) and s. 146 (4), see D HALSBURY'S STATUTES, Second Edn., Vol. 20, pp. 617, 745.

Cases referred to:

(1) *Re Good's Lease*, [1954] 1 All E.R. 275.

(2) *Imray v. Oakshette*, [1897] 2 Q.B. 218; 66 L.J.Q.B. 544; 76 L.T. 632; 31 Digest, Replacement, 554, 6738.

E ACTION.

The plaintiffs claimed possession of 96, Sussex Gardens, Paddington, damages for breach of covenant, and arrears of rent. The first defendant, Helena Netta Bates, did not enter an appearance and was not represented, and judgment for possession and arrears of rent and mesne profits was signed against her on Feb. 18, 1954. The second defendant, Philip Norman Bennett, counterclaimed that, by reason of a legal charge made on June 10, 1953, between Mrs. Bates and himself, he was, by virtue of the Law of Property Act, 1925, s. 87 (1), an under-lessee of the property and entitled to relief against forfeiture under s. 146 (4) of the Act.

G Prior to 1951 the premises had been used as a guest house, under licence, and in that year the second defendant purchased the residue of the lease and paid £1,000 for the contents of the house, which he continued to use as a guest house. By a lease dated June 4, 1953, the plaintiffs demised the premises to the second defendant for a term of fourteen years commencing on Sept. 29, 1953, at a rent of £425 per year (but reducible to £375 so long as the second defendant should physically reside on the premises and carry on business thereon) and an additional rent of £4 4s. per year payable quarterly, being a contribution to a fund for the upkeep of a private road, footpath and garden.

H By the lease, the second defendant covenanted (inter alia) to carry out the repairs specified, to pay the rent, and by cl. 2 (14) not to assign, transfer, under-let, or part with the possession of the demised premises, or any part thereof, without the previous consent in writing of the plaintiffs, such consent not to be unreasonably withheld. By cl. 2 (15), the second defendant covenanted that he

“Will not use or permit or suffer the demised premises or any part thereof to be used for any illegal or immoral purpose nor without the previous written

consent of the [plaintiffs] for any trade business or profession whatsoever or as separate tenements or flats whether structurally divided or not but will keep and use the same only as and for a single private dwelling-house or as and for letting furnished apartments if and so long as the same be furnished and kept and used as hereinafter mentioned".

It was also provided that, in the event of any breach of any of the covenants or provisions therein contained, the plaintiffs might re-enter on the premises or any part thereof in the name of the whole and thereupon the said term should absolutely determine.

The second defendant, being desirous of selling the guest house, put the property in the hands of an estate agent and the first defendant was introduced as a purchaser. The first defendant supplied references which were found satisfactory by the second defendant and the plaintiffs, and on June 10, 1953, having obtained the consent of the plaintiffs, the second defendant assigned the residue of the old lease together with the new lease to the first defendant for £1,000. The guest house was taken over by the first defendant as a going concern and she agreed to pay £1,500 for the furniture. Of the £1,500, £350 was to be paid by a promissory note payable on July 1, 1953, with interest at five per cent, and the balance of £1,150 was to be secured on a first mortgage of the assigned premises with interest at six and a half per cent. By a legal charge dated June 10, 1953, made between the first defendant and the second defendant, in consideration of £1,150 paid by the second defendant to the first defendant, the first defendant covenanted with the second defendant to repay the principal and pay interest by monthly instalments, and by cl. 2:

"For the consideration aforesaid the borrower as beneficial owner hereby charges by way of legal mortgage all the property . . . with payment in accordance with the covenants herein contained of the principal money and interest and other money hereby covenanted to be paid by the borrower."

The first defendant continued to carry on the business of a guest house on the premises and, under an oral agreement made between the first defendant and the second defendant, the second defendant occupied the basement of the premises unfurnished on a weekly tenancy at £3 10s. per week. On Dec. 1, 1953, the first defendant was convicted on a charge of permitting the premises to be used as a brothel and was fined ten guineas and five guineas costs. On Dec. 5, 1953, a notice under the Law of Property Act, 1925, s. 146 (b), was served on the first defendant specifying the breach of the covenant not to permit the use of the premises for an immoral purpose. On Jan. 22, 1954, a writ was issued for possession, the plaintiffs also claiming in respect of an alleged breach of the covenant to repair. On Feb. 13, 1954, the first defendant pleaded guilty to a charge of acting in the management of a brothel on the premises and was conditionally discharged and ordered to pay ten guineas costs. On Feb. 18, 1954, judgment in the action was signed against the first defendant under R.S.C., Ord. 13, r. 12.

Binney for the plaintiffs.

C. D. E. Rich and *Deborah M. Rowland* for the second defendant.

The first defendant did not appear.

UPJOHN, J., stated the facts and continued: The first question that I have to consider is whether the second defendant (whom I call hereafter "Mr. Bennett") is entitled to counterclaim under the Law of Property Act, 1925, s. 146 (4), in the action for possession for forfeiture. Section 146 (4) provides:

"Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in

the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting . . ."

the property in such under-lessee on, to put it briefly, such terms as may be just. The principal question is whether, by virtue of the mortgage of June 10, 1953, Mr. Bennett is a person entitled to claim as an under-lessee. The point is a fine one and it is not free from difficulty.

A It is, of course, conceded that if the mortgage had been by way of sub-demise, Mr. Bennett would have fallen fairly and squarely within the ambit of s. 146 (4). But he is not a lessee by sub-demise: he is a mortgagee by way of legal charge. It is familiar that a mortgage by way of legal charge was a new method of mortgaging property, introduced by s. 85 and s. 86 of the Law of Property Act, 1925. Section 86 deals with the mortgage of leaseholds. The whole question is whether, being a mortgagee by way of legal charge, Mr. Bennett can claim the benefit of s. 146 (4).

B It is clear that a charge by way of legal mortgage under s. 1 (2) (c) of the Law of Property Act, 1925, creates no estate or term in the property. That is made abundantly clear by s. 87 (2), which provides:

C "Where an estate vested in a mortgagee immediately before the commencement of this Act has by virtue of this Act been converted into a term of years absolute or sub-term, the mortgagee may, by a declaration in writing to that effect signed by him, convert the mortgage into a charge by way of legal mortgage, and in that case the mortgage term shall be extinguished . . ."

D So that the chargee has no estate or term in the property. If, therefore, the matter rested there, it would be quite clear that Mr. Bennett could not claim the benefit of s. 146 (4). It is said that s. 87 (1) leads to another result. Section 87 (1) provides:

E "Where a legal mortgage of land is created by a charge by deed expressed to be by way of legal mortgage, the mortgagee shall have the same protection, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits, or any of them) as if . . . (b) where the mortgage is a mortgage of a term of years absolute, a sub-term less by one day than the term vested in the mortgagor had been thereby created in favour of the mortgagee."

F It is said that that puts the mortgagee as against the landlord in the position, so far as the protection of his mortgage is concerned, of being a sub-lessee, and, therefore, that he is entitled to claim under s. 146 (4) as an under-lessee.

G The matter has been commented on by text-book writers, and I have been referred to three books dealing with the express point before me: WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES, 12th ed., vol. 1, p. 373, and HALSBURY'S STATUTES OF ENGLAND, 2nd ed., vol. 20, p. 618, where the editors of those two works regard s. 87 as entitling a chargee by way of legal mortgage to the benefit of s. 146 (4), and, on the other side, there is a note in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 15th ed., vol. 2, p. 2, where the editor regards it as doubtful whether a chargee by way of legal mortgage can claim as an under-lessee.

H There is one authority on the matter, and that is the recent case of *Re Good's Lease* (1), which came before HARMAN, J. It was a case of a guarantee, and the guarantor was an equitable chargee of a lease vested in a lessee who went bankrupt and there was a forfeiture of the lease. The question was whether the guarantor could claim the benefit of s. 146 (4). HARMAN, J., decided that the guarantor, being an equitable chargee and one who, in the circumstances, was entitled to call for a legal mortgage, could call either for a mortgage by sub-demise or for a mortgage by way of legal charge, as he preferred, and in that event he could put himself in an undoubted position to exercise the rights conferred by s. 146 (4). HARMAN, J., also examined the position on the footing that the guarantor was

only entitled to call on the bankrupt to execute a charge by way of legal mortgage, and having referred to the Law of Property Act, 1925, s. 87, the learned judge said ([1954] 1 All E.R. 277):

"Therefore, as between him and his mortgagor, he is in the same position as if he had a mortgage by sub-demise. I think, on the whole, that the case of an equitable charge, entitled, under the covenant, to have a charge by way of legal mortgage, would be no different were he entitled to have the mortgage direct by sub-demise."

I understand that passage as being an indication of the learned judge's opinion that, even if he were only entitled to have a mortgage by way of legal charge, nevertheless the guarantor would be entitled to claim the benefit of s. 146 (4).

The argument of counsel for the plaintiffs is that a mortgagee by way of legal charge is not an under-lessee, and no one disputes that. He says that it would be quite wrong to give a chargee by way of legal mortgage the benefit of being an under-lessee for the purpose now under consideration when, for other purposes he gained advantages by not being treated as an under-lessee, and he refers me to the view generally held in the profession that a chargee by way of legal mortgage does not have to obtain the consent of a landlord to a charge where in the lease there is merely a common form clause against assigning, under-letting or parting with possession, because the charge is none of those things and the consent of the landlord is only required where the word "charge" is added to the prohibitory covenant. Therefore, he says a chargee by way of legal mortgage has this advantage, as does the lessee, that in the usual case the consent of the landlord is not required. Therefore, he submits that it would be quite wrong to treat the chargee as being for another purpose—i.e., for the purpose of obtaining relief under s. 146 (4)—as a chargee by way of sub-demise.

My approach to the problem is this. As I have already said, a charge by way of legal mortgage was introduced as a conveyancing device in the Law of Property Act, 1925, with a view to simplifying conveyancing, and it would, I think, be a pity to try to introduce subtle differences between a charge created in one way and one created in another way unless the words of the Act so require. It may be that there is the difference with regard to obtaining consent of the landlord to the charge, though that depends on the construction of the lease, but, in any event, that is no reason for making another difference between the two modes of creating a security unless the Act so requires. I approach s. 87 (1) in that spirit, and I find that the mortgagee is to have the same protection, powers and remedies as though he had a sub-demise. A mortgagee by sub-demise, undoubtedly, has the right to protect his mortgage, where it is a term of years, by applying for relief under s. 146 (4). That is a most important right which a mortgagee by sub-demise has, for it may be the only way of saving his security in the hands of some insolvent lessee. In my judgment, the effect of s. 87 (1) is to give the mortgagee, by way of legal charge, the same right because he has the same protection as though he were an under-lessee. I see no ground for confining s. 87 (1) to protection, powers and remedies merely as between the mortgagor and the mortgagee; it extends, in my judgment, to protection, powers and remedies against all persons—indeed, s. 87 (1) makes it plain that it includes powers against occupiers and other persons in respect of rents and profits, and I think the chargee by way of legal mortgage is entitled to be put in the same position as though he had a charge by way of sub-demise, and, therefore, in that right, he can claim as an under-lessee for the purposes of s. 146 (4). In my judgment, therefore, Mr. Bennett is entitled to make a claim under s. 146 (4).

In those circumstances it becomes unnecessary to deal at length with a subsidiary question, i.e., what was the true nature of Mr. Bennett's occupation of the basement, and, if he be a tenant, ought relief to be granted? This matter has been fully argued and I think that, without dealing with the arguments

in detail, I ought to express my opinion. On the whole, although I think the point is a fine one, I have come to the conclusion on the evidence that the ordinary relationship of landlord and tenant was created by the arrangement made with regard to the basement between Mr. Bennett and the first defendant. [HIS LORDSHIP considered the facts and continued :] But it is quite a different matter to grant relief, and, had it become necessary to decide the point, I should have had to refuse to grant relief from forfeiture in this case. It is conceded that the relief from forfeiture could only go to the basement, and that would be a rent-restricted tenancy. The whole object of the tenancy was for a purely temporary occupation for the few weeks while the plumbing of another house was being repaired for Mr. Bennett's occupation.

That is one factor which would weigh with me against granting relief, but another factor is that cl. 2 (15) of the lease compels the lessee "to use the same only as and for a single private dwelling-house or as and for letting furnished apartments." No consent to this arrangement between Mr. Bennett and the first defendant was given by the plaintiffs, and, therefore, the tenancy was in breach of the lease. That does not disentitle the tenant from asking for relief: see *Inray v. Oakshette* (2), where, however, it is pointed out (per LOPES, L.J. ([1897] 2 Q.B. 225) that the jurisdiction should be sparingly exercised. But as it is plain that the basement is not a furnished letting, because the furniture belongs to Mr. Bennett, his continuance there is in continuing breach of the clause to which I have referred. That is another factor which would weigh with me very much, and for those reasons I should not have been prepared to grant relief with regard to the basement premises. However, that question does not arise.

[HIS LORDSHIP then considered the merits of the case, held that Mr. Bennett was clearly entitled to relief against forfeiture, and assessed damages in respect of the breach of the covenants against user for immoral purposes and repair.]

Judgment accordingly.

Solicitors: *Bellamy, Bestford & Co* (for the plaintiffs); *Wegg-Prosser & Co.* (for the second defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

SELLARS v. BEST AND ANOTHER.

[YORK ASSIZES (Pearson, J.), February 16, 17, 1954.]

Electricity—Electricity supply—Faulty installation—Wife of consumer electrocuted—Liability of electricity board—Failure to test earthing arrangements—Negligence—Breach of statutory duty—Electricity Supply Regulations, 1937, reg. 27 (a).

The first defendant, an electrical contractor, installed at the plaintiff's house an electric boiler together with a new circuit for the same, but he failed to provide a fully efficient earthing system for the circuit. The second defendants, the electricity board supplying electricity to the house, connected up the new circuit to their supply, but, before so doing, although they carried out certain tests, they did not test to ascertain whether or not the earthing system was adequate. About three months after the installation of the boiler its insulation became defective as a result of which electricity escaped into the metal shell of the boiler and gave the plaintiff's wife a violent electric shock as a result of which she died. If there had been a proper earthing system, no accident would have happened. In an action by the plaintiff claiming damages in respect of his wife's death the first defendant was held liable to the plaintiff, but as regards the liability of the second defendants,

HELD: (i) regulation 27 (a) of the Electricity Supply Regulations, 1937, imposed no obligation on the second defendants to carry out any inspection or test of the new installation before commencing to give a supply of electrical energy, nor was it possible to say on the facts that they assumed any obligation to the plaintiff's wife.

(ii) to say that the second defendants before carrying out the potentially dangerous operation of sending electricity into the installation in the house should make sure that the electrical equipment was fully prepared to receive it, and, therefore, that they were responsible for what the plaintiff's contractor had done or omitted to do, would be carrying the kind of tortious liability envisaged in *Donoghue v. Stevenson* ([1932] A.C. 562) too far; and, therefore, the action failed as regards the second defendants.

AS TO UNDERTAKERS' RESPONSIBILITY FOR ACCIDENTS, see HALSBURY, A Hailsham Edn., Vol. 12, p. 550, para. 1083, and 1954 Supp.

Cases referred to:

- (1) *Donoghue v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (2) *Best v. Samuel Fox & Co., Ltd.*, [1952] 2 All E.R. 394; [1952] A.C. 716; 3rd Digest Supp.
- (3) *Hartley v. Mayoh & Co.*, [1954] 1 All E.R. 375; 118 J.P. 178.

ACTION tried before PEARSON, J.

The plaintiff, Lawrence Sellars, was the husband and administrator of the estate of Mary Sellars who died by electrocution on Aug. 11, 1952, when she received a violent electric shock from an electric boiler in the house at Newton-on-Rawcliffe, near Pickering, North Yorkshire, where she and the plaintiff lived. The cause of the accident was, first, the deficiency of the earthing system of the boiler, and, secondly, defective insulation between the heating elements of the boiler and its metal shell which occurred about three months after its installation.

In May, 1952, the first defendant, Lawrence William Best, supplied and installed the boiler on the plaintiff's instructions. The first defendant also installed a fifteen-ampere socket outlet with a three-pin plug arrangement for the boiler together with a new circuit, but he did not connect this circuit to the mains supply of the second defendants, the North Eastern Electricity Board, who supplied the electricity for the house. The large hole in the socket was for the earthing arrangements which consisted of an earthing line which, in the event of an escape of electricity, would carry off the electricity so that it would cause the ordinary electric fuse to give way and so isolate the circuit in which the fault had arisen. The earthing line was run to a small stake about eighteen inches long put in the earth outside the front door of the house. Although in some weather conditions, if the earth was very wet, this earthing arrangement would be sufficient, in dry or frosty weather it would be inadequate. The first defendant, although he made certain tests, did not make any test to ascertain the capacity of the earthing system. If there had been a proper earthing system, no accident would have happened. The second defendants connected up the ends of the circuit to their supply of electricity, and the facts relating to these defendants are fully set out in HIS LORDSHIP's judgment.

The plaintiff claimed damages as administrator of his wife's estate against the first defendant under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of the estate for her loss of expectation of life and under the Fatal Accidents Acts for the funeral expenses, and he also claimed for his own benefit damages for the loss of his wife's consortium, including her servitium, alleging failure of the first defendant to exercise reasonable care and skill in carrying out the contract with the plaintiff to instal the boiler. Against the second defendants the plaintiff claimed under the same Acts similar damages for their negligence and breach of statutory duty under reg. 27 of the Electricity Supply Regulations, 1937.

McLusky for the plaintiff.

E. Ould for the first defendant.

Veale, Q.C., and *G. N. Black* for the second defendants.

PEARSON, J., stated the facts, considered the Regulations for the Electrical Equipment of Buildings issued by the Institution of Electrical Engineers and the evidence of the practice in the district, held that the first defendant, in addition to his contractual obligation to the plaintiff to instal the boiler in a reasonable and proper manner so as to make it safe, also owed an obligation by way of common law liability to use reasonable care to the plaintiff's wife who would be a person likely to use the boiler and so he was liable to the plaintiff for breach of contract and negligence, and continued: I pass to the more difficult problem as to the situation of the board in these matters. First of all, what they did was to connect up the loose ends, sometimes called "tails", to their own meter. It has been pointed out that the board is a seller of electricity, and the delivery of the electricity is effected at the terminal points, or supply points, which are situated approximately at the meter. Up to those supply points everything belongs to, and is under the control of, the board. Beyond that point, generally speaking, everything belongs to, and is under the control of, the consumer. The board did carry out a test for leakage, and they may or may not have carried out some other tests or made some kind of cursory inspection, but they did not at any rate test to ascertain whether or not the earth system was adequate. The problem is whether they were under an obligation to do so, because it is reasonably plain (and I infer from the evidence) that, if they had carried out a suitable test for the adequacy of the earthing capacity, they would have ascertained its inadequacy and steps would have been taken and this accident would not have happened. The whole problem, as I see it, is whether they owed an obligation to Mrs. Sellars to make sure that the earthing system was adequate.

The board's obligation to give a supply of electricity is under s. 27 in the schedule to the Electric Lighting (Clauses) Act, 1899, which I have been told, no doubt correctly, has been applied to the board by a provision of the Electricity Act, 1947. It is sufficient to say that s. 27 imposes an obligation on the undertakers to give a supply on being required to do so, although that is subject to certain conditions.

Then we come to the Electricity Supply Regulations, 1937, and the most material one is reg. 27, but I think it is important to look at some others also in order to see what the scheme of obligation is. Regulation 25 (a) may be important as showing where the division of responsibility comes. It provides that:

"The undertakers shall be responsible for all electric lines and apparatus placed by them on the premises of a consumer and either belonging to the undertakers or under their control (whether forming the whole or part of the consumers installation or not) being installed and maintained in a safe condition and suitable for their respective purposes and being so fixed and protected as to prevent so far as is reasonably practicable leakage to any adjacent metal".

There one has the responsibility placed on the undertakers for electric lines and apparatus with which they are concerned, that is to say, both placed by the undertakers on the premises of the consumer and also belonging to the undertakers or under their control. It tends to suggest that there is not at any rate the same responsibility for electric lines and apparatus which have been placed on the consumer's premises by someone else or which do not either belong to the undertakers or come under their control. So the ordinary principle that responsibility is based on ownership or control seems *prima facie* to apply here. Then there is reg. 26:

"The undertakers shall not permanently connect a consumer's installation with their electric lines unless they are reasonably satisfied that the connection, if made, would not cause a leakage from the consumer's installation exceeding [a certain fraction]."

The wording there is to impose a definite prohibition. Under that regulation, if the undertakers do make the connection without being reasonably satisfied, they commit an offence, as appears from reg. 39, and they would be liable to a penalty for default. When we come to reg. 27 (a) the wording is changed. That provides:

"The undertakers shall not be compelled to commence or, subject to the provisions of reg. 32, to continue to give a supply of energy to any consumer unless they are reasonably satisfied in respect of the consumer's installation—
(i) That all conductors . . . are constructed installed and protected so as to prevent danger so far as is reasonably practicable . . . (ii) That every distinct circuit is protected against excess energy by means of a suitable fusible cut-out . . .".

Regulation 32 provides for the "discontinuance of supply in certain circumstances", and para. (a), sub-para. (v) provides:

"Where in pursuance of this regulation the undertakers have discontinued the supply of energy to the consumer's installation or any part thereof, the undertakers shall not recommence the supply of energy until they are reasonably satisfied . . ."

in certain respects.

It seems clear that reg. 27 (a) has been very carefully drawn and that it would be wrong to assume that the variation in the opening words of reg. 27 (a) as compared with reg. 25 (a), reg. 26 and reg. 32 (a) (v) is merely per incuriam. The effect of reg. 27 (a) is simply that the obligation to supply which was imposed by s. 27 of the schedule to the Act of 1899 is here being made subject to a condition that they shall not be compelled to commence or continue to give a supply unless they are reasonably satisfied in the way specified. If they do give a supply without being satisfied, they commit no offence under this regulation. If they commence to give a supply or continue to give a supply having satisfied themselves with a mere cursory inspection, they still commit no offence. It seems to me there is no obligation under this regulation to carry out any inspection or testing at all. They can if they choose; or rather, to be exact, their power under this regulation is only to refuse to give a supply. Strictly speaking, they have no power to insist on inspecting and testing an apparatus. It is open to the consumer to say: "I do not wish to have my installation inspected and tested by you. I will not take any supply. I will provide my own supply". If the consumer says that, there is no power under reg. 27 to insist on an inspection to test. The feeling I have about reg. 27 is that it is drafted with that in view, not to impose on the board a responsibility in respect of what the occupier by himself and his contractors and other agents may have done or omitted to do to his own chattels on his own premises. So that, so far as the regulations are concerned, it seems to me they afford no cause of action to the consumer or to the consumer's wife.

Very interesting arguments have been presented by counsel for the first defendant, in effect supporting the plaintiff against the board, and by counsel for the plaintiff, seeking to impose on the board an obligation towards Mrs. Sellars, because that is what has to be done. It has to be an obligation towards Mrs. Sellars in the circumstances. It is not at all, in my view, like the cases in which the board have themselves antecedently done something wrong, such as mixing up the two wires—putting the neutral wire where the phase wire should be and vice versa*. They have not at any stage done anything wrong as regards the installation. The only omission relied on is the omission to test for the adequacy of the earthing system. That case could be put in a different way. They could say they rely on the fact of the board having supplied electricity for use in this electric boiler without having first satisfied themselves and taken

* See *Hartley v. Mayoh & Co.* (3).

all reasonable steps to satisfy themselves that it was in a fit state to receive an electric current safely. Those are the two ways of putting it. The question is whether it is right to assume that the board do undertake any such obligation towards, not merely the consumer, but some other person who is likely to use the electrical equipment in question.

- One of the arguments is : " The board say they are going to test the equipment, because the contractor, according to the usual system of the board, gave to the board a notice to test the installation ". The form was produced and it is addressed to the board and signed by the contractor, and the contractor gives the board notice that a certain installation is now complete. It says : " Please inspect and test the same " on a certain date. It may be that the consumer should be deemed to know what his contractor has done and should be deemed to know that the board have been asked to test the installation, and have tested the installation. That still leaves unspecified what the test is going to be, how comprehensive it is going to be and what it is going to be a test for. There is the obligation on the electricity suppliers, in this case the board, under reg. 26 not to connect the consumer's installation with their electric lines until they are satisfied that the connection would not cause an undue leakage from the consumer's installation. So that leakage test they have to carry out, but there is nothing in this form to show what other test there is. It may be only that test. Equally on the facts of this case, having regard to the evidence as to the board's practice in the area in which this house was comprised, there is nothing to show that their test would extend beyond that. On the contrary, the evidence is the other way, that they did not carry out what may be a comprehensive test in this district.
- There is this further difficulty. If it is put on the ground of the board having undertaken to carry out testing and thereby having misled people into thinking that their test would be comprehensive and adequate to ensure against any unsafe feature of the installation, the question then arises: To whom do they undertake ? To whom do they make that assumption ? It is founded on some sort of *assumpsit*, using the technical phrase. It still remains to inquire, to whom is it made ? It might be made to the plaintiff as the intending consumer and the person asking for the supply, but there is no evidence that Mrs. Sellars knew anything at all about what the contractual arrangements were as between the plaintiff and the suppliers. On those two grounds I am unable to see how liability can be possible for the reason that they did in fact carry out some sort of test. The argument was they must either do it in whole or not at all. If they do not carry out any test, they are not responsible, but if they carry out a test they are bound to carry out a complete and adequate test. That begs the question : What is the test for ? What is it meant to do ? It may be only a test under reg. 26. Without more evidence I do not think it is possible to say any obligation was assumed by the defendant board towards Mrs. Sellars in this case.
- The other way of putting the argument is that the board, as it is said, unleash this dangerous substance, electricity, by sending it along their wires and through the connection which they have made in this house into the installation which is there, and before they carry out that potentially dangerous operation they should make sure that in fact it will be safe because the electrical equipment in the house is fully prepared to receive it. That is a possible argument, but I think it is too difficult to define the obligation, where it begins and where it ends, because the supply of electricity is a continuing operation. It may go on for years, and it is difficult to see any reason why it can be confined to the moment of first giving the supply. Is it sufficient for the board to be satisfied at the moment when they commence to supply electricity and then they cease to have any responsibility for the subsequent maintenance ? It is difficult to define it in a different respect. How far does it go ? Must they re-do all the work which

the electrical contractor has done—dig up the wires to see that they are sound, test the steelwork of the boiler and test the insulation and test everything? Is it possible to confine the so-called comprehensive test within any reasonable bounds at all? I think there is too much uncertainty there, and the more reasonable principle is that the board are responsible for what they themselves do and what they themselves have control over. They are responsible, of course, for bringing the electricity along their own lines and for making, and continuing to have, it may be, a proper connection at the terminal supply points. Then if they have installed and they still have control of some electrical equipment on what is called the consumer's side by virtue of that installation and continuing control, they would be responsible for that also. It seems to me too much to say that the board are responsible for what the occupier by himself and his contractors and agents may have done or omitted to do to his own chattels on his own premises. It seems to me that is carrying the kind of tortious liability which is envisaged in the case of *Donoghue v. Stevenson* (1) too far and it cannot be held to apply here. For those reasons I hold that the board are not liable to the plaintiff, and I hold in favour of the plaintiff against the first defendant, but not against the board.

As to the measure of damages under the first head under the Law Reform (Miscellaneous Provisions) Act, 1934, I give the more or less conventional sum of £400. Under the Fatal Accidents Act, 1846, the agreed sum is £30 6s. With regard to the claim for breach of contract by the plaintiff against the first defendant in respect of the loss of consortium of the wife there was no evidence here to show any actual pecuniary loss or expense arising to the husband by reason of his wife's death. I have had regard to what was said in the case of *Best v. Samuel Fox & Co., Ltd.* (2), in the House of Lords. I am not sure whether in those circumstances the proper result is that there should be merely nominal damages in the sense of a sum of 40s. or whether it is permissible and right to award something more than that by way of mere general damages for loss of consortium. I think the second is the true view; but although no large sum should be awarded in the absence of proof of financial damage, I think the proper view is that it can be more than a nominal sum, and I award £100.

Judgment for plaintiff for £530 6s. against first defendant; judgment for second defendants against plaintiff.

Solicitors: *J. D. Whitchard & Son*, Pickering (for the plaintiff); *Barnet Ellis*, Pickering (for the first defendant); *Jacksons, Monk & Rowe*, Middlesbrough (for the second defendants).

[Reported by G. M. SMAILES, ESQ., Barrister-at-Law.]

HOBBY v. HOBBY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Sachs, J.), March 2, April 27, 28, 1954.]

Justices—Clerk—Intervention in examination of witnesses—Notes of evidence based on proof of a witness—Desirability of taking notes in bound notebook.

The wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her. At the trial, where both the husband and the wife were legally represented, the clerk to the justices had before him a proof of the evidence of the wife from which he took his notes of her evidence. The husband's solicitor knew that the clerk had this proof and raised no objection. When the wife had given her evidence-in-chief, the husband's solicitor started to cross-examine her with a view to establishing that she had committed adultery, or had given the husband reasonable grounds for believing that she had committed adultery, or, alternatively, that by reason of her conduct he had just cause in living apart from her. The clerk intervened during the cross-examination so that the husband's solicitor was prevented from putting to the wife many questions relevant to those issues. When the husband was called to give evidence, the clerk enumerated some five points which should be put to him. The husband's solicitor put those five questions to the husband and a few more questions which were merely ancillary. The clerk then put questions to the husband in the nature of cross-examination and made a note of the husband's answers, after which the wife's solicitor cross-examined the husband, but the clerk made no note of this cross-examination. The court found the husband guilty of desertion and made an order in favour of the wife. On appeal by the husband,

HELD: since both parties were represented at the trial neither of them was in need of assistance to present his or her case to the court; it was clear that, although the clerk had a duty to see that the justices were advised as to what was and what was not relevant and that the time of the court was not wasted, he had exceeded his duty and had put substantial obstruction in the way of the husband's solicitor in the conduct of his client's case, so that vital questions were not put to the husband in examination-in-chief; accordingly, justice did not appear manifestly to have been done; and the decision of the justices could not stand and the case must be re-heard.

Per curiam: It was undesirable that the clerk to the justices should have had before him at the trial a proof of the wife's evidence, and in no circumstances should he have made it the basis of his notes of evidence. Such notes should be made in a bound notebook and not on such a proof and/or deposition paper.

AS TO CLERKS TO JUSTICES, see HALSBURY, Hailsham Edn., Vol. 21, pp. 658-667, paras. 1126-1140; and FOR CASES, see DIGEST, Vol. 33, pp. 371-374, Nos. 797-827.

Case referred to:

(1) *Cobb v. Cobb*, [1900] P. 145; 69 L.J.P. 52; 82 L.T. 626; 64 J.P. 200; 27 Digest, Replacement, 717, 6852.

APPEAL by the husband from an order of the Newcastle and Ogmere justices, sitting at Bridgend, dated Nov. 5, 1953.

The parties were married in December, 1950, and a child was born in 1951. On Mar. 1, 1952, the parties separated. On Oct. 24, 1952, a second child was born to the wife. The wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground of the husband's desertion. Before the justices the husband sought to establish that the wife had committed adultery or that he had reasonable grounds for believing that

she had committed adultery, and, alternatively, that he had just cause for living apart from her. On Nov. 5, 1953, the justices found the desertion proved and made an order in the wife's favour. The husband appealed.

R. E. G. Howe for the husband.

P. L. W. Owen for the wife.

Tasker Watkins for the justices.

LORD MERRIMAN, P. : I will ask **SACHS, J.**, to give the first judgment.

SACHS, J., stated the facts and continued: It is common ground that the occasion of the parting on Mar. 1, 1952, was a quarrel which resulted from the wife having on the previous night been out at a dance, where she removed her wedding ring, and that the husband's brother, at whose house the husband and wife were staying, ordered the wife out of the house. The husband acquiesced in the order, and thereafter did not want to have anything more to do with the wife. Before this parting there had been a number of quarrels, due to complaints by the husband that the wife returned home late at night. It also appears to have been common ground at the trial that at any rate on two occasions the wife had been away for one or more nights from the place at which she was living, without having given any particular explanation of her absences. Some eight months after the parting, namely, on Oct. 24, 1952, a child was born to the wife. There was a conflict of evidence when last complete sexual intercourse took place between the husband and the wife, and in particular whether that intercourse was on a date or dates likely to have resulted in the birth of a child on Oct. 24, 1952. The husband sought at the trial to establish that his wife had committed adultery, and that, even if he were unable to establish that adultery, he had reasonable ground for believing that it had taken place, not least having regard to the previous general conduct of the wife during the marriage. Alternatively, he alleged that the general conduct of his wife was such as in any event to justify him in not having anything more to do with her. By his notice of appeal the husband alleged, *inter alia*, that there was no evidence on which the justices could hold that he had deserted his wife, and that the decision of the justices was against the weight of the evidence. Early in this appeal, however, it was very properly conceded by counsel for the husband that on the evidence as it stood before the justices at the conclusion of the trial those two grounds could not be reasonably supported. Accordingly, it is unnecessary to deal further with them. The substantial ground of this appeal is an allegation that the hearing before the justices was so interfered with by their clerk that the trial as a whole was unsatisfactory, that justice did not appear to have been done, and that, in particular, all the appropriate evidence which was available on behalf of the husband did not come before the justices. To support this allegation various matters were put forward, but no suggestion was made against the bona fides of either the justices or the clerk, nor was any suggestion made that at any stage they acted with any improper motive. The main points put forward were, first, that there had been interference by the clerk to the justices with the cross-examination of the wife; secondly, that there had been interference by the clerk to the justices with the conduct of the examination-in-chief of the husband; thirdly, that the announcement of the reasons, before the court's decision, was made by the clerk, as opposed to being made by the chairman of the justices. In addition, the husband, during the course of this appeal, complained of the fact that the wife's solicitor, just before the hearing of the case, handed to the clerk a copy of the wife's proof of evidence and that proof was used by the clerk as the basis of his notes of her evidence-in-chief, and it was also said that he took no notes at all of the cross-examination of the husband.

When this appeal first came on for hearing on Mar. 2, 1954, affidavits were put in which had been sworn to and filed by the husband's solicitor, dated Jan. 27, 1954; by the clerk to the justices, dated Jan. 29, 1954; by one of the

justices who sat at the hearing, also dated Jan. 29, 1954; by the wife's solicitor, dated Feb. 2, 1954; and by an independent solicitor who was not connected with the case, but was present during a considerable portion of the trial, dated Feb. 9, 1954. On it appearing on Mar. 2, 1954, that neither the justices nor their clerk had had an opportunity of considering and replying to the affidavit of the independent solicitor and on it also appearing that there were a number of matters in other affidavits which needed amplification, the appeal was adjourned. On this adjournment it was expressly stated by the court that an opportunity was to be given to all concerned to put on record such further material as might be needed, in order that the court might be fully seized of the facts, so as to come to a decision. A number of further affidavits was then filed, and the court has been assured that the justices and the clerk have had every opportunity of dealing with the matters raised in the affidavits filed both before and after the initial hearing of this appeal.

The evidence of the husband's solicitor, himself clerk to a neighbouring bench of justices, is, first, to the effect that at a relatively early stage in the cross-examination of the wife, a stage that he puts at after some twelve or so questions, the clerk objected to certain questions he was putting to the wife. These questions, in the main, related to her conduct. The husband's solicitor in his original affidavit, states that

"by his frequent interventions and directions the clerk to the justices was allowed substantially to control the conduct of the proceedings."

As to the interventions, the husband's solicitor states that the clerk intervened without reference to or discussion with any of the justices. Indeed, in none of the affidavits (and there are several of them) filed by the justices or by the clerk himself, is it suggested as regards any intervention that reference was made to the justices or that they, or any of them, took part in any of the resulting discussions. It is further stated that the interventions of the clerk were such that he, the husband's solicitor, was prevented from dealing during his cross-examination of the wife with a number of relevant facts, and, in particular, with facts relevant to the general conduct of the wife, facts which induced in the husband, so it is alleged, a reasonable belief that the wife had committed adultery. These statements by the husband's solicitor as to interference with his cross-examination are, to an extent, supported by the affidavit of the independent solicitor, who deposes that after argument between the husband's solicitor and the clerk to the justices the former desisted from questions which he was asking. Perhaps more striking, however, is the unconscious support given by the clerk himself to the allegation that his interventions were such as to give the appearance that he had taken control of the conduct of the husband's case. In his second affidavit, sworn after he had had ample time to consider all the material relevant to this appeal, he denies that he restricted the husband's solicitor's cross-examination, but he proceeds to set out a list of suggestions that he made to the husband's solicitor as to the questions which should be put in cross-examination. Merely to read those suggestions brings home the way in which the clerk was clearly attempting to govern in detail the cross-examination of the wife. It is likely that an advocate would be embarrassed by what must have been a considerable flow of interventions, or, alternatively, something in the nature of a lecture on how to conduct his case.

In the result, though a certain amount of cross-examination about the wife's conduct appears on the notes of the evidence taken by the clerk, it, nevertheless, seems that the husband's solicitor was deterred from putting questions which were, undoubtedly, relevant. Thus, the wife was not cross-examined on relevant matters such as the reason why, according to the husband, she was turned out on certain occasions, once at least from the house of her sister and once from the house of her mother. Nor was she asked about a letter which, it is alleged, she wrote to her husband after the parting, the effect of which was: "You will be

surprised to know I am expecting another child in seven months' time". What would have been the answers to these questions if put in cross-examination, or what would have been the weight which the justices would have attached to them, is not a matter with which this court is at this stage concerned. Suffice it to say that these questions would have been relevant, and that the course which the proceedings took was such that they were not put.

The second and most substantial allegation made by the husband's solicitor, is that his examination-in-chief of his own client was restricted, and, indeed, to a great extent, conducted by the clerk. This examination followed an unsuccessful submission of no case. The version of the husband's solicitor of what took place is to be found in the second of the affidavits which he swore. He says:

"At the commencement of my examination-in-chief of the husband the clerk to the justices again intervened (without prior reference to or discussion with the justices) to say that the only thing that concerned the court was this question of adultery prior to the parting on Mar. 1, 1952. He then detailed the five or six points which he wished to be put to the husband and indicated that they were the only questions which need be put . . . I prefaced the first question to the husband by saying: 'Since I am prohibited from putting anything further to you, will you now answer these questions'. The clerk to the justices did not object or make any comment on my use of the word 'prohibited' in that context. I then put to the husband the questions which had been enumerated by the clerk to the justices in the order and in the form which he had indicated. During the course of such questions I referred to the fact that I was unfortunately compelled to put leading questions to the husband. The solicitor for the wife then stated that he was not going to object since they were helping his case in that form."

The independent solicitor, in his affidavit of Feb. 9, 1954, gives this version of what took place:

"At the commencement of the examination-in-chief of the [husband] I recall the clerk to the justices enumerating five points or questions that should be put to the [husband]. [The solicitor for the husband] then put to the [husband] the five questions preceded by a statement to the effect that: 'Since I appear to be prohibited from putting anything further to you will you now answer these five questions'".

At this point it is relevant to note that, apart from five main questions, the examination-in-chief of the husband consisted merely of some half-dozen ancillary questions. "Ancillary" in the sense that they were merely adjuncts to the five. There is a notable absence of the considerable number of further questions in examination-in-chief which one would normally have expected to find in such a case.

Turning to the evidence of the solicitor for the wife, as to what happened with regard to the examination-in-chief of the husband, one finds that his version includes the following:

"After the submission by [the husband's] solicitor that he had no case to answer and the justices' ruling that there was a case to answer the clerk to the justices indicated that there were certain questions which he enumerated that the [husband] was required to answer. To the best of my recollection the clerk put these questions to the [husband's] solicitor who in turn put them to the [husband]. The [husband's] answers to these questions are set out in his evidence-in-chief in the notes of evidence filed, and are the first four sentences in his evidence."

The wife's solicitor then goes on to say that, in his view, the husband's solicitor was not prohibited from putting what I have referred to as ancillary questions.

The above being the detailed accounts of what happened on the examination-in-chief of the husband according to the affidavits filed by both parties, the

state of affairs was obviously one which called for some satisfactory explanation on oath from the clerk to the justices or from the justices themselves. Four affidavits have been filed on behalf of the justices and their clerk since they have had all the material before them, but not one of those four affidavits goes so far as even to mention the examination-in-chief of the husband. Indeed, the clerk to the justices, who was specifically given an opportunity to answer the affidavit of Feb. 9, 1954, by the independent solicitor, does not go so far in his affidavit as to say that he had even read the evidence of the independent solicitor.

It is right at this stage to mention that while this court has had every possible assistance from counsel for the justices, it does not appear on this appeal to have had that full and careful assistance in the way of affidavits from either the justices or their clerk which an appellate court normally requires, and to which it is, in the circumstances of such a case, entitled. The above omission is one instance. Another occurs in the affidavit of Mr. Richards, one of the justices, sworn on Jan. 29, 1954. Mr. Richards put on oath that he entirely disagreed with so much of the first affidavit of the husband's solicitor as is contained in its second paragraph:

"That the [husband] desired to raise in issue the whole conduct of the [wife] since the celebration of the marriage with the [husband] with the intention of showing that he had reasonable cause and was justified in refusing to live with the [wife]."

Yet Mr. Richards, who so swore in his affidavit of Jan. 29, 1954, had himself signed on Nov. 5, 1953, as reason for the decision of the justices:

"There has been no evidence given to us to justify the allegations of the husband that the general conduct of the wife since the marriage has been sufficient to absolve him from a charge of desertion."

That aspect of the justice's affidavit was properly admitted at the Bar to be "lackadaisical". It is not necessary to say anything more about it.

In this difficult state of affairs it is necessary, first, to assess the evidence as a whole in so far as it relates to allegations of undue interference by the clerk to the justices. It seems evident that the allegations made by the husband's solicitor in relation to interference both with the cross-examination of the wife and the examination-in-chief of the husband are in substance established as accurate. Both the evidence of the independent solicitor and the inferences to be drawn from the other affidavits support this view. There was, indeed, a suggestion made on behalf of the justices, that when it came to dealing with the examination-in-chief of the husband the clerk did no more than amplify the refutation of the submission of no case. The evidence which I have already read out from other deponents does not appear to be consistent with this suggestion, but, in any event, the point is whether some limitation was or was not, in effect, placed on the examination-in-chief of the husband. It seems to me that a limitation was placed, and that it was an undesirable limitation.

The third point raised by the husband's solicitor—that of the alleged undue interference by the clerk as to the announcement of the reasons for the court's decision—has resulted in a considerable conflict of evidence between the various affidavits filed on this appeal. Apart from those affidavits, however, this court has, for the first time, today [Apr. 28, 1954] seen the notes of the clerk to the justices. In those notes there appears a passage which relates both to the decision of the justices and to the reasons, as purported to be given by them at the time. It is one of the less happy features of this case that the contemporaneous note of the reasons given by the justices at the time was excised from the copy of the general notes sent up on this appeal to this court. What appears on that note is not inconsistent with the version of the husband's solicitor as to who it was who announced the decision of the court, but the reasons themselves agree with those stated in the affidavit of the wife's solicitor. In all the circumstances of

the present case, it does not appear necessary further to resolve the conflict of evidence on the point as to who made the announcement.

Both parties were represented at the trial by solicitors. Accordingly, neither of them was in need of assistance as to how to present the case to the court. Both parties were entitled, within the limits of relevancy and reasonableness, so to conduct their case as seemed best to their legal representatives in court. In those circumstances a justices' clerk is no more entitled to step into the arena and conduct a litigant's case for him than is a justice himself. Indeed, it is important in the interests of justice that the clerk should not give even the appearance of seeking himself to conduct the case of either party or to limit the way in which that case is conducted. At any trial this need to allow freedom to the litigant has from time to time to be balanced against the clerk's duty to assist the court as to what is and what is not relevant—matters, however, on which it is not for him to give a ruling himself. Sometimes the dividing line between the part a clerk may, on the one hand, take to see that the time of the court is not wasted, and the interventions, on the other hand, which, in the interests of justice appearing to be done he ought not to make, is difficult of demarcation. In the present case, however, it is clear that the clerk overstepped the line to a considerable degree, and put substantial obstruction in the way of the husband's solicitor in the conduct of his client's case. The clerk seems to have given the appearance both of being master of the conduct of the husband's case and also to some degree of being master of the court as regards what should and should not be given in evidence. It is, perhaps, a symptom of this attitude of the clerk that after the short examination-in-chief of the husband it was the clerk who took up the cross-examination, although the wife was represented in court by a solicitor. Then, having finished and noted his own cross-examination, the clerk did not take a single note of the cross-examination by the wife's solicitor. Indeed, looking at the notes of evidence as taken by the clerk, this court was at first under the impression that there had been no cross-examination at all by the wife's solicitor, but, in fact, the wife's solicitor, in the course of his frank affidavit, has set out that he did cross-examine the husband at some length, and it is clear from his affidavit that his cross-examination elicited facts of importance. Some of those facts were of assistance to the husband, some were of assistance to the wife, but in neither case was any note taken of them, an omission which is in itself contrary to what has been laid down as a clerk's duty in relation to taking notes.

The result of what I have previously referred to as the substantial obstruction of the husband's solicitor's conduct of his client's case was that a considerable amount of evidence was not adduced in chief which he would otherwise have sought to obtain from the husband. Indeed, the notes of evidence clearly reveal that something appears to have gone wrong at the trial. Those notes reveal an examination unnatural in sequence, and curtailed as regards the number of questions to quite an unusual degree. Vital points were not put to the husband in examination-in-chief. Many of those vital points were discussed in argument before this court today, but they are points which, perhaps, it is undesirable to recapitulate in view of the order which this court may be making. The result was that justice certainly did not appear manifestly to be done at this stage. Accordingly, on the facts which I have so far stated, in my opinion, the trial was unsatisfactory, and the decision of the justices cannot stand.

That, however, leaves over the question which has been raised in relation to the wife's proof having been handed to the clerk to the justices, and to the way in which the clerk's notes were taken from that proof. The fact is clear that during the trial there was before the clerk a proof of the wife, which she had given to her solicitor, so it is said, in August, 1953. Equally it is clear that it was physically used as the basis on which the clerk made the notes of the wife's examination-in-chief. The facts that led to this state of affairs are not so clear. In August,

1953, a summons was taken out by the wife, which I will refer to as the earlier summons. This court has been told from the Bar that it was a summons under the Guardianship of Infants Acts, 1886 and 1925, but the clerk's affidavit seems to indicate a difference on that matter. On the taking out of the summons in August, 1953, a document, also in the form of a proof, was then lodged with the clerk to the justices, it being different in its contents from the proof before the clerk at the hearing. Whether or not the latter proof related to the earlier summons is not clear, nor is it clear whether it was originally handed over to the clerk to the justices on Nov. 4, 1953 (when the wife's summons was issued, to be heard, by consent on Nov. 5, 1953), as being material on which a fresh complaint was founded, or whether it was actually handed to him on the morning of the trial, as seems more likely from the affidavits which have been put before us.

- A
- B These doubts, however, do not affect the question now before the court, i.e., as to the propriety of a proof of the complainant being before the clerk during the hearing of the summons, and, further, as to the propriety of its being used by the clerk as a document from which to take his notes. We are not considering what is and what is not proper material on which a summons can be issued. Here I pause to note that in the court of summary jurisdiction at Bridgend
- C there seems to be no court notebook in which the justices' clerk takes notes. He appears to use, as a practice, the complainant's proof as being part of his notebook, simply altering any portions of the proof which he thinks have not been given in evidence and making such additions to that proof as he thinks accord with the evidence as given. For subsequent notes he uses deposition paper. This court has been informed of no reason why a bound notebook is not used as
- D in neighbouring courts. While there neither is, nor can be, a rule of universal application as to the exact form in which notes of matrimonial matters should be taken in varying circumstances, it is right to make it clear that it is obviously preferable that normally there should be used for such notes the usual bound notebook.

- E That the proof of the wife was before the clerk during the hearing of the case, was of itself clearly undesirable. Indeed, this was conceded at the Bar by those who sought to support the decision in this case. Such a document, not having been seen by the other party's representative, is apt to be regarded with suspicion by that other party. Further, in no circumstances should such a proof be used as the basis of the notes of the clerk to the justices. His duty is accurately set out in *RAYDEN ON DIVORCE*, 6th ed., p. 542, as follows:

- F "It is the duty of the clerk to the magistrate or justices to take a full note of the evidence given at the hearing of the application".

The responsible nature of that duty has frequently been emphasised. As long ago as *Cobb v. Cobb* (1) it was stated by SIR FRANCIS JEUNE, P. ([1900] P. 146):

- G "Unless notes are taken and furnished, the Act [Summary Jurisdiction (Married Women) Act, 1895] would be unworkable, for it would be impossible for us, without the notes, to do justice between the parties upon these appeals."

- H In more than one place the notes contain unaltered the phraseology of that proof of evidence which the wife's solicitor had taken some months earlier. In such circumstances this court cannot be certain that when it receives on an appeal a note thus compiled it contains the true shades of wording which the witnesses, in fact, used. Notes so taken are unreliable, and the method used in this case was wrong, and, indeed, dangerous in so far as the interests of justice are concerned. It was for these reasons, indeed, properly conceded by counsel for the justices that notes taken in the way which this clerk adopted cannot fairly be said to be real notes of the evidence given.

Accordingly, there was an error both in the proof being before the clerk at the trial and in the clerk making that proof the basis of his notes. But, as the

husband's solicitor appears to have seen the proof being handed to the clerk, the husband cannot, on this appeal, rely on this error in procedure, nor, indeed, does he raise it as one of his grounds of appeal. The general importance of this matter of the notes lies in the fact that this appeal has brought to light something touching the interests of justice in relation to the court at Bridgend. Its particular relevance to this case lies in the fact that where there are notes of this type before a clerk they may have some bearing on his attitude of mind towards such allegations as may be sought to be put forward by the opposing party. As I have already indicated, however, this appeal does not turn on the question of these notes. It is on the obstruction placed in the way of the husband's solicitor in conducting his case that this appeal turns. It is on that ground that, in my view, a fresh trial is necessary. As a fresh trial is necessary, it follows that nothing more need be said on the merits of the case or as to the weight or otherwise of any matters excluded by the procedure adopted on Nov. 5, 1953. Those are matters for the new trial. I would only add that, if those questions which were excluded on Nov. 5 had resulted in answers favourable to the husband, or, indeed, if the husband's case had been allowed to be conducted freely by his solicitor, there might have been a different result. It is, however, not for this court to express any opinion on what the result would have been.

LORD MERRIMAN, P.: I agree. With regard to the main issue I am in complete agreement with the concluding observations of SACHS, J. If favourable answers had been obtained to the questions in cross-examination of the wife or in examination-in-chief of the husband, which the husband's solicitor was deterred from putting in the circumstances which have been described by SACHS, J., it might conceivably have thrown a fresh light on the rest of the evidence. More than that it is not necessary to say. I also agree emphatically that this is clearly a case in which the principle that justice must manifestly be seen to be done has been infringed. As to the use of the proof of the wife, it is no part of my business to dictate to the Bridgend court how the details of an information sworn to by a complainant shall be recorded, but I am strongly of opinion that it is highly undesirable that that record, whatever form it takes, but particularly if it takes, as it did in the present case, the form of a proof of evidence, should be transferred to the actual hearing and used as the basis of the notes of the complainant's evidence given in open court. The objections to that practice are so obvious that it is unnecessary to dilate on them, and, indeed, no attempt has been made to defend the practice. The objections are indisputable, and I hope that this will be the last instance in which the practice is followed in that particular court. I would only add, as another footnote, so to speak, to what SACHS, J., has said, that its relevance in the present case is not that it is raised as a substantive ground of appeal, nor, indeed, could it have been raised, for the reasons given by SACHS, J., but, in my opinion, one cannot ignore the possibility that the use of this proof as the basis of the note may have been a factor which induced the apparent reluctance of the clerk to widen the area of investigation. The result is that the appeal must be allowed, the order set aside, and the wife's complaint remitted for re-hearing by a completely fresh panel of justices, and I would add the suggestion that on the re-hearing it would be desirable that a deputy for the clerk should be appointed.

Case remitted.

Solicitors: *Helder, Roberts & Co.*, agents for *B. Edward Howe, Nicholas & Toms*, Port Talbot (for the husband); *Rutland & Crauford*, agents for *Walter P. David & Surpe*, Bridgend, Glamorgan (for the wife); *Torr & Co.*, agents for *R. H. C. Rowlands*, Cardiff (for the justices).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

BLACKMORE v. BUTLER.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.JJ.), April 29, 30, May 19, 1954.]

Agriculture—Agricultural holding—Notice to quit—“Aggregate of agricultural land comprised in contract of tenancy”—Cottage occupied by farm worker employed by tenant on adjoining holding—Cottage and holding held on separate agreements—Agricultural Holdings Act, 1948 (c. 63), s. 1 (1), (2).

A By an agreement, dated Mar. 10, 1942, the trustees of an estate let to the tenant some 270 acres of farm land which formed part of the estate. During the negotiations for the written agreement an oral agreement was made by the parties that a cottage adjoining the land would be let to the tenant for the use of one of his farm workers as soon as other accommodation could be found for the occupant, a farm worker employed by the trustees.

B By an agreement dated Aug. 26, 1947, the trustees granted to the tenant a further lease of the farm land and of some additional land. The cottage was not mentioned in either of the written agreements. In 1947 the tenant became the lessee of the cottage and since then it had been occupied by a farm worker employed by him on the farm. In December, 1947, the trustees sold the cottage to the landlord subject to the tenant's lease.

C In 1953 the landlord served on the tenant a notice to quit the cottage, and the tenant thereupon served a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1). In an action by the landlord for possession of the cottage the tenant claimed that it was part of an agricultural holding, and, alternatively, that it was itself an agricultural holding within the Act of 1948.

D HELD (i) (SOMERVELL, L.J., dissentiente): the “contract of tenancy” referred to in s. 1 (1) meant a single contract of tenancy; the written agreement for the tenancy of the farm and the oral agreement for the tenancy of the cottage were two separate and distinct tenancies and the premises comprised therein formed two holdings; those holdings were not

E “the aggregate of the agricultural land comprised in a contract of tenancy” within the meaning of the sub-section; and, therefore, the tenant did not hold the cottage as part of an agricultural holding consisting of the farm and the cottage; but

(ii) the question whether a dwelling-house was “agricultural land” within s. 1 (2) of the Act of 1948 was one of fact and degree; having regard (a) to the situation of the cottage, (b) to the fact that it was used at all material times for the purpose of housing agricultural workers, and (c) to the fact that it was let to the tenant expressly for the purpose of housing a worker on the adjoining farm land, the cottage was “agricultural land” within the meaning of the sub-section, and, therefore, the notice to quit was ineffective and the landlord was not entitled to possession.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 1, s. 24, and s. 94 (1), see G HALSBURY'S STATUTES, Second Edn., Vol. 28, pp. 29, 46 and 93.

Cases referred to:

(1) *Godfrey v. Waite*, (1951). Unreported.

(2) *Houkins v. Jardine*, [1951] 1 All E.R. 320; [1951] 1 K.B. 614; 2nd Digest

Supp.

H APPEAL by the landlord from an order made by His Honour JUDGE TYLOR at Basingstoke County Court on Mar. 8, 1954, dismissing an action for possession of a cottage, known as North Cottage, at Dogmersfield, in the county of Surrey.

In 1941 North Cottage and the adjoining land, comprising some 270 acres, formed part of the Dogmersfield Park Estate, which was owned by the trustees of a settlement under which a Mrs. Anson was beneficially interested. The land was used as a farm and the cottage was occupied by a farm worker, named Goddard, employed on the farm. In or about 1941, Mr. Anson, the husband of

the beneficiary under the settlement, and Mr. F. Butler, the tenant's father, entered into negotiations for the lease of the farm to the tenant. Before the lease was signed, Mr. Butler made it clear that the tenant required North Cottage for one of his farm workers, and it was understood or agreed that, as soon as alternative accommodation was available for Goddard, the cottage would be let to the tenant. In the meantime, another cottage was put at the tenant's disposal. By an agreement dated Mar. 10, 1942, the trustees of the settlement granted a lease of the farm land to the tenant, and by an agreement dated Aug. 26, 1947, they granted him a further lease of the land the subject-matter of the lease of 1942 and some additional land. The cottage was not mentioned in either of the written agreements. In 1947 Goddard left the cottage, and from that time the tenant had paid the rent and the cottage was occupied by a worker employed by him on the farm.

In or about December, 1947, the trustees sold North Cottage and some other cottages to the landlord, Mr. Blackmore, subject to the lease to the tenant. In 1953 the landlord served on the tenant a notice to quit the cottage. The tenant thereupon served a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1). In an action by the landlord for possession, the tenant claimed that he held the cottage as part of an agricultural holding, and, alternatively, as an agricultural holding, and that, therefore, he was entitled to the protection of the Act of 1948. The learned county court judge rejected the tenant's first contention, but accepted his second contention and dismissed the action.

de Montmorency for the landlord.

Wallis-Jones for the tenant.

Cur. adv. vult.

May 19. The following judgments were read.

SOMERVELL, L.J., stated the facts and continued. I will now read the relevant sections of the Agricultural Holdings Act, 1948. Section 1 provides:

"(1) In this Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord. (2) For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business . . ."

The definition of agriculture in s. 94 (1) is as follows:

"'agriculture' includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and 'agricultural' shall be construed accordingly."

It is right to refer to the definition although it does not throw any light on the present problem.

The landlord's argument may be summarised as follows. Under s. 1 (1) the holding must be contained in a single contract of tenancy. However connected or subsidiary or complementary the subject-matter of a second contract of tenancy may be to a tenancy of agricultural land, it cannot with the subject-matter of the latter tenancy constitute a single holding. That is his answer to the tenant's first contention. On the second point, namely, that the cottage considered by itself is an agricultural holding, the landlord does not seek to exclude the surrounding circumstances, but he submits that a cottage let for an agricultural worker, however closely connected with the land on which he works, is not within the definition because it is not "used for agriculture". Those words, he says, necessitate some product or use peculiar to agriculture. A cottage is simply a dwelling-house used as such. There is no element peculiar to agriculture.

Similar issues and arguments came before this court in *Godfrey v. Waite* (1). That case is unreported so I will summarise it. Originally, a house, Rodborough Manor, and thirty-two adjoining acres of farm land were owned and occupied by the plaintiff's husband. He died. The house was converted into two separate dwelling-houses. The thirty-two acres were let to the defendant's husband. At that time he lived three quarters of a mile away. In 1945 one of the halves of Rodborough Manor fell vacant and the defendant's husband with the defendant moved in under a lease from the plaintiff. In the spring of 1950 the plaintiff served a notice to quit to expire at Christmas, 1950. The defendant's husband died in September, 1950, his widow continuing to carry on the business. The defendant maintained that the half of Rodborough Manor let in 1945 was an agricultural holding within the Act. If this were right, it was conceded that the notice was ineffective. In considering the application of the decision in *Godfrey v. Waite* (1) to the present case it is important to note the absence in the judgment of any point as to the user of the house for any other purpose than as a residence. There is no indication of any point based on the use of the house for the business of the farm—filling up forms, correspondence, and so on. It is treated as premises or land used as a dwelling-house for the farmer, admittedly adjacent to the land farmed. It, therefore, raised potentially the question of construction: Can a dwelling-house ever be an agricultural holding per se if held under a separate tenancy? It was argued in the first place, as in the present case, that the house was so adjacent to and connected with the thirty-two acres that the whole thing together became one entity, one amalgamated holding, one farm with a farm house. The county court judge had held that it was not so amalgamated, the matter being treated, apparently, as one of fact and degree rather than of law. This issue was not pursued in the Court of Appeal.

SIR RAYMOND EVERSHERD, M.R., dealing with the other way the case was put, said:

"We, therefore, have to consider this case, as I understand it, with our eyes fixed exclusively on this particular tenement, the Rodborough Manor segment, and ask whether that, not as part of some larger whole, but in itself, is an agricultural holding. Let me turn again to the definition. The words are relatively few in number and apparently simple in expression. Is this holding which I have described, this tenement, 'used for agriculture'? I need not take any further time in considering the qualification about trade or business, for there is, I think, no doubt whatever—we certainly have heard no argument to the contrary—that the farming or agricultural activities carried on by Mrs. Waite are not carried on as a hobby or for pleasure, but are carried on for the purposes of trade or business. So it depends on the meaning of these three simple words, 'used for agriculture'. In one sense you may say that anybody carrying on an agricultural activity was using the place where he lived for agriculture in so far as it could be said that he must live somewhere, and, if he carried on his business while residing at the particular premises, then it could be said in a general sense that he was using these premises for agriculture—he was using them for the purpose of carrying on therefrom his agricultural business at some nearby place. But there must clearly be some limit to the scope of the phrase in that connection. In the course of the argument it was asked: Supposing that Mrs. Waite lived in a small house in the main street of Stroud and went by motor car or bicycle, or whatever other conveyance she might have available, to her farm property in order to conduct her business—Stroud is not far away—could it be contended seriously on those facts that she was 'using her dwelling-house for agriculture'? I do not forget, as counsel pointed out, that the word 'agriculture' covers a very wide amplitude of activities, some of them apparently of a trivial character. If at a house in the main street of Stroud, in the garden at the back, she conducted a business of market

gardening on quite a small scale, it might be said that she was using that house for agriculture. But if it were so said, it would be because she was using the garden for the purposes I have mentioned, and it would have nothing to do with the fact that she carried on nearby some dairy farming at Manor Farm. However, if you move the hypothetical dwelling-house nearer and nearer to the Manor Farm and further and further from Stroud, until you eventually reach the position when the two things are adjacent, does there come a point when you have, so to speak, crossed the line, and because of geographical propinquity you must then say that the place where Mrs. Waite lived is used for agriculture? If you do, are you so saying because by reason of its position it has become part of the farm? Putting the case in that way, it seems to me to indicate that this apparently simple inquiry is apt to become very much a matter of degree and a question for the trial judge *prima facie* to determine as a matter of fact in each particular case".

The Master of the Rolls then considered the learned county court judge's findings. He had, in effect, found that there was no intention to let the house as a farm house for the thirty-two acres. It was a more convenient dwelling-house. It was, therefore, not an agricultural holding. This was upheld. The importance is that the question was held to be one of fact and degree. If it had been let as a farm house for use in connection with the farm, the county court judge could and should have decided that it was an agricultural holding. It was also recognised that the purpose might alter during the currency of the contract.

On this basis it seems to me clear that there was evidence in the present case on which the county court judge could find that the cottage was an agricultural holding. Indeed, it is difficult to see how any other conclusion could be reached once it is clear that, as a matter of law, a dwelling-house as such may be "land used for agriculture". The learned judge rejected the tenant's first contention. He held that, as there were two contracts, there could not be one holding. It is unnecessary to decide whether this is of universal application. If a second contract is intended and expressed to be subsidiary or supplemental to or by way of variation of the main contract, I can, as at present advised, see no reason why the "contract of tenancy" for the purpose of s. 1 (1) should not be the original contract as so modified. It might, indeed, be unreal not so to apply the words of the sub-section. I would dismiss the appeal.

BIRKETT, L.J., stated the facts and said: By s. 24 (1) of the Agricultural Holdings Act, 1948, where notice to quit is given to the tenant of an agricultural holding and the tenant serves a counter-notice, the notice to quit has no effect, save under the conditions set out in s. 24 (2), unless the Minister of Agriculture and Fisheries consents to the operation thereof. In the case before us, it is agreed that the notice to quit which was given by the landlord is ineffective if the cottage is an agricultural holding. Section 1 (1) of the Act of 1948 defines "agricultural holding" as being

"... the aggregate of the agricultural land comprised in a contract of tenancy ..."

Section 1 (2) of the Act defines "agricultural land" as

"... land used for agriculture which is so used for the purposes of a trade or business ..."

The two questions on which this appeal turns and which were decided by the learned county court judge were these: (i) Can the tenant's tenancy of the farm made in 1942 and his tenancy of the cottage made in 1947 be regarded as "a contract of tenancy" within the meaning of s. 1 (1) of the Act of 1948? (ii) If not, can the cottage itself with its garden be regarded as agricultural land within the meaning of s. 1 (2) of the Act and so qualify to be an agricultural holding itself? The learned county court judge answered the first question in the negative and the second question in the affirmative, and, in my opinion, he was right in both answers.

- The "contract of tenancy" referred to in s. 1 (1) of the Act is, I think, a single contract of tenancy, and on the facts of the present case, the learned county court judge was plainly right in saying that there were two distinct tenancies, the written agreement for the tenancy of the farm in 1942, and the oral agreement for the tenancy of the cottage in the circumstances which have been stated. I do not think, therefore, that it is possible to say on the facts of this case that the tenant holds the cottage as part of an agricultural holding consisting of the farm and the cottage, and that they are the aggregate of the agricultural land comprised in a contract of tenancy so as to satisfy the provisions of s. 1 (1) of the Act. I think the facts of each case must be examined to see whether there is a contract of tenancy to satisfy s. 1 (1) of the Act. Cases may arise, of course, where, after the original contract of tenancy, other agreements are entered into, either adding to or subtracting from the land in the original tenancy, and it will be a question for consideration in each case whether such agreements may be read together with the original contract of tenancy and form the "contract of tenancy" referred to in s. 1 (1) of the Act. But on the facts of the present case I think the learned county court judge was right in saying that there were here two distinct contracts of tenancy which could not be so regarded.
- On the second question, the learned county court judge considered the definition contained in the Act of 1948 and asked himself whether the cottage, in all the circumstances of the case, could properly be described as an agricultural holding within the meaning of the Act. Could the cottage and garden be properly described as "agricultural land", that is "land used for agriculture", within the meaning of s. 1 (2)? Undoubtedly, the chief consideration in the mind of the county court judge was the use that had been made of the cottage at all times. It has already been pointed out that the bare fact that a cottage was occupied by an agricultural worker would not by itself make the cottage agricultural land. The county court judge took the view that the cottage was at least "land", and the question which he had to decide was whether it was "agricultural land". He considered the facts as to the use made of the cottage at all material times, and found that it had always been used to house an agricultural worker and had never been used for any other purpose. He considered the situation of the cottage in relation to the farm, and he also considered the evidence that, when the farm was first let, the tenant's father had wished the cottage to be included in the tenancy because of its situation and because of its use. Although, for the reasons already stated, this could not be done, the learned county court judge observed that, if it had been possible to do this and make the cottage part of the original letting, nobody would have doubted that it was an integral part of the holding, and not something merely incidental thereto. The fact that the cottage was occupied at all times by a farm worker does not stand in isolation. It is related to the history of the use of the cottage and the land and stamps the cottage with a definite character, and I think the judge was right in deciding that the cottage in all the circumstances of the case came within the definition of an agricultural holding. I agree that the appeal ought to be dismissed.

- ROMER, L.J.: I also agree, and am of the opinion that the learned county court judge was quite right on both the issues which he determined. The first was whether the tenant's tenancy of the farm land and his tenancy of the cottage constituted together a "contract of tenancy" within the meaning of that phrase as used in s. 1 (1) of the Agricultural Holdings Act, 1948. In my opinion, the learned judge was plainly right in deciding that the two tenancies were separate and distinct and that the premises comprised therein formed two holdings and not one. One may test the matter in this way. If the rent of the cottage had fallen into arrear the landlord could have levied a distress on the tenant's goods in the premises, but he could not have distrained on the livestock

or agricultural machinery on the farm. This, in itself, shows that in the eye of the law the tenancies were distinct from one another—as, indeed, they were in fact, the tenant holding the land under a written agreement and the cottage under an oral agreement or arrangement of a different date. But then it was said that, even so, the two agreements were in substance one inasmuch as the tenant (or his father) made it a condition of his leasing the land that he should have a tenancy of the cottage as well, as from the time when its then occupant, Goddard, should vacate it. It is true, I think, that the tenant may have had a sufficient equitable interest in the cottage, arising from Anson's acceptance of this condition, to have entitled him to an injunction restraining Anson, when Goddard left, from letting the cottage to anyone else other than himself. This cannot, however, have the effect of merging the two contracts of tenancy into one, and, in my opinion, s. 1 (1) of the Act, in speaking of "a contract of tenancy" is envisaging only one contract, and not two or more, as is shown by (inter alia) s. 8, s. 23 and s. 24 of the Act. It is true that, if further agricultural land is added to land already comprised in an existing lease by an instrument which is supplemental thereto and applies its provisions to the extra land, there would be only one "contract of tenancy" for the purposes of s. 1 (1), but nothing of that kind was done in the present case. On the contrary, not only did the original tenancy agreement of Mar. 10, 1942, make no reference to the cottage, but the later agreement which the parties entered into on Aug. 26, 1947, was wholly confined to the land and made no mention at all, as it very well could have done, of any agreement to let the cottage when the departure of Goddard should make it available. I am, accordingly, unable to see how, on any view, the tenant's right to possession of the farm lands and cottage was attributable to only one "contract of tenancy".

There remains the question whether the cottage, by itself, was "used for agriculture" (which I take to mean "used for the purpose of agriculture" or "used in connection with agriculture") so as to constitute agricultural land. It is, of course, clear that the mere fact that a dwelling is occupied as a residence by a person who is an agricultural worker, or who is otherwise engaged in agricultural pursuits, is not in itself sufficient to constitute that dwelling agricultural land. *Godfrey v. Wade* (1), to which my Lord referred in his judgment, is sufficient authority for that. Moreover, the contrary view would lead to one of two results: either that, once the dwelling had been occupied by such a person, it would be stamped for evermore with the character of agricultural land, which would be absurd, or that it would be within or outside the Act of 1948 from time to time according to whether its occupier was such a person or not—a conception which this court in *Houkins v. Jordan* (2) declined to accept. Nevertheless, once it is conceded, as the landlord rightly did concede, that the cottage is "land", I can entertain no doubt but that, having regard to all the relevant circumstances, it is "agricultural land" within s. 1 (2) of the Act. Set, as it seems to be, in the midst of pastures and farm lands, it has, at all material times, so far as is known, been used for the purpose of housing agricultural workers. We were told that the whole time Goddard lived in it he worked for a tenant farmer, although not on the land which was farmed by the Butlers. The tenant in the present case wanted it for a similar purpose, and it was not suggested that the cottage had ever been let for the accommodation of any different type of worker. Taking, then, the history of the cottage into account, its situation, and the purpose for which it was let to the tenant, it follows almost inevitably, as I think, that it is "agricultural land" and that the learned judge was right in so deciding. I, accordingly, agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Bulcraig & Davis* (for the landlord); *Hollist, Mason & Nash*, Farnham, Surrey (for the tenant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

BERKELEY AND ANOTHER v. PAPADOYANNIS.

[COURT OF APPEAL (Somervell, Denning, Jenkins, Birkett and Romer, L.J.J.),
April 2, 5, May 20, 1954.]

*Rent Restriction—Separate dwelling—Parts of dwelling-house sub-let by tenant—
Different parts sub-let from time to time—Occupation by tenant of parts not
sub-let.*

A By an agreement dated Oct. 31, 1944, the landlords let to the tenant for three years a self-contained maisonette to which the Rent Restrictions Acts applied, and the tenant undertook "not to assign or under-let the [premises] without the previous consent of the landlord provided that the tenant shall notwithstanding have power to sub-let or under-let part of the said [premises]". After the contractual tenancy came to an end, the tenant remained in possession as a statutory tenant. The maisonette comprised three floors, there being two rooms on the first floor, three rooms on the second floor, and four rooms on the third floor. The tenant never occupied the whole of the premises, but he occupied different parts at different times and from time to time he sub-let, as two furnished sub-lettings, those parts not in his own occupation. At the time of the proceedings he had sub-let the two rooms on the first floor and three rooms on the third floor, but he intended, as soon as he could, to re-occupy the rooms on the first floor and to sub-let the fourth room on the third floor. On a claim by the landlords for possession of the rooms which were sub-let,

D HELD: as the tenant had merely sub-let different parts of the maisonette while remaining in occupation of the rest of it and as he had at various times during the tenancy occupied different parts of the premises and might continue to do so in the future, thus re-occupying the accommodation, or part thereof, then occupied by the sub-tenants, and as he was entitled to suspend any decision whether or not, if a sub-tenant should go, he would re-occupy the whole or any part of the premises sub-let, he had not forfeited the protection of the Rent Restrictions Acts in respect of the rooms which he had sub-let, and, therefore, the landlords were not entitled to possession of them.

Crowhurst v. Maidment ([1952] 2 All E.R. 808), distinguished.

AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-335, paras. 392-401; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 692-698, Nos. 7829-7894.

F Cases referred to:

- (1) *Crowhurst v. Maidment*, [1952] 2 All E.R. 808; [1953] 1 Q.B. 23.
- (2) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 31 Digest, Replacement, 659, 7612.
- (3) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 38 B.W.C.C. 48; 2nd Digest Supp.
- (4) *Baker v. Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401; 31 Digest, Replacement, 647, 7516.
- (5) *Whitty v. Scott-Russell*, [1950] 1 All E.R. 884; [1950] 2 K.B. 32; 31 Digest, Replacement, 645, 7507.
- (6) *Roe v. Russell*, [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253; 92 J.P. 81; 31 Digest, Replacement, 695, 7868.
- (7) *Oak Property Co., Ltd. v. Chapman*, [1947] 2 All E.R. 1; [1947] K.B. 886; [1947] L.J.R. 1327; 177 L.T. 364; 31 Digest, Replacement, 711, 7979.

APPEAL by the tenant from an order of His Honour JUDGE REID made at Marylebone County Court on Jan. 15, 1954, in an action by the landlords for possession of certain rooms in a maisonette.

The tenant had been the contractual tenant of the maisonette, and after the contractual term expired in 1947 he held over as a statutory tenant. He had never occupied the whole of the premises, but he occupied different parts at different times and sub-let, as two furnished sub-tenancies, the part not occupied by him. At the time when the proceedings were brought, two rooms on the first floor and three rooms on the third floor were sub-let, and the landlords claimed possession of these rooms. The learned county court judge held that the case was indistinguishable from *Crouchurst v. Maitland* (1), and, accordingly, made an order for possession.

R. E. Megarry for the tenant.

Heathcote-Williams, Q.C., and *C. Salmon* for the landlords.

Cur. adv. vult.

May 20. **SOMERVELL, L.J.**, read this judgment of the court. This is an appeal by the defendant, John Papadoyannis (referred to hereinafter as the tenant), from a judgment of His Honour Judge REID at Marylebone County Court, dated Jan. 15, 1954, whereby he ordered the tenant to give up possession to the plaintiffs of two rooms on the first floor and three rooms (other than the room used by the tenant as a boxroom) on the third floor of the maisonette consisting of the first, second and third floors of the premises known as No. 256, Randolph Avenue, W.9. The plaintiffs (referred to hereinafter as the landlords) sued as executors of a Mrs. Hilda Berkeley who died on June 23, 1953. Mrs. Berkeley, by an agreement dated Oct. 31, 1944, and made between herself, of the one part, and the tenant, of the other part, let to the tenant the maisonette in question (sometimes referred to as a flat) for three years from October, 1944, at a yearly rent of £160. The agreement included an undertaking in cl. 5 by the tenant

“Not to assign or under-let the said flat [the maisonette] without the previous consent of the landlord provided that the tenant shall notwithstanding have power to sub-let or under-let part of the said flat ”

the proviso being interpolated in ink in the typescript. The remaining material facts are sufficiently stated in the following extract from the judgment of the learned county court judge:

“The three floor maisonette in question comprises on the first floor two rooms, on the second floor three rooms, and on the third floor four rooms. For these three floors there is one bathroom and one w.c., both situated on a landing between the first and second floors of the house. The [tenant] says (and I accept his evidence) that the maisonette was at all times too large for his own occupation but that he took it because he could not at that time get anywhere else, that he insisted throughout the negotiations that he should have power to sub-let part of the place, and that as the result of his insistence the proviso to cl. 5 which I have read was interpolated in ink in the agreement before its execution. When in 1947 the original three years period expired the [tenant] held over as a statutory tenant. He and his wife, whom he married in 1945, have at all times made their home there and still live there, but do not occupy and never have at any time occupied the whole of the maisonette. The parts of the maisonette not in their occupation for the time being have from time to time been sub-let. They have always occupied the second floor of the house. For part of the time they have also occupied the first floor. The present position is that they occupy the second floor and a small room on the third floor which they use as a boxroom. The first floor with two rooms (one equipped as a kitchen, the other a large room) is, and has been since September, 1953, let to a Mr. Cygan who lives there with his wife. Three rooms on the top floor (one a kitchen) are and have been let for the last two and a half years to a Mr. Harold who lives there with his wife. Both lettings are furnished, the first floor sub-tenant

A paying £2 and the top floor sub-tenant £3 10s. a week. Rent in each case includes electricity and each sub-tenant pays for his own gas. The rent payable by the tenant has from time to time been increased from the original £160 a year and is now £13 15s. a month. Both sets of sub-tenants share in common with the tenant and his wife the bathroom and w.c. The whole three floors form a self-contained maisonette distinct from another maisonette in the lower part of the house, but inside the maisonette there are no structural divisions shutting off from each other the premises occupied by the tenant and his respective sub-tenants".

B The landlords' particulars of claim alleged that they were entitled to possession of the whole of the maisonette, but their claim was, in fact, limited to those parts of it in respect of which the order under appeal was made, that is to say, the two rooms on the first floor and the three rooms other than the boxroom on the third floor, which were the parts not occupied by the tenant. They based their claim on two grounds, the first being that the tenant had sub-let the first and third floors of the premises and at all material times had neither occupied nor intended to occupy the first and third floors; and the second being that suitable alternative accommodation was available for the tenant and his family in the shape of the second floor of the premises. The learned judge rejected the second ground, which was not relied on before us and, therefore, passes from the case.

C Having disposed of the second ground, the learned judge proceeded to deal with the first in these terms:

D "I come now to the other limb of the landlords' argument. They say that since the tenancy agreement expired in 1947 the tenant has had no more than a statutory tenancy, that is, the right so long as he retains possession to be protected on the conditions defined by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1). So far as he has sub-let part of the premises he has ceased to retain possession for the purposes of that section and has, accordingly, lost his right to protection.

E In support of this contention I was referred to *Crouchurst v. Maidment* (1), a case with facts very similar to those here. What was involved there was a three-floors house with a different residence on each floor, as against here a self-contained maisonette, but in the three-floors house no physical division into flats had been made any more than in the present case. The only distinction that I can see is that there the three floors were separately let

F as a permanent arrangement, whereas, here, that part of the maisonette which the tenant himself occupies and those parts which remain available for letting to under-tenants have to some extent fluctuated. The tenant and his wife at one time occupied the first and second floors. They now occupy the second floor and one room on the third. The tenant told me that that was not a convenient arrangement and that, while he was on excellent terms with his sub-tenants and did not contemplate giving either notice, he hoped, should opportunity occur, again to occupy himself the first and second floors, in that event, as I understood it, giving up the boxroom on the top floor. The slight degree of uncertainty which that involves does not, in my judgment, constitute sufficient to distinguish the present case from *Crouchurst v. Maidment* (1). I was referred to the Landlord and Tenant (Rent Control) Act, 1949, s. 9, which was in operation when *Crouchurst v. Maidment* (1) was decided, but was not referred to there, the under-lettings being unfurnished. I do not see in principle how there can be any distinction between a statutory tenant who parts with possession to an unfurnished tenant and one who parts with possession under a furnished tenancy. In my view, I am bound by *Crouchurst v. Maidment* (1), and there will be an order for possession in twenty-eight days of the two rooms on the

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first floor and the three rooms (but not the room used by the tenant as a boxroom) on the third floor ”.

Counsel for the tenant supported his appeal from the learned judge's decision on three grounds. First, he submitted that, if the present case is not distinguishable on its facts from *Crouchurst v. Maidment* (1), we can and should decline to follow that authority because, although it is a decision of this court, it is inconsistent with other decisions both in this court and in the House of Lords. Secondly, he submitted that the facts of this case are distinguishable from those in *Crouchurst v. Maidment* (1). Thirdly, he submitted that on the facts of this case, and with *Crouchurst v. Maidment* (1) out of the way on one or other of his first two grounds, he was entitled to succeed. We are all of opinion that his second submission succeeds and that the facts of this case are distinguishable from those in *Crouchurst v. Maidment* (1). In that case it was conceded (and the concession was the basis of the decision) that the tenant had never at any material time occupied any part of the two upper floors and had no intention of ever again residing in any part of either floor. There was no such concession in the present case. As appears from the passage already cited from the judgment below, the tenant and his wife have at various times during the tenancy occupied different parts of the house and may continue to do so in the future — including the accommodation or part of it at present occupied by either of the sub-tenants. Assuming *Crouchurst v. Maidment* (1) to be binding on us, it is to be confined to cases where the facts are in accordance with the concession mentioned. The mere fact that a part of the premises has been sub-let does not raise an implication that the principle in *Skinner v. Georg* (2) is applicable to that part. The tenant is fully entitled to suspend any decision as to whether, if any sub-tenant should go, he would or would not re-occupy the whole or any part of the premises sub-let. The tenant while remaining in the rest of the premises has done no more here than sub-let parts of the dwelling-house. This plainly does not in itself forfeit the protection of the Rent Restrictions Acts.

In order that counsel for the tenant should succeed in his first submission, the court would have to be satisfied that the decision in *Crouchurst v. Maidment* (1) fell within one of the three categories set out in *Young v. Bristol Aeroplane Co., Ltd.* (3) ([1944] 2 All E.R. 300). Counsel sought to bring it within either the third or first of these categories, or both. He submitted that it was given per incuriam in that it was in conflict with the ratio of *Baker v. Turner* (4). He further submitted that it was in conflict with the rationes of other decisions of this court, namely, *Whitty v. Scott-Russell* (5), *Roe v. Russell* (6), and *Oak Property Co., Ltd. v. Chapman* (7). If we had come to a unanimous conclusion that this submission either succeeded or failed, we should have thought it right to deal with and decide it. In fact, we differ in our conclusions, and, as we are unanimous in thinking that this case is plainly distinguishable, we propose to limit this decision to the facts of this case. For these reasons the appeal will be allowed with costs here and below and judgment entered for the tenant.

Appeal allowed.

Solicitors: *Clifford Symons* (for the tenant); *Tackley, Fall & Read* (for the landlords).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

MORGAN (INSPECTOR OF TAXES) v. TATE & LYLE, LTD.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Keith of Avonholm), April 5, 6, 7, 8, 12, June 1, 1954.]

Income Tax—Deduction in computing profits Expenditure on campaign against proposal to nationalise industry—Income Tax Act, 1918 (c. 40), sched. D, Cases I and II, r. 3 (a).

A To protect the company's business and assets from loss through the nationalisation of the industry in general and of its concern in particular, of which its directors believed there was a serious risk in certain political eventualities, a sugar refining company expended £15,339 on an anti-nationalisation campaign, including advertising, film making, film showing, and the issue of pamphlets, ration-book holders (suitably inscribed), photographs and recordings.

B HELD (LORD TUCKER and LORD KEITH OF AVONHOLM dissentientibus): the money was spent to prevent the seizure of the business and assets of the company and was "wholly and exclusively laid out or expended for the purposes of the trade" of the company within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, and so was deductible in arriving at the company's profits under that schedule.

C Dictum of LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* ([1906] A.C. 453), *Mitchell v. B. W. Noble, Ltd.* ([1927] 1 K.B. 719), *Southern v. Borax Consolidated, Ltd.* ([1940] 4 All E.R. 412), and dictum of SCRUTTON, J., in *Smith v. Incorporated Council of Law Reporting for England & Wales* ([1914] 3 K.B. 684), applied.

Ward & Co., Ltd. v. Taxes Comr. ([1923] A.C. 145), distinguished.

Decision of COURT OF APPEAL ([1953] 2 All E.R. 162), affirmed.

E AS TO DEDUCTIONS IN COMPUTING THE PROFITS OF TRADE UNDER CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-161 and 177, paras. 309-327 and 371; and FOR CASES, see DIGEST, Vol. 28, pp. 42-49, Nos. 215-252.

FOR THE RULES APPLICABLE TO CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, r. 3 (a), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 156.

F Cases referred to:

(1) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; 28 Digest 56, 287.

(2) *Strong & Co., Ltd. v. Woodfield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215; 28 Digest 57, 290.

(3) *Mitchell v. Noble (B.W.), Ltd.*, [1927] 1 K.B. 719; 96 L.J.K.B. 484; 137 L.T. 33; sub nom. *Noble (B.W.), Ltd. v. Mitchell, Mitchell v. Noble (B.W.), Ltd.*, 11 Tax Cas. 372; Digest Supp.

(4) *Nevill (W.) & Co., Ltd. v. Federal Comr. of Taxation*, (1937), 56 C.L.R. 290; 10 A.L.J. 459; 4 A.T.D. 187; 43 A.L.R. 210.

(5) *Southern v. Borax Consolidated, Ltd.*, [1940] 4 All E.R. 412; [1941] 1 K.B. 111; 110 L.J.K.B. 705; 23 Tax Cas. 597; 2nd Digest Supp.

(6) *Associated Portland Cement Manufacturers, Ltd. v. Inland Revenue Comrs.*, *Associated Portland Cement Manufacturers, Ltd. v. Kerr*, [1946] 1 All E.R. 68; 27 Tax Cas. 103; 2nd Digest Supp.

(7) *Cooke v. Quick Shoe Repair Service*, (1949), 30 Tax Cas. 460; 2nd Digest Supp.

(8) *Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K.B. 674; 83 L.J.K.B. 1721; 111 L.T. 848; 6 Tax Cas. 477; 28 Digest 52, 262.

- (9) *Ward & Co., Ltd. v. Taxes Comr.*, [1923] A.C. 145; 28 Digest 42, o.
- (10) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 28 Digest 52, 264.
- (11) *Bourland (Inspector of Taxes) v. Kramat Pasha, Ltd.*, [1953] 2 All E.R. 1122.
- (12) *Inland Revenue Comrs. v. Barr (trading as Henry & Galt)*, [1954] 2 All E.R. 218.
- (13) *Inland Revenue Comrs. v. Warnes & Co.*, [1919] 2 K.B. 444; 89 L.J.K.B. 6; 121 L.T. 125; 28 Digest 46, 235. A
- (14) *Rhymney Iron Co. v. Fowler*, [1896] 2 Q.B. 79; 65 L.J.Q.B. 524; 3 Tax Cas. 476; 28 Digest 44, 223.
- (15) *Thomas Merthyr Colliery Co., Ltd. v. Davis*, [1933] 1 K.B. 349; 102 L.J.K.B. 25; 148 L.T. 32; 17 Tax Cas. 519; Digest Supp.
- (16) *Smith's Potato Estates, Ltd. v. Bolland, Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp. B
- (17) *Mersey Docks & Harbour Board v. Lucas*, (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 2 Tax Cas. 25; 28 Digest 21, 104.
- (18) *Inland Revenue Comrs. v. Dowlall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401; 3rd Digest Supp. C
- (19) *Inland Revenue v. West*, 1950 S.C. 516; 31 Tax Cas. 402; 2nd Digest Supp.
- (20) *Bell v. National Provincial Bank of England*, [1904] 1 K.B. 149; 73 L.J.K.B. 142; 90 L.T. 2; 68 J.P. 107; 5 Tax Cas. 1; 28 Digest 41, 211.
- (21) *Union Cold Storage Co., Ltd. v. Jones*, (1923), 129 L.T. 512; 8 Tax Cas. 725; 28 Digest 53, 270.
- (22) *Rushden Heel Co., Ltd. v. Keene, Rushden Heel Co., Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 378; [1948] L.J.R. 1570; 30 Tax Cas. 298; 2nd Digest Supp. D
- (23) *Inland Revenue Comrs. v. Von Glehn*, [1920] 2 K.B. 553; 89 L.J.K.B. 590; 123 L.T. 338; 28 Digest 46, 236.

APPEAL by the Crown from an order of the Court of Appeal (JENKINS and HOBSON, L.J.J., SINGLETON, L.J., dissentiente), dated May 5, 1953, and reported [1953] 2 All E.R. 162, affirming an order of HARMAN, J., dated Dec. 18, 1952, dismissing the Crown's appeal by Case Stated from a decision of the General Commissioners of Income Tax for the City of London. E

The respondent company, the taxpayers, appealed against an assessment to income tax under Case I of sched. D to the Income Tax Act, 1918, for the year ending Apr. 5, 1951, in the sum of £2,200,000 less £100,000 capital allowances, on the ground that certain expenditure incurred in carrying out a propaganda campaign was deductible in computing the profits of the company. The expenditure, amounting to £15,339 15s. 2d., was incurred through an agent of the company, Aims of Industry, Ltd., whose activities included advertising, film making, film showing, and the issue of pamphlets, ration-book holders (suitably inscribed), photographs, and recordings. The campaign was directed against the nationalisation of the sugar refining industry, in which the company was engaged, which was being advocated by the Labour Party and was included in the policy statement submitted to the party's annual conference in 1949, and the directors of the company believed that nationalisation would result if the party were returned to power at the general election of 1950. The company contended that the expenditure incurred in carrying out the propaganda campaign was for the sole purpose of preserving its business and assets and thereby enabling it to carry on its business, and that it was, therefore, money wholly and exclusively laid out for the purposes of the trade and was a permissible deduction in computing profits for income tax purposes. The commissioners held that the sum was money wholly and exclusively laid out for the purposes of the company's trade and was an admissible deduction in computing its profits F
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for income tax purposes. On Dec. 18, 1952, HARMAN, J., dismissed the Crown's appeal against the decision of the commissioners, and on May 5, 1953, the Court of Appeal by a majority affirmed his decision.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills for the Crown.

Millard Tucker, Q.C., Borneman, Q.C., and D. C. Miller for the company.

The House took time for consideration.

June 1. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the respondent company (hereafter referred to as "the company") claims that a sum expended by it in carrying out a "campaign" against the nationalisation of the sugar refining industry was deductible in computing its profits, for the purpose of assessment to income tax under Case I of sched. D to the Income Tax Act, 1918, for the year ended Apr. 5, 1951. The amount claimed is £15,339 15s. 2d., but it is intended that the precise amount shall be agreed between the parties if your Lordships uphold this claim in principle.

The case turns on the wording of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D, but other portions of the Income Tax Act, 1918, should be quoted. Section 209 (1) provides:

"In arriving at the amount of profits or gains for the purpose of income tax—(a) no other deductions shall be made than such as are expressly enumerated in this Act."

Schedule D, para. 1, is as follows:

"Tax under this schedule shall be charged in respect of—(a) the annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere."

Paragraph 2 provides:

"Tax under this schedule shall be charged under the following Cases respectively; that is to say, Case I.—Tax in respect of any trade not contained in any other schedule."

The Rule Applicable to Case I of sched. D, as amended by the Finance Act, 1926, s. 37 (3) and sched. V, Part I, is:

"The tax shall extend to every trade carried on in the United Kingdom or elsewhere . . . and shall be computed on the full amount of the balance of the profits or gains . . ."

The Rules Applicable to Cases I and II, so far as relevant, are as follows:

"1 (1) The tax shall be charged without any other deduction than is by this Act allowed . . . 3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation . . . (f) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation . . ."

I pause to say that I agree with the comment of JENKINS, L.J. ([1953] 2 All E.R. 175):

" . . . it has long been well settled that the effect of these provisions as to deductions is that the balance of the profits and gains of a trade must be ascertained in accordance with the ordinary principles of commercial trading, by deducting from the gross receipts all expenditure properly deductible from them on those principles, save in so far as any amount so deducted

falls within any of the statutory prohibitions contained in the relevant rules, in which case it must be added back for the purpose of arriving at the balance of profits and gains assessable to tax."

See *Usher & Wiltshire Brewery, Ltd. v. Bruce* (1), per LORD LOREBURN ([1915] A.C. 444), LORD PARKER OF WADDINGTON (ibid., 458), LORD SUMNER (ibid., 467, 468), and LORD PARMOOR (ibid., 473, 474).

My Lords, the commissioners held that

"the sum in question was money wholly and exclusively laid out or expended for the purposes of the company's trade and was an admissible deduction from its profits for income tax purposes"

and their decision was upheld by HARMAN, J., and by the Court of Appeal (JENKINS and HODSON, L.J.J., SINGLETON, L.J., dissenting). The commissioners are the judges of fact, but they have not found for what purpose or purposes the sum in question was, in fact, laid out. Accordingly, your Lordships have first to decide this question, and have then to decide, as a question of law, whether expenditure for that purpose is, or is not, deductible for income tax purposes.

The facts are fully set out in the Case Stated, and for the present purpose I need only quote two paragraphs thereof, prefacing them by stating that in 1949 the directors of the company formed the view, for reasons set out in the Case, that the nationalisation of the sugar refining industry would become part of the Labour Party's considered official programme and they endeavoured, without success, to persuade the policy committee of the Labour Party to receive a deputation. Paragraph 8 of the Stated Case is as follows:

"Efforts to obtain consent to the said deputation having failed, the directors were more than ever convinced that nationalisation of the industry was intended and that the company would thereby lose its business and assets. Accordingly at an extraordinary general meeting of the stockholders of the company which was held on Sept. 15, 1949, the following resolution was proposed and passed: 'Believing as we do that nothing but harm to workers, consumers and stockholders alike can spring from the nationalisation of the sugar refining industry, the members of this company hereby empower the board of directors to do everything in their power to meet the threats of the nationalisers who, learning nothing from the chaos, losses and labour unrest that they have created in other industries, now wish to seize the assets of this company . . .'"

There follows a reference to Lord Lyle's speeches at the meeting, a report whereof is annexed to the Case. Paragraph 10 is as follows:

"In fulfilment of the obligation imposed upon them by the resolution referred to in para. 8 hereof, the directors decided to intensify their anti-nationalisation propaganda campaign which was of national dimensions and which was in the hands of Aims of Industry, Ltd. in order to try to preserve the business and assets of the company intact."

My Lords, the purpose for which a company expends money can only be either the purpose of the directors, if they expend it under the powers conferred on them by the memorandum and articles without the express sanction of a general meeting, or the purposes of the shareholders if these purposes are expressed at a general meeting. Here there is no conflict between the purpose of the directors and the purpose of the shareholders in general meeting. The passages which I have quoted from the Case Stated show that these bodies had one purpose only, viz., to prevent the seizure of the "business and assets" of the company. The sum in question was spent for that purpose. It would appear likely, from the documents exhibited to the Case Stated, that part of the sum was spent by the directors before Sept. 15, 1949, but, to my mind, this fact is immaterial, as the purpose for which it was spent was the same throughout.

A Counsel for the Crown pointed out that nationalisation of the sugar refining industry might have taken one or other of two forms, in the case of the company and of every other company in the industry, either (a) the acquisition of the business and assets of the company by a national body, or (b) the acquisition of the company's capital stock by a national body. He contended that the propaganda campaign had the dual purpose of (a) preventing the former type of nationalisation, and (b) preventing the latter type of nationalisation, and that expenditure for either of these purposes was not expenditure for the purposes of the company's trade, within the meaning of r. 3 (a). Counsel for the respondent company conceded that, if the Labour Party had intimated that nationalisation would take the form of acquisition of the company's capital stock by a national body, and if the expenditure had been directed to avoiding this form of nationalisation, it would not have answered the test laid down by r. 3 (a). B He accepted the argument of counsel for the Crown that money laid out merely for the purpose of preventing a change in the identity of the stockholders could not be regarded as being laid out for the purposes of the trade. My Lords, I am content to assume that the argument so accepted was correct in law, for there is no evidence that any such intimation was given, and there is abundant C evidence that the money was laid out solely for the purpose which I have already stated. I have already quoted para. 8 and para. 10, and Lord Lyle said, in his oral evidence, that he

"had never thought of the alternative method of nationalisation by which the State would have acquired all the capital stock of the company from its members."

D Lord Lyle was the president of the board of directors and the only one of the three witnesses who was a director of the company at the time when the money was spent. Mr. W. R. Booth, who was secretary to the company when the money was spent and became a director later, said that it did occur to him that one way of nationalising the company would be for the State to acquire all the capital stock, but there is no evidence that he communicated this thought to anyone E else.

My Lords, thinking as I do that, in fact, the only purpose for which this money was expended was to prevent the seizure of the business and assets of the company, I now turn to consider whether expenditure for that purpose is deductible for the purpose of arriving at the balance of profits or gains assessable to tax. I start with the evidence of Mr. John Arthur Nicholson, a chartered accountant. F He was the last of the three witnesses called before the commissioners, and they stated that they accepted the evidence of all three witnesses. Mr. Nicholson stated that

"in accordance with ordinary commercial accountancy practice [the sum in question] must be charged against the profit to which it related."

G He added that

"any item of expenditure which did not produce a capital asset had to be so charged."

This evidence is not, of course, conclusive of the matter in issue. One must next inquire whether the deduction of the sum in question, for the purpose of arriving at the balance of profits and gains, is prohibited by any statutory H provision. Counsel for the Crown did not contend in this House that the expenditure was of a capital nature, but relied solely on the prohibition in r. 3 (a) already quoted. Thus, there arises a question of law, which may be stated as follows: Can it properly be held that money spent to prevent seizure by the State of the company's assets, including the goodwill of the business carried on by the company, is money "wholly and exclusively expended for the purposes of the trade" within the meaning of r. 3 (a)? I pause to point out that "the trade" referred to in r. 3 (a) can only be the trade of the company asserting that

the expenditure in question is a proper deduction. It is the profits of that trade, and no other, which are being ascertained, and the question is whether the sum spent was wholly and exclusively laid out for the purposes of that trade. I should have thought it unnecessary to state this, had not some discussion arisen at the hearing as to whether the commissioners had put a "gloss" on r. 3 (a) by referring in their finding to "the company's trade".

My Lords, apart from authority, I should have no hesitation in answering the question just posed in the affirmative. Looking simply at the words of the rule I would ask: "If money so spent is not spent for the purposes of the company's trade, for what purpose is it spent?" If the assets are seized, the company can no longer carry on the trade which has been carried on by the use of these assets. Thus, the money is spent to preserve the very existence of the company's trade. The same result follows if I apply to the present case the oft-quoted observation of LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (2), in regard to the words "for the purposes of such trade" in the corresponding provision of the Income Tax Act, 1842 ([1906] A.C. 453):

"These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

The last sentence of this observation has sometimes been quoted in isolation, but it cannot be supposed that, in this one short passage, LORD DAVEY intended to ascribe two different meanings to the words in question, and, if his observation is read as a whole, I think it is clear that the last sentence in no way qualifies or alters the statement as to the meaning of the words in question which is contained in the first sentence. Applying that statement to the facts of the present case, the "person" to whom LORD DAVEY refers is surely the person who seeks to deduct the sum in question, i.e., the company, and it seems to me that money expended to prevent seizure of the company's assets is accurately described as money expended "for the purpose of enabling the company to carry on and earn profits in the trade", since without its assets it could not carry on its business.

My Lords, in my opinion, no one of the cases, dealing with the income tax statutes of this country, which were cited in argument, throws any doubt on the view which I have just expressed, and four at least of these cases support that view. In *Mitchell v. B. W. Noble, Ltd.* (3), a payment made to secure the retirement of a director was held to be deductible, both by ROWLATT, J., and by the Court of Appeal, and SARGANT, L.J., said ([1927] 1 K.B. 738):

"Now, first, as to the question whether this was a disbursement wholly and exclusively laid out or expended for the purposes of the trade, it seems to me that there is nothing at all to show that it was not so exclusively laid out. The object, as disclosed by para. 9 of the Case, was that of preserving the status and reputation of the company, which the directors felt would be somewhat imperilled by the other director remaining in the business or by a dismissal of him against his will, involving proceedings by way of action in which the good name of the company might suffer. To avoid that and to preserve the status and dividend-earning power of the company seems to me a purpose which is well within the ordinary purposes of the trade, profession or vocation of the company."

I can see no distinction in principle between a payment made to preserve the status and dividend-earning power of the company and a payment made to prevent seizure of the company's profit-earning assets. It is interesting to note that in *W. Nerill & Co., Ltd. v. Federal Comr. of Taxation* (4), the High Court of Australia arrived at the same conclusion, on similar facts, when construing

the narrower wording of s. 25 (e) of the Income Tax Assessment Act, 1922-32,

"wholly and exclusively laid out or expended for the production of assessable income."

Southern v. Borax Consolidated, Ltd. (5) has a strong bearing on the present case. There, the company was in danger of losing a valuable asset, not by confiscation, but by legal proceedings attacking the company's title to that asset.

A LAWRENCE, J., held that the expense of resisting these proceedings was deductible, and said ([1940] 4 All E.R. 419):

"It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses which were incurred in the ordinary course of maintaining the assets of the company, and the fact that it was maintaining the title, and not the value, of the company's business does not make it any different."

B This decision was approved by the Court of Appeal in *Associated Portland Cement Manufacturers, Ltd. v. Inland Revenue Comrs.* (6) ([1946] 1 All E.R. 72) and was applied by CROOM-JOHNSON, J., in *Cooke v. Quick Shoe Repair Service* (7).

C Further, I derive assistance from the dicta of SCRUTTON, J., in *Smith v. Incorporated Council of Law Reporting for England & Wales* (8) ([1914] 3 K.B. 684):

"There may be cases where it is clear even to a judge who knows nothing about the trade, that a particular payment could not be wholly or exclusively laid out for the purposes of the trade. I do not desire to discuss politics, but I take examples which seem to me fairly clear. Payments for political purposes might conceivably be for the purposes of trade. It might be that a payment by a company to the Tariff Reform League might be of great advantage to its trade. It might be that a payment by a company to a political party which was supposed to be identified with the interests of a particular trade might be to the advantage of the trade; but one can easily imagine cases, such as a payment by a company to the National Service League, where it would be impossible to conceive that anybody could find that such money was wholly or exclusively laid out or expended for the purposes of the trade."

E Counsel for the Crown relied strongly on *Ward & Co., Ltd. v. Taxes Comr.* (9). In that case the Judicial Committee of the Privy Council had to consider the language of s. 86 (1) of the New Zealand Land and Income Tax Act, 1916, which provides as follows:

"In calculating the assessable income derived by any person from any source no deduction shall be made in respect of . . . (a) Expenditure or loss of any kind not exclusively incurred in the production of the assessable income derived from that source . . ."

G The expense in question was incurred by a brewery company in financing a campaign to persuade the public to vote against the prohibition of the sale of intoxicating liquors, at a poll which was about to be taken. It was held by the Judicial Committee that this expense was not deductible, on the true construction of the New Zealand Act, and I think it is desirable to quote the reasoning of the Board in full. It is as follows ([1923] A.C. 149):

H "The conclusion of the Court of Appeal upon this point is contained in the following passage in the judgment of that court: 'The question, therefore, is: Was the expenditure under consideration exclusively incurred in the production of the assessable income, for unless it was so, the Act expressly prohibits its deduction from such income. This question must, we think, be answered in the negative. We find it quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the production of in-

come, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing. It was contended by the company that it was illogical that while legitimate expenses incurred in the production of the income are deductible, similar expenses incurred for the much more important purpose of keeping the profit-making business alive are not deductible, and, further, that it was inequitable that the legislature should, on the one hand, force a certain class of traders into a struggle for their very existence, and, on the other hand, treat the reasonable expenses incurred in connection with such struggle as part of the profits assessable to income tax. These aspects of the matter are clearly and forcibly set out in the contentions of the company as embodied in the correspondence with the commissioner contained in the case, but they raise questions which can only be dealt with appropriately by the legislature. This court, however, cannot be influenced by such considerations, being concerned only with the interpretation and application of the law as it stands." Their Lordships agree with this reasoning. The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing. The expense may have been wisely undertaken, and may properly find a place, either in the balance sheet or in the profit-and-loss account of the appellants; but this is not enough to take it out of the prohibition in s. 86 (1) (a) of the Act. For that purpose it must have been incurred for the direct purpose of producing profits. The conclusion may appear to bear hardly upon the appellants; but, if so, a remedy must be found in an amendment of the law, the terms of which are reasonably clear. It is only necessary to add that the decisions on the English Income Tax Acts, the language of which is different from that of the New Zealand Act, have no real bearing upon the question now under decision."

In my view, this case is of no assistance to the Crown, having regard to the difference in language which is pointed out by the Board in the last sentence just quoted. The language of the New Zealand statute is much narrower than that of r. 3 (a), and I think that if the Board had been applying r. 3 (a) to the facts in the New Zealand case its decision might have been to the opposite effect. It is noteworthy that VISCOUNT CAVE, L.C., in delivering the judgment of the Board, said that in order to take the expense in question out of the prohibition in s. 86 (1) (a) of the New Zealand Act (*ibid.*, 150),

"... it must have been incurred for the direct purpose of producing profits".

With this observation should be contrasted the observation of VISCOUNT CAVE, L.C., only three years later, in regard to r. 3 (a) in *British Insulated & Helsby Cables v. Atherton* (10) ([1926] A.C. 211):

"It was made clear in the above cited cases of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1) and *Smith v. Incorporated Council of Law Reporting for England & Wales* (8) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade; and it appears to me that the findings of the commissioners in the present case bring the payment in question within that description."

The Crown also called in aid the recent decision of DANCEWERTS, J., in *Boarland (Inspector of Taxes) v. Kramat Pulai, Ltd.* (11), but I do not find that case of any assistance, as the learned judge took the view that the expenditure in

question had two objects, one of which was not for the purposes of the company's trade.

I come now to the last argument advanced on behalf of the Crown, which may, I think, fairly be stated as follows: (i) Although "the trade", within the meaning of r. 3 (a), is, no doubt, the trade which the company was carrying on when the sum in question was spent, yet the trade of a company, or of any other trader, is regarded by the Income Tax Acts as being an entity which can continue to exist, notwithstanding that its ownership is transferred from one company or person to another company or person. (ii) This proposition is established beyond all question by the speeches recently delivered in this House in *Inland Revenue Comrs. v. Barr* (*Trading as Henry & Galt*) (12). (iii) Nationalisation, even in the form of a compulsory acquisition of the whole of the assets and undertaking of the company, would not destroy or adversely affect the company's business, but would merely transfer it from the ownership of the company into the ownership of whatever body or authority the nationalising legislation might constitute for the purpose of carrying it on. Thus, the expenditure in question was not laid out for the purpose of preserving the company's business, but for the purpose of preventing the company's business from being taken away from the company and transferred to, and thenceforth carried on by, the new body or authority. (iv) A sum expended to resist such a transfer is not "laid out for the purposes of the company's trade".

My Lords, I find this argument unconvincing. Propositions (i) and (ii) are correct, but irrelevant for the present purpose, for the question is not whether a trade can continue to exist after a change of ownership, but is whether money spent by a company to prevent seizure of its assets is "money laid out for the purposes of the trade", within the meaning of r. 3 (a). For the solution of this question I derive no assistance from anything that was said in *Inland Revenue Comrs. v. Barr* (12), or from any of the provisions of the Income Tax Acts which were cited in argument. In *Inland Revenue Comrs. v. Barr* (12) the only question was whether a trade was "permanently discontinued" within the meaning of s. 17 (1) of the Income Tax Act, 1945, merely because it had been sold by one person to another, notwithstanding that the business was sold as a going concern, and it was found as a fact that

"after the sale the business was carried on and continued as if there had been no change"

of ownership. The other provisions of the Income Tax Acts which were cited in argument related to the taxation of profits in cases where there had been some change in the persons who owned the business, but the business had not been discontinued as a result of such change. These matters seem to me very remote from the question now under consideration.

As to (iii), this seems to me to be an assumption wholly unwarranted by the evidence. There is no evidence that a transfer of the assets to a national body or authority would not destroy or adversely affect the company's business. The whole of the assets might be merged with those of some other company compulsorily taken over, and by these or other means the business at present carried on by the respondent company might cease to exist. It is true that, when a transfer of a business has been carried out, it is possible to look back to what was actually done by the transferee after the transfer and to decide whether or not the business has ceased to exist: see *Inland Revenue Comrs. v. Barr* (12) and cases there cited. It is, however, impossible to say in advance what the transferee will do with the business. He may put an end to it altogether, as I have pointed out. It is equally impossible to say in advance whether the transfer will, or will not, adversely affect the business. In the present case, the resolution set out in para. 8 of the Case Stated, already quoted, and the speeches of Lord Lyle at that meeting, which are exhibited to the Case, show that the shareholders and the directors were strongly of opinion that the efforts of the

"nationalisers" would cause "chaos, losses and labour unrest". They may have been right or wrong in so thinking; but there can be no doubt that they did think that the transfer of assets, which they spent money to avert, would cause serious damage to the company's assets and profits.

The fourth proposition, deprived of any support from propositions (i), (ii) and (iii), must amount to a mere statement that in no circumstances can it properly be held that a sum laid out to prevent the seizure of the whole of the company's business and assets is laid out "for the purposes of the trade" within the meaning of r. 3 (a). This proposition is wholly unsupported by authority and is difficult to reconcile with *Southern v. Borax Consolidated, Ltd.* (5), already cited. If expense for the purpose of preserving the ownership of one asset of a company is deductible, why is not expense for the purpose of preserving the ownership of all the assets also deductible? Further, the proposition is, in my opinion, contrary to the view of LORD DAVEY, already quoted, as to the meaning of r. 3 (a); a view which has been accepted more than once by this House. The proposition places a wholly unnecessary and unwarranted restriction on the meaning of the words of r. 3 (a). They are not technical words and ought not to be given a narrow or technical construction. It is clear that the commissioners must have rejected the proposition, and it was successively rejected by HARMAN, J., and by the Court of Appeal. I see no reason for differing from their conclusions and I would accept entirely the following observations of JENKINS and HODSON, L.JJ. JENKINS, L.J., said ([1953] 2 All E.R. 183):

"I confess myself unable to follow this argument. The trade with which we are here concerned is surely the trade carried on by the company; the purposes for which the disputed expenditure, in order to be allowable as a deduction, must be shown to have been laid out are surely the purposes of the trade so carried on; and, when LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (2) explained expenditure for the purposes of the trade as expenditure for the purpose of enabling a person to carry on and earn profits in the trade, surely he meant for the purpose of enabling the trader claiming to deduct that expenditure to carry on and earn profits in *his* trade. It is clear on the authorities that LORD DAVEY's formula includes expenditure for the purpose of preventing a person from being disabled from carrying on and earning profits in the trade. Here, too, it seems to me reasonably plain that the relevant trade is that of the trader claiming to make the deduction. There is no doubt that legislation compulsorily divesting a trader of the whole of the assets and goodwill of his business, and (one may suppose) precluding him from establishing any similar business in the future, would utterly disable him from carrying on and earning profits in his trade."

HODSON, L.J., said (*ibid.*, 186):

"In my opinion, the expenditure is a proper debit item to be charged against the incomes of the trade when computing the balance of the profits of it, and is none the less a proper revenue charge because it is laid out for the purpose of preserving the assets of the company. It is not, I think, a good answer to say that the asset is not in danger and the only question is a change of ownership. If the trader has his business taken from him by the State, whatever form nationalisation may take, he cannot continue to carry on his trade. Accordingly, expenditure laid out in protecting himself against nationalisation is directed towards enabling him to retain the trade which he is carrying on."

The commissioners have found that the sum in question was an admissible deduction from the profits of the company for income tax purposes, and there is, in my view, no reason in law which prevents them from so finding. I would dismiss the appeal with costs.

My Lords, my noble and learned friend, **LORD ASQUITH OF BISHOPSTONE**, who is unable to be present today, asks me to say that he has read my opinion and he finds himself in full agreement with it.

LORD REID: My Lords, in 1949 the respondent company spent £15,339 on a propaganda campaign against nationalisation of their business, and they maintain that that sum is a proper deduction in arriving at their profit for income tax purposes. The commissioners accepted evidence of a chartered accountant that, in accordance with ordinary commercial accountancy practice, this sum must be charged against profit. The question is whether there is anything in the Income Tax Acts to prohibit the deduction for income tax purposes. The Crown relies on r. 3 (a) of the Rules Applicable to sched. D, Cases I and II. That rule provides:

“ . . . no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade . . . ”

It was agreed that, in order to determine for what purposes money was spent, it is necessary to ascertain what was, in fact, the purpose of the trader in spending the money. In this case the trader was a limited company which in the eye of the law is a person distinct and different from the shareholders or any of them, and such an artificial person cannot in any real sense have a purpose. But the purpose of the body which was entitled to act, and did act, for the company must be held to be the company's purpose. On Sept. 15, 1949, the stockholders at an extraordinary meeting passed a resolution which I shall deal with later. But it appears from documents annexed to the Case that at least a large part of the money must have been spent before that date by the board of directors, and, therefore, I turn first to see what was the purpose of the board.

In the Case Stated, the commissioners set out fully the evidence which was before them and which they accepted, and then they state that they

“ found that the sum in question was money wholly and exclusively laid out for the purposes of the company's trade ”,

but they do not state specifically what the purposes were. The purpose of a person or of a board of directors in spending money is a pure matter of fact. It may be that it can only be ascertained by drawing an inference from other facts, but the commissioners are entitled to draw inferences. Probably they did so in this case, but, as their conclusion is not expressed and from reading the Case I cannot feel satisfied that I know what it was, I find it necessary to examine the Case and draw my own inference.

It appears from the Case that, after 1945, the directors were becoming increasingly concerned by statements of supporters of the Labour government advocating nationalisation of the sugar refining industry. Early in 1949 statements in the Press, which are quoted, led them to believe that the Labour Party executive were discussing this matter, but, apparently, the board did not begin their campaign before the issue in April, 1949, of a statement of policy for discussion at the Labour Party conference. The important paragraph in that statement is as follows:

“ Sugar refining is also controlled by a State-protected private monopoly which has enabled large profits to be made for private shareholders. One concern dominates the British sugar industry; it also has large interests in some of the colonial territories which the Labour government is pledged to develop. The sugar industry is vital both in war and peace. Labour intends to transfer to public ownership all the sugar manufacturing and refining concerns.”

Having quoted that paragraph the Case then states:

“ On a perusal of this publication, the board of directors entertained no

doubt that the nationalisation of the sugar refining industry would become part of the Labour Party's considered official programme and furthermore that the company itself was the 'one concern' therein referred to. They accordingly decided to take every legitimate step to oppose this".

It would seem, although this is not stated in the Case, that the campaign was then started. Dealing with the position at the end of July the Case states that then

"the directors were more than ever convinced that nationalisation of the industry was intended and that the company would thereby lose its business and assets."

The Case then sets out the resolution of the extraordinary meeting of the stockholders on Sept. 15:

"Believing as we do that nothing but harm to workers, consumers and stockholders alike can spring from the nationalisation of the sugar refining industry, the members of this company hereby empower the board of directors to do everything in their power to meet the threats of the nationalisers who, learning nothing from the chaos, losses and labour unrest that they have created in other industries, now wish to seize the assets of this company . . ."

Then it is stated:

"In fulfilment of the obligation imposed upon them by the resolution referred to in para. 8 hereof, the directors decided to intensify their anti-nationalisation propaganda campaign which was of national dimensions and which was in the hands of Aims of Industry, Ltd. in order to try to preserve the business and assets of the company intact."

The only other relevant parts of the Case are, I think, a summary of the evidence of Lord Lyle of Westbourne, president of the board, and copies of speeches delivered by him at the stockholders' meeting, which are annexed to the Case. I do not think that the evidence of Mr. Booth is of assistance on this matter: he was not then a director and he only gives his personal views. As I think that the commissioners accepted Lord Lyle's evidence as indicating the purpose of the board of directors, I shall quote the relevant part of it:

"The directors thought that if nationalisation occurred the State would take over the company's assets and its business, and they decided that they would take such legal steps as they could to try and prevent this. The primary object of the propaganda campaign was to prevent the company from losing its business and to preserve its assets intact. He agreed that if the company lost its business the stockholders would also suffer and he also agreed that the preservation of the company's business would, incidentally, save the stockholders from injury as well. He had never thought of the alternative method of nationalisation by which the State would have acquired all the capital stock of the company from its members. The directors' intention was to protect the company—in so doing no doubt they protected the stockholders also; it would be their duty to protect them as well."

The proposal which the directors were opposing was the transfer to public ownership of their sugar refining concern. If that proposal became law, the company would lose its business and assets. I think that it is reasonably clear that the dominant purpose of the directors was to prevent the company from losing its business and to preserve its assets intact. People often have more than one reason for forming a purpose, and I think that the facts found in the Case indicate that the directors had two main reasons. They believed that nationalisation would be disastrous to the industry and that it would cause loss to the shareholders. Whether their beliefs were right or wrong is quite

immaterial. The question whether their purpose can be held to come within the terms of r. 3 (a) does not depend on whether or not their purpose was misconceived.

A The shareholders' purpose and reasons are set out in the resolution of Sept. 15 and there is nothing in the Case to indicate that its terms do not reflect their real purpose and reasons. Their purpose was to prevent the assets of the company being seized and their reasons were that such seizure would harm workers, consumers and themselves alike. Again, it does not matter whether those reasons were good or bad.

B It was maintained by the Crown at one stage that this expenditure was not wholly and exclusively laid out for the purposes of the respondent company's trade because their propaganda was directed against nationalisation of the industry of sugar refining as a whole and was not confined to opposition to compulsory acquisition of their own concern. But this argument has now been given up. If the propaganda was to be effective it had to be on broad lines, and the fact that it would also benefit other concerns does not matter if the purpose was to preserve the respondent company's own concern.

C The question of law which has to be determined is whether expenditure for the purpose of preventing the company from losing its business and preserving its assets intact can be expenditure "for the purposes of the trade" within the meaning of r. 3 (a). The Crown's main argument was that this expenditure was wholly directed to the question of who should own the trade, and was not in any way incidental to the earning of profit in carrying on the trade: the respondent company's "trade" is an entity which could and would continue in existence after it had been nationalised, and that trade could not benefit in any way from this expenditure. There are many authorities which deal with the meaning of the phrase "the purposes of the trade", and, although none is directly in point, I find it necessary to examine several for the light which they throw on this case.

E The Crown founds strongly on the decision of the Privy Council in *Ward & Co., Ltd. v. Taxes Comr.* (9). That was an appeal from New Zealand where the rule corresponding to r. 3 (a) is in different terms: it prohibits the deduction of expenditure

"... not exclusively incurred in the production of the assessable income ..."

F In that case, a brewery company spent money on an anti-prohibition campaign and their expenditure was held not to be deductible. In delivering the judgment of the Board, VISCOUNT CAVE, L.C., said ([1923] A.C. 149):

G "The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing."

But, he added (*ibid.*, 150):

H "It is only necessary to add that the decisions on the English Income Tax Acts, the language of which is different from that of the New Zealand Act, have no real bearing upon the question now under decision."

I contrast that with what LORD CAVE, L.C., said, three years later, in *British Insulated & Helsby Cables v. Atherton* (10) ([1926] A.C. 211):

"It was made clear in the above cited cases of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1) and *Smith v. Incorporated Council of Law Reporting for England & Wales* (8) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to

facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade . . ."

If that is a correct statement of the law in England—and I think it is—it is not difficult to see why the Board in *Ward's case* (9) said that the English decisions had no real bearing on the question in *Ward's case* (9). And, if that is so, then it appears to me that the converse must be true: *Ward's case* (9) has no real bearing on the question now before your Lordships.

In *Usher's Wiltshire Brewery* (1) the company were held entitled to deduct sums which they had expended in aid of their tenants in their tied houses. That expenditure, though it was made voluntarily and though it was also of benefit to the tenants, was made for their own benefit because it promoted the sale of their beer. LORD SUMNER said ([1915] A.C. 469):

"Where the whole and exclusive purpose of the expenditure is the purpose of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit, say that of the publican, or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of the finding as to the whole and exclusive purpose."

In that case the brewers were also held entitled to deduct certain fire and licence insurance premiums.

In *Smith's case* (8), to which LORD CAVE also referred, a retiring gratuity to one of the reporting staff was held deductible. In the course of his judgment SCRUTTON, J., said ([1914] 3 K.B. 684):

"Payments for political purposes might conceivably be for the purposes of trade. It might be that a payment by a company to the Tariff Reform League might be of great advantage to its trade. It might be that a payment by a company to a political party which was supposed to be identified with the interests of a particular trade might be to the advantage of the trade; but one can easily imagine cases, such as a payment by a company to the National Service League, where it would be impossible to conceive that anybody could find that such money was wholly or exclusively laid out or expended for the purposes of the trade."

Those statements were obiter, but we were not referred to any later case where they were disapproved. In *Bourland (Inspector of Taxes) v. Kramat Pulai, Ltd.* (11) the expense of distributing a chairman's speech containing general political propaganda was disallowed because the protection of the business from injury was plainly not the sole object.

In *Mitchell v. B. W. Noble, Ltd.* (3) money paid to get rid of a director and save the company from scandal was held deductible. ROWLATT, J., held that this was covered by the passage from the speech of LORD CAVE which I quoted earlier. SARGANT, L.J., said ([1927] 1 K.B. 738) that to avoid the good name of the company suffering

"... and to preserve the status and dividend-earning power of the company seems to me a purpose which is well within the ordinary purposes of the trade . . ."

And, dealing with an argument that one object had been to enable the other directors to gain personal benefits, he said (*ibid.*, 739):

"... a payment to ensure the prosperity of the whole company was not, in my judgment, in any way tarnished or rendered suspicious by the fact that it would ultimately enure in a secondary sense for the benefit of those who remained the directors and managers of the company".

There are a number of other cases in which expense incurred in defending or preserving the existence of capital assets has been held to be deductible. In *Southern v. Borar Consolidated, Ltd.* (5) legal expenses in defending a title to

land abroad were allowed. *Associated Portland Cement Manufacturers, Ltd. v. Inland Revenue Comrs.* (6) was a case rather like *Mitchell v. B. W. Noble, Ltd.* (3). LORD GREENE, M.R., there said ([1946] 1 All E.R. 72):

“ The money that you spend in defending your title to a capital asset, which is assailed unjustly, is obviously a revenue expenditure ”,

A and, having said that it was not a capital expense, apparently he saw no reason why it should not be deductible. *Cooke v. Quick Shoe Repair Service* (7) somewhat resembled *Usher's Wiltshire Brewery* (1), in that the taxpayer, in order to maintain the goodwill of the business, voluntarily discharged certain liabilities which the vendor of the business had failed to discharge. He was held entitled to deduct these payments because they had been made to preserve an asset of the business.

B On the other hand, there are cases where it has been held that expenditure is not deductible, because it was not incurred by the taxpayer in his capacity of trader. Payment of a fine is not an ordinary commercial loss: *Inland Revenue Comrs. v. Warnes & Co.* (13); and insurance against loss owing to strikes has been held not to be deductible: *Rhyymney Iron Co. v. Fowler* (14); *Thomas Merthyr Colliery Co., Ltd. v. Davis* (15). I find these last cases difficult to follow and I cannot find that they throw any light on the present case. The ground of judgment is most clearly stated by SLESSER, L.J., in the latter case where he said ([1933] 1 K.B. 374):

D “ I find the greatest difficulty in taking the view that an expense which is incurred exclusively for the purposes of the trade can be extended to cover an expense wholly and exclusively laid out for the purpose of protecting the trader against the absence of trade . . . ”

That may or may not be right in its context, but I do not think it sets out any general rule capable of wider application.

E The case of *Strong & Co., Ltd. v. Woodfield* (2) was relied on by both sides. The brewery company owned an inn which was carried on as part of their business. A customer in the inn was injured by the fall of a chimney and he recovered damages from the company. It was held that the amount of the damages could not be deducted for income tax purposes. The ground of judgment was stated by LORD LOREBURN, L.C. ([1906] A.C. 452):

F “ In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader . . . In the present case I think that the loss sustained by the appellants was not really incidental to their trade as innkeepers, and fell upon them in their character not of traders, but of householders.”

G LORD DAVEY adopted a rather different ground: he said (*ibid.*, 453):

H “ I think that the payment of these damages was not money expended ‘ for the purpose of the trade ’. These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.”

Before I comment on this, I shall notice two recent cases in this House where

these statements of the law were approved and applied. In *Smith's Potato Estates, Ltd. v. Bolland* (16) LORD PORTER said with regard to excess profits tax ([1948] 2 All E.R. 372):

"It is true that a trader only is liable to pay it, but it is not payable by him as a trader. He pays as an individual, like any other individual, the tax on the sum which he has earned as a trader. 'To my mind,' said LORD SELBORNE, L.C., in *Mersey Docks & Harbour Board v. Lucas* (17) (8 App. Cas. 905), 'it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used . . . , and, therefore, what your Lordships have to determine is whether the expense is incurred in order to earn gain or is the application or distribution of that gain when earned.'"

LORD SIMONDS said (*ibid.*, 374):

" . . . it is, I think, important to emphasise that the words 'for the purposes of the trade' in their context, i.e., where a computation of 'profits' for the ascertainment of taxable income is being made, must mean 'for the purpose of enabling a person to carry on and earn profits in the trade'. These familiar words I cite from LORD DAVEY's speech in *Strong & Co., Ltd. v. Woodfield* (2) . . . neither the cost of ascertaining taxable profit nor the cost of disputing it with the revenue authorities is money spent to enable the trader to earn profit in his trade."

LORD NORMAND, who was also one of the majority, said (*ibid.*, 376):

"There is the more substantial reason that income tax is an impost made on profits after they have been earned, and that, unless the observations of LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (2) ([1906] A.C. 453) which have often been referred to and applied in later cases, are to be disregarded, a payment out of profits after they have been earned is not within the purposes of the trade carried on by the taxpayer."

Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd. (18) followed *Smith's Potato Estates* (16), and also dealt with excess profits tax. I do not think that, for present purposes, it adds anything: it merely recognises the distinction laid down in *Smith's Potato Estates* (16) between spending money for the purpose of earning profits and applying the profits when earned.

I have referred to a good many cases in which phrases like "money spent to earn profits" have been used by high authorities in referring to sums which are deductible. Counsel for the Crown argued that these phrases accurately express the meaning of r. 3 (a) and that, as the expenditure in this case cannot be directly related to the earning of profit, it is, therefore, not deductible. I do not think that this argument is well founded. LORD DAVEY used the two expressions "for the purpose of enabling a person to carry on and earn profits" and "for the purpose of earning the profits" in close juxtaposition and he cannot have intended them to mean different things. He obviously intended the former to be the more accurate phrase, because that is what he said he thought the words of the rule meant. Similarly, LORD SIMONDS, in the passages I have quoted from his speech in *Smith's Potato Estates* (16), first quoted the former phrase of LORD DAVEY and later referred to "money spent to enable the trader to earn profit", and he, also, cannot have intended these phrases to have different meanings. I doubt whether in any case the shorter phrase was intended to be an accurate definition, and I am satisfied that "purposes of the trade" in r. 3 (a) has a wider meaning than purposes directly related to the earning of profits. Defending or preserving a profit earning asset of the business is within the purposes of the trade and that must apply equally to a single asset or a collection of assets.

It is convenient to deal now with another argument for the Crown. In most industries where nationalisation had been effected before 1949 the assets of those engaged in the industry had been compulsorily acquired from them and vested

in statutory bodies which used those assets to carry on the industry. But in two cases, the Bank of England and Cables and Wireless, Ltd., nationalisation had been effected by compulsory transfer of all the stock or shares to government nominees. It was admitted for the respondent company that expenditure to resist the latter form of nationalisation would not be expenditure for the purposes of the trade; and it was argued for the Crown that, as there is no substantial difference between these forms of nationalisation in the result, it would be anomalous if expenditure to resist one form were deductible while expenditure to resist the other form were not. But in law there is an essential difference: the company is held in law to be a person entirely different from the shareholders, and the company is the trader, not the shareholders. By the first form of nationalisation, the company, the trader, is deprived of its assets. But by the latter form the company's position is unchanged; it retains its assets and continues to carry on its business. All that happens is that the new shareholders can alter its policy; but a change of shareholders does not interest the company as a trader, and expenditure to prevent a change of shareholders can hardly be expenditure for the purposes of the trade. It was argued that, in the case of sugar refining, nationalisation might have taken either form and, therefore, the expenditure being directed against both forms, was not wholly and exclusively laid out for the purposes of the trade. But I think that the facts stated in the Case show that neither the directors nor the shareholders had in mind the latter form of nationalisation, and, if this be relevant, there is nothing in the Case to show that they ought to have had it in mind. What they had in mind was that the company would remain in existence, but would have its assets taken away (no doubt on payment of compensation) and would no longer be able to carry on the trade of sugar refining, and the question is whether expenditure to resist that is deductible as a trading expense.

That brings me to what is, to my mind, the most difficult question in this case. For the respondent company it is said that LORD DAVEY's words "for the purpose of enabling a person to carry on and earn profits in the trade" exactly fit the present case. The threat was to prevent the respondent company from carrying on their trade of sugar refining, and the purpose of their expenditure was to avert that threat, and so enable them to carry on trading. On the other hand, it is said that that is taking LORD DAVEY too literally: he might equally well have said for the purpose of enabling the trade to be carried on and profits to be earned in it. In the present case, it is said that there was no question of preventing the carrying on of the respondents' trade: the only proposal was that it should be carried on by some other body under national ownership. Taking the words of r. 3 (a) it is said that "for the purposes of the trade" means for the purposes of the trade by whomsoever it may be carried on, because the Act regards the trade as something which continues, notwithstanding that it passes from the ownership of one trader to that of another.

I turn to the relevant statutory provisions to see whether that is so. I shall take those contained in the Act of 1918 and omit later amendments because they cannot have been intended to alter, and, in my view, do not alter, the general conception of "a trade". I do not find any assistance in any provisions beyond sched. D, and I shall refer as shortly as I can to those provisions in sched. D and its rules which have some relevance. Schedule D provides that tax shall be charged in respect of profits arising or accruing to any person from any trade, profession, employment, or vocation carried on in the United Kingdom or elsewhere (r. 1 (a) (ii)) or exercised within the United Kingdom (r. 1 (a) (iii)): and that tax shall be charged under Case I in respect of any trade not contained in any other schedule. The Rule Applicable to Case I provides for computation of tax on an average of the profits of the preceding three years. The Rule Applicable to Case II makes similar provisions with regard to professions, employments and vocations. In the Rules Applicable to Cases I and II there are several which deal

with setting up a trade, discontinuance of a trade, or succession to a trade. Rule 8 (1) begins:

"Where a person charged or chargeable with tax in respect of any trade, profession, or vocation which has been set up or commenced within the period of three years . . ."

(not "which has been set up or commenced by him") and r. 8 (2) provides:

"Where a trade, profession, or vocation is discontinued in any year, any person charged or chargeable with tax in respect thereof, shall be entitled . . ."

to certain relief. Rule 9 (1) begins:

"If a person charged under this schedule ceases within the year of assessment to carry on the trade, profession, or vocation in respect of which the assessment is made, and is succeeded therein by another person . . ."

and then makes provision for adjusting the assessment by charging the successor with a fair proportion thereof and relieving the person originally charged of a like amount. Rule 11 provides:

"If within the year of assessment or the period of average upon which the assessment is to be based a change occurs in a partnership of persons engaged in any trade or profession, by reason of death, or of dissolution of the partnership as to all or any of the partners, or by the admission of a new partner, or if any person succeeds to a trade or profession, the tax payable in respect of the partnership, or any of the partners, or of the person so succeeding shall be computed according to the profits or gains of the trade or profession during the respective periods prescribed by this Act, notwithstanding the change or succession, unless the partners or the person succeeding to the trade or profession prove . . ."

a certain ground of relief. Accordingly, the Act contemplates that, when a trader ceases to carry on his trade, one or other of two things may happen. Either the trade may be discontinued or that trader may be succeeded in the trade by another: and a change in a partnership of persons engaged in a trade is treated in the same way as a succession. To that extent, at least, the Act treats the trade as something which may persist, notwithstanding that one trader has been replaced by another.

The word "trade" appears to me to be used in the same sense in r. 3. That rule begins:

"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of . . ."

A trader is taxed only in respect of the profits of his own trading and not in respect of the profits of the trading of his predecessor or successor in his trade, and so it might seem that "trade" in this rule should mean his own trade and nothing more. But the trader is not taxed on his actual profits in the year of assessment. The Act of 1918 contains rules for an artificial computation of profits for that year which might bring into the computation receipts and expenses of his predecessor if he had recently succeeded to the trade, and in such a case r. 3 must apply to all expenditure which is being brought into the computation, whether or not it was incurred by the person who is being assessed. Moreover, it is not difficult to suppose a case where a trader is shortly to be succeeded in his trade by another person, and where he spends money the benefit of which will accrue in whole or in part to his successor. It could not be said that for that reason the money was not wholly and exclusively laid out for the purposes of the trade.

But does that mean that expenditure by a trader to protect his own business is not deductible if his assets are to be taken from him and vested in some other body to be used in carrying on the same or a similar trade in future? This is a

question which could not arise in any ordinary case. In all other cases a trader who is protecting his business is doing so both in the interests of himself and of possible successors (if he considers them at all): but it is said that the respondent company were protecting, not their business, but only their ownership of it because there was no threat to discontinue their business. That argument appears to me to depend on an assumption that "the trade" of the respondent company would not have been discontinued and that the new body which was to carry on the industry would have been their successors in their trade. The recent decision of this House in *Inland Revenue Comrs. v. Barr (trading as Henry & Galt)* (12), by approving the actual decision in *Inland Revenue v. West* (19), though not the grounds of judgment, shows that "the trade" of a particular trader may be discontinued although his trading assets are to be used in the same industry by the person who acquires them: that fact by itself is not sufficient to establish that the person acquiring the assets is the successor of the former trader. This may be a technical distinction, but the argument for the Crown is a technical argument. Once it is decided that in the ordinary case expenditure incurred by a trader in defending his business is a permissible deduction, it can only fail to be a permissible deduction in this case by reason of the technical meaning of "the trade" in r. 3. But counsel for the Crown assumed rather than argued that any statutory body in which the respondents' assets were vested would have become the successors of the respondents in the income tax sense. In my view, it is by no means certain, and, perhaps, not even probable, that that would have happened. It is true that when a business is acquired by agreement, as in *Bell v. National Provincial Bank of England* (20), the purchaser may become the successor in the income tax sense, although he merges its accounts and profits with those of his own business: he has acquired the whole business, including the goodwill, for the purpose of carrying it on, and whether he carries it on in isolation or in conjunction with his own business is a matter for his decision. It is independent of the acquisition of the business and may be immaterial. But it does not appear to me to follow that, if the sugar refining assets of all the firms in the industry had been vested by statute in a body directed to carry on the industry in accordance with provisions in the statute, that body would necessarily have become the successor of all those firms in the income tax sense so that "the trade" of each of them would continue: and I find nothing in the Case Stated to indicate that that would have happened or that the respondent company's directors or shareholders had any views about that matter. On nationalisation, the respondent company's trade might or might not have been discontinued in the income tax sense. That would depend on the terms of the statute. But, as I have said, the argument of the Crown is based on the assumption that the respondent company's trade would not have been discontinued. Of course, the industry would not have been discontinued, but that is quite a different matter.

The respondent company's expenditure was wholly and exclusively laid out to prevent their business and assets being taken from them, and I do not think that it is a sufficient answer to say that their trade might not have been discontinued after nationalisation even if it were an answer to say that it would not have been discontinued. If the future fate of their trade was indeterminate it cannot be said that the only matter in question was who should own that trade, and that its continued existence was not in question.

A general test is whether the money was spent by the person assessed in his capacity of trader or in some other capacity: whether, on the one hand, the expenditure was really incidental to the trade itself, or, on the other hand, it was mainly incidental to some other vocation or was made by the trader in some other capacity than that of trader. It is said that the Crown can succeed in this case on an application of that test because a distinction must be recognised between a person as trader and the same person as owner of his trade. I find

that distinction difficult to understand. Whatever may be meant by referring to the trade as an "entity", until there is a change of ownership of the trade, the trade only exists because it is being carried on by the trader, and the trader is only owner of the trade because he is carrying it on. I do not see how a person can be owner of the trade unless he is also the trader, or how he can be the trader unless he is also the owner of the trade. It, therefore, appears to me that there is no real distinction between a person in his capacity of trader and that person in his capacity of owner of the trade and that, if the Crown is to succeed, it must be because the terms of the rule require, in the special circumstances of this case, some modification of the test generally applicable. I see no sufficient reason for so holding. It is not very satisfactory to decide this case on these somewhat narrow grounds. But in this case the terms of a statute have to be applied to circumstances far removed from anything that can have been in contemplation when the statute was passed, and, therefore, it is not surprising if there is no satisfactory or clear-cut solution. Not without some hesitation I have come to be of opinion that the decision of the Court of Appeal should be affirmed.

LORD TUCKER: My Lords, in my view, the decision in this case ultimately depends on the meaning of the words "the trade" in r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918. Do these words refer to the particular trader—X—carrying on a particular trade at the material time, or do they refer to the trade as distinct from the trader? Is expenditure directed, not to enabling the trade to produce profits, but to ensure that its assets and goodwill from which its profits are derived shall be retained by X to the exclusion of Y, a permissible deduction? It is, of course, true that it is the trader who is being taxed, but his tax is computed on the profits or gains arising or accruing from his trade. My Lords, in their language, para. 1 and para. 2 of sched. D, the Rule Applicable to Case I, r. 3 of the Rules Applicable to Cases I and II, and the old r. 8, r. 9 and r. 11 all, I think, point to the conclusion that "the trade" is regarded as an entity for tax purposes distinct from the persons who may be carrying it on at a particular moment. Your Lordships had recently to consider this question in connection with a balancing charge under s. 17 (1) of the Income Tax Act, 1945, in *Inland Revenue Comrs. v. Barr (trading as Henry & Galt)* (12). The actual decision of that case has, of course, no bearing on the present appeal, but it shows that, in cases of discontinuance of and succession to a trade, the Income Tax Acts regard the trade as distinct from the trader. Perhaps the clearest and most relevant example for present purposes is to be found in the fact that, when the profits of the trade were computed on the average of the preceding three years and the trade had changed hands during those years, the profits from that trade continued to be calculated without regard to the change. If this is the true meaning of the words "the trade" in r. 3 (a), it would appear to me to follow as a matter of law that there was no evidence before the commissioners to justify a finding that the sum in question was money wholly and exclusively laid out for the purposes of the trade. In fact, it is to be observed that their actual finding is that it was laid out for the purposes "of the company's trade". If, by the use of these words, they meant—as I think they must—that the expenditure was for the purpose of retaining the trade in the hands of the company, then I think they have misinterpreted the language of the rule.

Although this rule has been the subject of discussion in numerous cases before your Lordships' House and elsewhere, most of which have been exhaustively examined and analysed in the judgments in the Court of Appeal, this particular point has never arisen before. Consequently, I can derive little assistance from authority. In the course of his dissenting judgment, SINGLETON, L.J., said ([1953] 2 All E.R. 168):

"Expense incurred in maintaining the properties or assets of the company in a state to earn profits for the business, and expense incurred in protecting

the assets against thieves or marauders are properly deductible in arriving at the balance of profits or gains, and so too may be the cost of insurance of the premises owned. A different element creeps in when the expense is incurred for the purpose of opposing nationalisation of an industry or of a particular undertaking. Nothing in the nature of destruction of the assets of the undertaking is involved, nor is there a proposal to render the undertaking, or the industry, less profit bearing, whatever the result might be. It is natural to assume that, if the government took control of an undertaking, it would be their desire to increase rather than to diminish its efficiency and profit-earning capabilities."

My Lords, it is the presence of this fresh element which the learned lord justice refers to as having "crept in" which deprives me of the benefit which I should otherwise have derived from a study of existing authorities. When LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (2) said ([1906] A.C. 453):

"These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits",

he was not considering the question whether any distinction was to be drawn between the trade and the particular trader carrying on that trade. When he spoke of "a person", he was not referring to A as distinct from B. Every business must be carried on by a person or persons who, of necessity, must have incurred the expenditure in question, but to use the language of LORD DAVEY to support the proposition that expenditure directed solely to securing that the trade shall in future be carried on by A rather than B is

"money wholly and exclusively laid out or expended for the purposes of the trade"

seems to me wholly unwarranted. These words of LORD DAVEY have often been quoted with approval, but never in any context involving consideration of the fresh element which has given rise to the present case. It is on this aspect of the case alone that, with great diffidence, I find myself unable to agree with the conclusion arrived at by JENKINS and HODSON, L.JJ. JENKINS, L.J., examined the authorities and set out the conclusions he derived from them ([1953] 2 All E.R. 181). I do not question these conclusions, except in so far as they are expressed in language which is coloured by the interpretation he has throughout placed on the words of LORD DAVEY.

In *Union Cold Storage Co., Ltd. v. Jones* (21) ROWLATT, J., said (129 L.T. 516):

"That is not bringing grist to their mill or bringing customers to their door . . ."

Having quoted this passage ([1953] 2 All E.R. 178) JENKINS, L.J., later (*ibid.*, 181) refers to this passage again as "bringing grist to the mill". It is on this distinction between *the* mill and *their* mill that, in my opinion, this case turns. ROWLATT, J., was not attempting to draw any such distinction because it did not arise, but, in my view, expenditure to increase the profit-earning capacity of a mill is something altogether different from expenditure to secure that A, rather than B, shall continue to own and manage the mill and enjoy the resulting profits. The former, unless of a capital nature, is clearly a permissible deduction under r. 3 (a), whereas, in my view, the latter is not.

I do not consider that the decision in *Southern v. Borax Consolidated, Ltd.* (5) in any way conflicts with this view. The loss or destruction of one asset is, of course, a detriment both to the trader and the trade. Similarly, the destruction of all the assets is still more detrimental. But, although the transfer from A to B

of all the assets intact, together with the goodwill, may be highly detrimental to A, it does not follow that it will have any adverse effect on the trade which comprises those assets and goodwill.

I have reached this conclusion without reference to the Privy Council decision in *Ward & Co., Ltd. v. Taxes Comr.* (9), because, although the facts there more nearly resemble those in the present case than in any other which was cited, the language of the New Zealand statute is not identical with that of the rule now in question, and because VISCOUNT CAVE, L.C., delivering the judgment of the Board, expressly stated that decisions in the English Income Tax Acts had no bearing on the question then under discussion. In these circumstances, it does not seem profitable to examine the precise difference in the language of the relevant legislation or to speculate as to what the decision might or might not have been in different circumstances.

My Lords, I conceive that, if this be the true construction of the rule, cases may still arise where the evidence shows that the change of ownership will, or may, bring about the extinction of the trade previously carried on and the expenditure is incurred to prevent this result. In the present case there is no such finding, nor is there any trace of any such issue having been canvassed before the commissioners or in the courts below, nor do I think there is sufficient material to justify your Lordships in drawing any inferences with regard to such risk. For these reasons I would allow the appeal.

LORD KEITH OF AVONHOLM: My Lords, the Commissioners for the General Purposes of the Income Tax have found that the sum involved in this appeal was money wholly and exclusively laid out for the purposes of the respondent company's trade, and was an admissible deduction from its profits for income tax purposes. In so finding, the commissioners have done little more than echo the words of the statute. Rule 3 of the Rules Applicable to Cases I and II of sched. D says:

"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade . . ."

Even if the precise object to which the money has been devoted is not in doubt, it may not always be easy to say whether it is a deductible expenditure in law, but, at any rate, the starting point of the problem is clearly defined. As the argument in this case developed, it seemed to me that part of the difficulty in the case lay in a certain ambiguity in the facts found. There is no finding in fact of the particular objective of the company's expenditure and it is possible, I think, to say that a number of objectives or combination of objectives could be deduced from the facts found by the commissioners. This matter calls, perhaps, for a little elaboration.

It is agreed that the expenditure in question was incurred in a campaign against the nationalisation of the sugar refining industry in general, and of the business of the respondent company in particular. It is conceded that nothing turns on the wider aspect of the campaign and that the case must be looked at as if conducted solely in the interests of the company. It is found in the Case that nationalisation could take two forms—acquisition of the business or stock of the company concerned to nominees of the Treasury or a public body. It was conceded by counsel for the respondent company that, if the campaign were directed wholly or partly against the latter form of nationalisation, he would have no case, for the reason, as I understood, that the company would continue to exist and carry on its business, albeit under government control, and that the battle would be a battle on behalf of the existing shareholders and not on behalf of the company. I confess to finding this distinction somewhat unreal in substance as it seems to me immaterial whether the business of a company is carried

on, for better or for worse, by a government which has acquired the assets and business of the company or by a government which has acquired all the shares of the company and carries on the business of the company as sole shareholder. It is just here that the findings of the commissioners seem to me to be deficient, because they do not find whether the expenditure was incurred exclusively to resist nationalisation by way of acquisition of business and assets, or to resist control by either form of nationalisation. It was maintained, however, that the findings may be held to support the view, however unrealistic it may be, that the expenditure was primarily to prevent the company—with emphasis on the company—from losing its business and assets. I am not prepared to say that this is not a supportable view of the facts, and, if so, it leads to the question whether the commissioners were entitled to hold that, in law, the expenditure was made for the purposes of the company's trade. It is on that view that I propose to examine the case, with reference to the statute and the authorities.

It is necessary, in my opinion, to distinguish between a threat to the assets of a business and a threat to the right of the owner of the business and assets to carry on its business. The assets of a business may be threatened in a variety of ways. They may be said to be under a constant threat of loss by fire, or burglary, or peril of the sea, or other risk varying with the nature of the business or asset; or they may come under a more direct threat by challenge of the right to use or employ them in the business. Such threats leave the question of ownership of the business unaffected. The owner of the assets may be able to continue in business and preserve the goodwill even if the threat is realised. On the other hand, it may be that the loss of the asset or assets will so cripple him as to put him out of business. But he is free to carry on his business if he can make good, or afford to ignore, his loss. What result will follow will depend on circumstances varying with each individual case and personal to the owner concerned. Where the threat is to the ownership of the business the position is different. If the threat matures and is successful, the owner, or reputed owner, is put out of business and there can be no question of his continuing the business with a view to profit, though his challenger may do so. Apart from nationalisation, such a situation could arise where a person starts a business or profession in breach of a restrictive trade covenant, or where some question of partnership, or succession, or other challenge of title to ownership of the business has arisen. There is a plain difference between these two cases. Where loss of, or damage to, an asset results there is loss or damage to the trade, as such: where loss of ownership results there is no necessary loss or damage to the trade at all. The trade may go on as before in the hands of the successful challenger with the old assets, or may, for a variety of possible reasons, come to an end. Income tax legislation has, at different times, made different provisions for cases of discontinuance of a trade or succession to a trade. These are, no doubt, provisions relating to the manner or measure of assessment, but, as they are a clear recognition of the common commercial experience of a business continuing through several hands, they indicate that "the trade", when used in the statutes, is to be construed as an entity in itself. In the present case, the form of nationalisation postulated involved the continued carrying on of the trade, with the assets and business acquired, under public ownership and control.

In its shortest form this appeal raises the question whether expenditure designed to retain the ownership and control of a business is expenditure laid out for the purposes of the trade within the meaning of r. 3 (a). Counsel for the respondent company agreed that this is the question. As he put it, the expenditure was to determine who was going to carry on the trade. And, he submitted: "It was not the trade as an entity that was to be looked at, but the person who was carrying on the trade". For this view reliance was placed on a passage in the speech of LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (2).

Referring to the words "for the purposes of the trade" LORD DAVEY said ([1906] A.C. 453):

"These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

I am unable to attach any special significance to the words

"for the purpose of enabling a person to carry on and earn profits in the trade."

There must always be some person carrying on a trade and earning, or trying to earn, profits in it and necessarily making some expenditure. The question remains whether the expenditure was for the purposes of the trade. In the case of *Strong & Co., Ltd.* (21) it was held that the expenditure incurred was not for the purposes of the trade. No question arose, or could have arisen, whether the expenditure was necessary to enable the trader to keep the business for himself and LORD DAVEY, in my opinion, had no such case in his mind. It is impossible, in dealing with income tax legislation, to avoid referring from time to time to "the person carrying on the trade", or "the trader", or "the taxpayer", but that is no reason for taking the language used out of its context. What LORD DAVEY's statement has repeatedly been taken as meaning is that expenditure for the purposes of the trade must be expenditure for the purpose of earning profits in the trade. In that sense it has been applied over and over again as a sound exposition of the meaning of the statutory language. I need go no further than refer to the two recent decisions of this House in *Smith's Potato Estates, Ltd. v. Bolland* (16) and *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (18).

That expenditure by a person, whether a company or individual, for the purpose of earning profits in the trade is not the same thing as expenditure for the purpose of keeping the profits earned by a trade for himself would seem very clear if one considers the case of a person who wishes to acquire a trade, or the profits of a trade for himself. It would be abuse of language to say that expenditure by such a person for such a purpose was expenditure for the purposes of the trade, even if the desired result was achieved. Does it become any more expenditure for the purposes of the trade by the fact that it is made by a person already in the trade for the purpose of keeping the other person out of the trade? I cannot think that that is so, or that LORD DAVEY ever thought of it being so.

It has frequently been pointed out that, when a trader claims to deduct expenditure as made for the purposes of the trade, it is material to consider the capacity in which he has made the expenditure. So expenditure has been disallowed as a deduction where made by a person, not as trader, but as taxpayer: *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (18); *Smith's Potato Estates, Ltd. v. Bolland* (16); *Rushden Hed Co., Ltd. v. Keene* (22); or as property owner or householder: *Strong & Co., Ltd. v. Woodfield* (2); *Union Cold Storage Co., Ltd. v. Jones* (21); or as law-breaker: *Inland Revenue Comrs. v. Warnes & Co.* (13); *Inland Revenue Comrs. v. Von Glehn* (23). Here I would say that the expenditure was made by the company, not as trader, but as owner of the trade, and from purely personal considerations not connected with the purposes of the trade.

Expenditure to be deductible before profits for the purpose of income tax are struck must, in my opinion, be related to, or affect, the profit-earning capacity of the trade. That is not necessarily conclusive, for capital expenditure cannot be deducted. But it is, I think, a minimum requirement. In all the cases in which the question has been considered and in which expenditure of a revenue

character has been allowed or disallowed as a deduction it will, I think, be found that this test is satisfied, though there may be some narrow cases like *Smith's Potato Estates, Ltd. v. Bolland* (16), in which there was a difference of opinion as to the side of the line on which the case fell. If the purpose of the expenditure is to benefit the trade, it is not necessary to show that, in fact, the expenditure has produced, or will produce, profit, or has prevented loss of profit, or has facilitated, or will facilitate, the earning of profit. But it must, in my opinion, be laid out for that purpose and with that expectation. In the present instance, I am unable to see any ground for thinking that the expenditure in question will benefit the trade of the company by one penny, though I see that it might benefit the company by securing that it will continue to enjoy the profits earned by the trade. On this latter count I should say that this was a typical case of the application of profits earned and not of expenditure to earn profits.

As the cases cited in debate are, in my opinion, all illustrations of the application of the principles which I have endeavoured to set out I refrain from examining them in detail. I would, however, say a word or two about a few of them which were much pressed in the argument for the company. In *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1) the question was whether a brewery company which owned or held on lease a number of tied houses was entitled to treat as deductible, in arriving at their brewery profits, expenses incurred in connection with these tied houses in the shape of repairs, abatements of rent, fire and licence insurance premiums, rates and taxes and legal and other costs. As it was found that the tied houses had been acquired to promote the profits of the company's brewery trade it was held that the expenses were incurred for the purpose of earning the profits. The specialty of the case was that the houses in question were occupied by tenants of the brewery company who were carrying on their own trade therein as publicans, but once it is appreciated that these houses were held to be really trading assets of the brewery business, there seems to me to be no material difference between the tied houses and any other trading assets of the brewery company. Expenses put out to protect these assets would be in no different position from expenses put out to protect any trading assets, for example, insurance premiums on the stock in trade of a business. The material point in that case was that the brewery company had acquired the tied houses for the purposes of its trade.

In *British Insulated & Helsby Cables v. Atherton* (10) a company had established a pension fund for its clerical and technical salaried staff and made an initial payment of £31,784 to form the nucleus of the fund. This House held that this was an expenditure wholly and exclusively laid out or expended for the purposes of the company's trade, but disallowed the deduction as being a payment in the nature of capital expenditure. On the first point VISCOUNT CAVE, L.C., said ([1926] A.C. 211):

"It was made clear in the above cited cases of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1) and *Smith v. Incorporated Council of Law Reporting for England & Wales* (8) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly or exclusively for the purposes of the trade . . ."

It is clear, in my opinion, that what LORD CAVE had in mind with reference to *Usher's* case (1) was the indirect benefit resulting to the trade from the acquisition of the tied houses and the expenditure put out on or in connection with them by the brewery company. The context of LORD CAVE's observation is of some importance when one comes to consider what he said three years earlier in *Ward & Co., Ltd. v. Taxes Comr.* (9).

A case not dissimilar to *Usher's* case (1) in respect of the indirect nature of the expenditure incurred is *Southern v. Borar Consolidated, Ltd.* (5). The company

in that case had acquired certain land in California, of which a subsidiary company was put into possession for the purpose of its business. The whole of the capital of this subsidiary company was held by the parent company, and it was agreed that the business of the subsidiary company should be treated as if it were a branch of the parent company's business. The title of the company's land in California was challenged by the city of Los Angeles and the company expended a sum of over £6,000 in the litigation that ensued. It was held by LAWRENCE, J. (as he then was) that the expenditure was wholly and exclusively laid out for the purposes of the company's trade and was not capital expenditure. It was, therefore, a deductible expense. In the circumstances of that case I see no reason to differ from the first branch of that decision. The land was just a trading asset of the company on the use of which it relied for making profits, and expenditure incurred in protecting that asset could, in law, be properly regarded as expenditure made for the purposes of the trade. I see no reason why a similar conclusion could not be reached where a trading company or syndicate had only one asset, say, a mine or piece of land, and was put to expense in defending its title to that asset, though it might depend on circumstances whether the expenditure fell to be treated as capital or revenue expenditure.

The last case I would refer to in detail is *Ward & Co., Ltd. v. Taxes Comr.* (9). The expense there was expense incurred by a brewery company in New Zealand with a view to defeating a proposal for the prohibition of the sale of intoxicating liquors throughout New Zealand to be voted on by a special poll of the parliamentary electors. If carried, this proposal would have meant the destruction of the company's business. The company would, no doubt, be left in possession of its assets but, as they could not be employed for brewing beer for sale in New Zealand, it was really the business that was threatened with destruction. The language of the statute in New Zealand was somewhat different from that of r. 3 (a) in this country. What was prohibited as a deduction was expenditure "not exclusively incurred in the production of the assessable income." I quote one short passage from the judgment of the Court of Appeal in New Zealand in rejecting the claim of the taxpayer:

"We find it quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the production of income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing."

On appeal to the Privy Council this judgment was affirmed. VISCOUNT CAVE, L.C., who delivered the judgment of the Board, said ([1923] A.C. 149):

"The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing. The expense may have been wisely undertaken, and may properly find a place, either in the balance sheet or in the profit-and-loss account of the appellants; but this is not enough to take it out of the prohibition in s. 86 (1) (a) of the Act. For that purpose it must have been incurred for the direct purpose of producing profits."

That case is not, of course, binding on this House and it was decided under a different statute, to which the decisions under the Income Tax Acts in this country are not applicable, as LORD CAVE points out. But I find the reasoning convincing and no less capable of application to the present case. Some stress was laid on the reference by LORD CAVE to the words "for the direct purpose of producing profits" as contrasted with the words "indirectly to facilitate the carrying on of the business" used by him three years later in the *British Insulated & Helsby Cables* case (10), in the passage which I have already quoted. The

case of *Ward* (9) was not before this House in the later case and it is pure surmise that LORD CAVE had any distinction in his own mind in the language used in the later case. An expenditure may be for the direct purpose of producing profit though the means of achieving that purpose are indirect. *Usher's case* (1), which LORD CAVE cited in the passage in question in his speech in the *British Insulated & Helsby Cables case* (10), was a typical illustration of producing profits by indirect means. We were referred to an Australian case of *W. Nerill & Co., Ltd. v. Federal Comr. of Taxation* (4), in which the High Court of Australia held that a sum paid to a managing director to secure his resignation was a loss or outgoing incurred in gaining or producing assessable income, language nearly identical with that in the New Zealand case of *Ward* (9). In that case *Ward's case* (9), *British Insulated & Helsby Cables v. Atherton* (10) and *Mitchell v. B. W. Noble, Ltd.* (3), were all before the court and a perusal of the judgments in that case satisfies me that, in determining what is an expenditure to produce assessable income, the Australian court proceeded on the same principles and reached the same result as would have been recognised and reached by an English court deciding what was an expense laid out for the purposes of the trade.

It was sought to attach some importance to evidence of the auditor of the company that the sum in question here was, in accordance with ordinary commercial accountancy, charged against the profit to which it related. That may have some relevance to the question whether expenditure is capital expenditure or revenue expenditure, but, as has been repeatedly pointed out in this House and elsewhere, it is in no way conclusive on the question whether it is a proper deduction in assessing profits liable to tax. This was very clearly pointed out by WARRINGTON, L.J., in *Inland Revenue Comrs. v. Von Glehn* (23) ([1920] 2 K.B. 567).

There does not appear to me to be any difficulty in ascertaining the principles to be applied here as illustrated in the decided cases, nor do I think there is much difficulty in applying these principles to this case. The judges of the majority of the Court of Appeal were, I think, only able to reach the conclusion which they did by holding that expenditure to help the trader to keep the profits of the trade for himself is expenditure for the purposes of the trade. I know of no decision which has gone that length, and for the reasons I have endeavoured to state such a result cannot follow on a sound construction of the statute. I would allow the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Pennefather & Co.* (for the company).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

Ex parte CORKE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., and Slade, J.), May 28, 1954.]

Habeas Corpus—Applicant serving prison sentence—Availability of writ.

A writ of habeas corpus cannot be used as a means of appeal from a sentence passed by a competent court of summary jurisdiction. The writ is a writ of right, and not a writ of course, and before it can issue or before leave can be given to apply for a writ an affidavit must be before the court showing some ground on which the court can say that the applicant is unlawfully detained. A person who has been sentenced to imprisonment by a court of summary jurisdiction has the right to appeal to quarter sessions, and unless the conviction is set aside by quarter sessions he is lawfully in custody.

AS TO THE WRIT OF HABEAS CORPUS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 701-705, paras. 1200-1204; and FOR CASES, see DIGEST, Vol. 16, p. 248, Nos. 462-473.

APPLICATION for leave to apply for a writ of habeas corpus.

The applicant was serving a sentence of imprisonment passed on him by the magistrate sitting at Bow Street Magistrate's Court under the Vagrancy Act, 1824, s. 4, as amended by the Penal Servitude Act, 1891, s. 7.

The applicant was not represented.

LORD GODDARD, C.J., read the judgment of the court. The court has received an affidavit from a person who calls himself "the Reverend William Corke". Considering the number of times he has been convicted, I doubt whether he is entitled to the title of "Reverend". He is at present in Pentonville Prison, serving a sentence of three months' imprisonment as a suspected person loitering with intent to commit felony, under the Vagrancy Act, 1824, s. 4, as amended by the Penal Servitude Act, 1891, s. 7. He has forwarded to the court an affidavit, at which the court will look though it is not in proper form, asking for a writ of habeas corpus, his complaint being that he was wrongly convicted, or convicted on perjured evidence.

It is as well that persons serving sentences passed on them by a competent court of summary jurisdiction should understand that habeas corpus is not a means of appeal. If they complain that they are wrongly convicted, they should appeal to quarter sessions. A person convicted by a competent court of summary jurisdiction cannot apply for a writ of habeas corpus, and the affidavit here shows that William Corke is in prison serving a sentence passed at the Bow Street Magistrate's Court under the Vagrancy Act, 1824. It has always been the law, since it was laid down by WILMOT, J., in giving his opinion on the writ of habeas corpus, in answer to the questions proposed to the judges by the House of Lords in 1758, that a writ of habeas corpus is a writ of right and not a writ of course; see WILMOT'S NOTES OF OPINIONS AND JUDGMENTS, p. 82. That means that, before a writ can issue or leave can be given to apply for a writ, an affidavit must be before the court showing some ground on which the court can say that the applicant is unlawfully detained. In this case, it is perfectly clear that, unless the conviction was set aside by a court of appeal (and the time for appeal has long gone by), he is lawfully in custody, serving a lawful sentence, and his application for a writ of habeas corpus is, therefore, refused.

Application refused.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

COVE v. FLICK.*

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), December 17, 1953.]

Rent Restriction—Possession—Personal occupation—Occupation by tenant's parents—Intention to return.

A By a written agreement the landlord let to the tenant a dwelling-house to which the Rent Restrictions Acts applied for one year and thereafter from month to month. The tenant informed the landlord that the premises were to be used as a home for his parents, his sister, and himself. In or about 1949 the tenant married and went to live elsewhere, but he left his furniture on the premises and he intended to return and live there if one of his parents should die or his sister should leave. On Aug. 30, 1953, the landlord gave the tenant notice to quit, but the tenant's family remained in possession. In an action by the landlord for possession,

B HELD: neither the fact that the tenant informed the landlord that his parents and sister would occupy the premises nor the fact that he had left his furniture thereon and intended to return thereto in the circumstances mentioned rendered him in such occupation or possession of the premises as to take him out of the principle of *Skinner v. Geary* ([1931] 2 K.B. 546) that, to be entitled to the protection of the Rent Acts, a tenant must be in personal or actual possession of the premises in respect of which he seeks that protection, and, therefore, the landlord was entitled to possession.

C AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 334, para. 400; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 692-706, Nos. 7829-7946.

D Cases referred to:

- (1) *Wabe v. Taylor*, [1952] 2 All E.R. 420; [1952] 2 Q.B. 735; 3rd Digest Supp.
 (2) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675;
 95 J.P. 194; 31 Digest, Replacement, 659, 7612.
 (3) *Hiller v. United Dairies (London), Ltd.*, [1934] 1 K.B. 57; 103 L.J.K.B. 5;
 150 L.T. 74; 31 Digest, Replacement, 660, 7618.

E APPEAL by the tenant from an order of His Honour JUDGE HOWARD at Southend County Court dated Sept. 28, 1953, granting possession to the landlord, plaintiff in the action.

F In 1938 the landlord, by a written agreement, let to the tenant premises to which the Rent Restrictions Acts applied for one year and "after the expiry of the said term from month to month until determined by notice". At the date of the agreement the tenant told the landlord that he intended that the premises should be used as a home for his parents, his sister, and himself, but that he wished the tenancy to be in his name as his father was too ill to take the tenancy. In or about 1949 the tenant married and went to live elsewhere, but he left his furniture in the premises and intended to return should one of his parents die or his sister leave. On Aug. 30, 1953, the landlord served on the tenant a notice to quit, but the tenant's family remained in possession of the premises. In an action by the landlord for possession the tenant contended (i) that, as his parents and sister had remained and wished to continue in occupation, their occupation should be regarded as occupation by himself, and (ii) that, as he had an intention of returning and had left his furniture on the premises, the principle of *Skinner v. Geary* ([1931] 2 K.B. 546) was inapplicable. The learned county court judge rejected the first contention on the ground that it could not be said that the basis of the tenancy agreement was that the premises were to be occupied by someone other than the tenant, and the second contention on the ground that the possibility of the tenant's returning was too contingent to render the principle of

* This case was referred to in *S. L. Dando, Ltd. v. Hitchcock* (ante, p. 335) and was then stated, as was the fact at that time, to be "not reported".

Skinner v. Geary inapplicable. Accordingly, he made an order for possession in favour of the landlord.

J. H. Gower for the tenant.

E. B. Gibbens for the landlord.

SOMERVELL, L.J., stated the facts and continued: The learned judge referred to *Wabe v. Taylor* (1), which was the case of a deserted wife who remained in the matrimonial home. Her position was, of course, a very special one. She paid the rent, but, according to the evidence, when the landlord's wife went to collect it she asked the deserted wife: "What name shall I put in the rent book?" It would, therefore, appear that the landlord would have been willing to accept her as the tenant, but the deserted wife said: "Mr. Taylor", her husband. In those circumstances I think we all thought that the claim might well have succeeded on the alternative ground that her occupancy had been accepted in those circumstances as the occupancy of her husband. In MEGARRY'S THE RENT ACTS, 6th ed., p. 155, the learned author refers to two county court cases, in neither of which was the tenant in occupation, but in both of which there were grounds for saying that when the tenancy was negotiated it was the basis of the tenancy that somebody other than the lessee should occupy the premises. Mr. MEGARRY concludes the discussion of these cases by saying (*ibid.*):

"Such decisions present obvious theoretical difficulties, but the satisfactory results can perhaps be supported (at all events between the original parties) on the ground that by their agreement the parties have made occupation by the daughters or the manager equivalent to personal occupation by the tenant."

I am not at all clear whether the parties can do that. As DENNING, L.J., pointed out in the course of the argument, it may be difficult to reconcile that with the decision where a limited company was the defendant. I think that what was said in *Wabe v. Taylor* (1) ought not to be regarded as having any general application beyond the facts of the case as there stated. For these reasons I am clear that this point does not avail the tenant and that what he said as to the family coming into the premises and the fact that they did go there in no way prevents the landlord from relying on the principle of *Skinner v. Geary* (2), if that principle is applicable to this case.

The second point taken is that the fact that the tenant had the intention of returning to the premises and had left furniture there displaced the principle of *Skinner v. Geary* (2). As to that, he was in the neighbourhood, and, being a devoted son, he went to visit his mother and father nearly every day. He said in his evidence that, if either parent died or if his sister left home, he would have to go back. It might appear from the judgment of the county court judge that he may have said that it was a house which he would in the future like to make his own home. I agree with the learned judge that those possibilities of returning are so contingent that they do not take the case out of the *Skinner v. Geary* (2) principle. That being so, the fact that he left some of his furniture does not help him in maintaining that he should not be treated as a non-occupying tenant. I agree with the judgment and with the reasons which the learned judge gave for his conclusion and I would dismiss the appeal.

DENNING, L.J.: The Rent Acts only protect occupying tenants so long as they are in occupation. If a tenant should cease to occupy or should die, the members of his family cannot stay on in the house except in the special circumstances provided for by s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. For that reason it is often important to inquire who is the legal tenant. For instance, after a father and mother are both dead the question arises whether the daughter can stay on, it is often

important to decide whether the father or the mother was the tenant or whether both of them were tenants. That is a problem which continually arises. It was held by LORD WRIGHT in *Hiller v. United Dairies (London), Ltd.* (3) ([1934] 1 K.B. 61) that limited companies are incapable of having any protection under the Rent Acts. He said (*ibid.*):

- A “ If the rights under the Acts which are given to the statutory tenant are, as this court has held in several cases, purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted ”.

That principle is really sufficient to decide the first point in this case. As to the proposition which was stated in MR. MEGARRY'S *THE RENT ACTS*, 6th ed., p. 155, I can well see that the court would not allow a landlord to evade the Act by taking
B an absent member of the family as a nominal tenant when the real occupier and real tenant was to be a present member, but, subject to cases of that kind, it seems to me that the principle stated by LORD WRIGHT is beyond question. I agree with all that my Lord has said on the other point also and that the appeal should be dismissed.

- C **ROMER, L.J.:** I also agree. The passage in MR. MEGARRY'S book, 6th ed., p. 155, after referring to these cases and to occupation by daughters or by a manager of a business, went on:

- D “ Such decisions present obvious theoretical difficulties, but the satisfactory results can perhaps be supported (at all events between the original parties) on the ground that by their agreement the parties have made occupation by the daughters or the manager equivalent to personal occupation by the tenant.”

I notice that in the seventh edition the precautionary word “ perhaps ” has been dropped. I quite agree with what my brethren have said on the difficulty of the proposition, but at the moment I should like to see the word “ perhaps ” restored. I agree that the appeal should be dismissed.

- E *Appeal dismissed.*

Solicitors: *Kingsford, Dorman & Co.*, agents for *Gregson & Golding*, Southend-on-Sea (for the tenant); *Gibson & Weldon*, agents for *H. Maxwell Lewis*, Southend-on-Sea (for the landlord).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

ATTRIDGE v. LONDON COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Ormerod, J.), May 10, 11, 1954.]

Housing—Compulsory purchase order—Acquisition of dwelling-house as part of estate—Intention to demolish—Duty of acquiring authority to convert house for housing purposes—Housing Act, 1936 (c. 51), s. 73 (a), (b), s. 79 (4).

On May 11, 1948, the London County Council made an order under the Housing Act, 1936, Part V, which was later confirmed without objection, for the compulsory purchase of land for development as a housing estate. The land included a dwelling-house with land adjoining, comprising some sixteen acres, belonging to the plaintiff. In an action by the plaintiff for an injunction to restrain the council from trespassing on her land and a declaration that they were not entitled to demolish the dwelling-house or otherwise interfere with it,

Held: the plaintiff's house had been acquired by the council as part of land acquired by them as a site for the erection of houses for the working classes under s. 73 (a) of the Housing Act, 1936, and had not been acquired under s. 73 (b) as a house which was, or could be made, suitable as a house for the working classes, and, therefore, the council were not under a duty to use it for the occupation of the working classes, or, under s. 79 (4), to secure its alteration to make it suitable for such occupation, but were entitled to demolish it in accordance with their scheme, and the action must fail.

Uttoxeter Urban District Council v. Clarke ([1952] 1 All E.R. 1318), applied.

EDITORIAL NOTE. The Housing Act, 1936, s. 73 (a), has been amended by, and s. 73 (b) and s. 79 (4) have been replaced by, new sections set out in the Housing Act, 1949, sched. I, for which see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 643.

FOR THE HOUSING ACT, 1936, s. 73 and s. 79 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 11, pp. 516 and 520.

Case referred to:

(1) *Uttoxeter Urban District Council v. Clarke*, [1952] 1 All E.R. 1318; 116 J.P. 328; 3rd Digest Supp.

ACTION for an injunction and a declaration.

On May 11, 1948, the defendants, the London County Council, made an order under the Housing Act, 1936, s. 73, for the compulsory purchase of sixteen to seventeen acres of land at Hainault, Essex, for development as a housing estate, which included a bungalow and adjoining land belonging to Mrs. Florence Attridge, the plaintiff. In November, 1948, after an inquiry by the Ministry of Health, the compulsory purchase order was confirmed. As no objections were made within the six weeks allowed by the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, Part IV, para. 15 (1), the order became finally valid and enforceable.

In 1950 and 1951 the defendants served on the plaintiff, first, a notice of their intention to enter on a portion of the land adjoining the bungalow, and, secondly, a notice to take over the whole of the land and the bungalow. The plaintiff objected. A warrant was issued to the sheriff's officer to evict the plaintiff, but, as the plaintiff was seriously ill at the time, the eviction was not carried out. Later, the defendants served a further notice of entry on the land, stating that they intended to take over the whole of the plaintiff's land except the bungalow itself and a portion eighty-five feet in depth from the front of the bungalow. That notice was eventually carried out and a fence erected leaving the plaintiff in possession of the bungalow and the remaining land. On Nov. 7, 1951, the plaintiff issued a writ claiming, first, an injunction against the defendants to restrain them and their servants from trespassing on the premises or

otherwise interfering with the dwelling-house; secondly, a declaration that the defendants were not entitled to proceed with any scheme or plan to acquire the premises compulsorily or to demolish the dwelling-house or otherwise interfere with it; and, alternatively, for a declaration that the provisions of the Housing Act, 1936, s. 79 (4), applied to her dwelling-house and that, in those circumstances, the duty of the defendants was to use this bungalow or to adapt it so that it could be used as a dwelling for members of the working classes.

A

Phillimore, Q.C., and Samuel-Gibbon for the plaintiff.

Percy Lamb, Q.C., and J. R. Willis for the defendants.

B

C

D

ORMEROD, J., stated the facts and continued: The issue in this case resolves itself into a very short one and it is whether, in view of the terms of Part V of the Housing Act, 1936, the defendants are entitled, in the first place, to take possession of the plaintiff's property, and, in the second place, to demolish it in order to carry out such plans as they may have for the development of the site, or whether the position is that under Part V of the Housing Act, 1936 (as is contended by the plaintiff), the defendants have no right to demolish the house, that it is a working class dwelling within the terms of Part V of the Housing Act, 1936, and that under the provisions of s. 79 (4) of that Act the only power which the defendants have (and it is a power which they must exercise as that is a mandatory section) is the power to adapt, if adaptation is necessary, this dwelling-house to make it suitable for a dwelling for the working classes. That, I think, is the short issue. There have been other issues mentioned in the case and discussed from time to time, but although counsel for the plaintiff has reserved one or two of those issues in case there may be further discussion about the matter elsewhere, I think that, so far as this court is concerned, the case resolves itself to that short, but not necessarily simple, question.

E

Part V of the Housing Act, 1936, is concerned with the provision of housing accommodation for the working classes and begins with s. 71, which is a general section, giving a local authority power to review the housing conditions in their areas from time to time and to frame proposals for dealing with the provision of such houses as may be found to be necessary on such a review. To implement that section, s. 72 provides:

F

"(1) A local authority may provide housing accommodation for the working classes—(a) by the erection of houses on any land acquired or appropriated by them; (b) by the conversion of any buildings into houses for the working classes; (c) by acquiring houses suitable for the purpose; (d) by altering, enlarging, repairing or improving any houses . . . which have . . . been acquired by the local authority."

Section 73 provides:

G

"A local authority shall have power under this Part of this Act—(a) to acquire any land, including any houses or other buildings thereon, as a site for the erection of houses for the working classes; (b) to acquire any houses or other buildings which are, or may be made, suitable as houses for the working classes, together with any lands occupied with such houses or other buildings, or any estate or interest in such houses or other buildings and lands."

H

Section 79 (4), on which the plaintiff substantially relies, provides:

"Where a local authority acquire a house or other building which can be made suitable as a house for the working classes, or an estate or interest in such a house or other building, they shall forthwith proceed to secure the alteration, enlargement, repair or improvement of the house or building, either by themselves executing any necessary works, or by leasing or selling it to some person subject to conditions for securing that he will alter, enlarge, repair or improve it."

The plaintiff says here that this land, having been acquired compulsorily by the

defendants under this order, which has been approved by the Minister, against which there has been no appeal, and which is, therefore, an order which cannot be questioned, the only duty and the only right which the defendants have in regard to this house is to deal with it under s. 79 (4) as being a house which is or may be made suitable for the working classes, and, that being the case, the local authority have no power to demolish the house or to use it for any other purpose. Their power is restricted and has been sharply defined by the mandatory provision of s. 79 (4) and any other proposal which they may have for dealing with this land or with this house goes outside the powers which are given to them by the Act. How that is necessarily going to improve the position of the plaintiff is, perhaps, a matter with which I need not deal at this moment, but I may say, in passing, that it appears to me that the plaintiff is in the difficulty that, even if I were to accept her contention that this house must remain as it is and be a house for the accommodation of the working classes, it seems to me by no means to follow that the plaintiff would not be compelled to give possession so that other people who might, in the proper exercise by the local authority of their judgment in these matters, be better entitled to be accommodated, could become tenants of the local authority in that house in place of the plaintiff.

The contention of the plaintiff is that this house, being essentially a working class dwelling, comes within the terms of s. 73 (b) and, must, therefore, be dealt with under the provisions of s. 79 (4). As I understand it, the argument that has been put forward by counsel for the plaintiff is that although s. 73 (a) gives the local authority power to acquire any land including any houses or other buildings thereon—and "land" is defined in the Interpretation Act, 1889, s. 3, as including "messuages, tenements, and hereditaments, houses, and buildings of any tenure"—the phrase in s. 73 (a) of the Act of 1936 "including any houses or other buildings thereon" does not refer to houses for the working classes, but only refers to houses which are either not suitable for the working classes or are not capable of being made suitable for the accommodation of the working classes, and, therefore, that, if the local authority acquire a site which has on it some building which is neither in itself suitable as a working class dwelling, nor is capable of being adapted for that purpose, they may then in the exercise of their powers in developing the site demolish or deal with that building in any way which they think proper, but that, if any house or any building on that site is suitable in itself to be used as a dwelling-house for the working classes, or is capable of being adapted for such purpose, then that building cannot be touched except to carry out the mandatory provisions of s. 79 (4) of the Act.

In this case the intention of the local authority, who have produced before the court a lay-out plan, is to demolish this house in order that a road may be completed which runs round the building site and gives access from the main road adjoining the site to all the houses and dwellings on the site. It is quite clear from s. 79 (1) (a) of the Act that the local authority, if they have acquired land under this Part of the Act for the purpose of housing, may lay out and construct public streets, roads or open spaces on the land. So that it would appear on the face of it, if there were no s. 73 (b) and no s. 79 (4) (and, indeed, I think this position is admitted by counsel for the plaintiff), that, quite clearly, if the local authority acquired land for the purpose of developing a housing site, and there were houses or other buildings on that land, the local authority would have the power to demolish those buildings in order to construct roads or streets on the site, or otherwise develop the site as they in their proper judgment thought the site should be developed in order to be most suitable as a housing site. But, says counsel for the plaintiff, if there is a house on that site which is either suitable as a dwelling for the working classes or capable of being adapted for that purpose, then the powers of the Act are not exercised by virtue of s. 73 (a) of the Act, but by s. 73 (b) of the Act; in other words, the local authority have acquired a house or other building which is or may be made suitable as a house for the working classes.

The answer of the defendants to that is that s. 73 (a) is wide in its terms, and uses the term "land" which, of course, may be interpreted as defined by the Interpretation Act, 1889, and includes any houses or other buildings thereon. Their contention (and I may say now that it is a contention which I accept) is that the word "houses" there has no restricted meaning such as the plaintiff wishes to put on it. It does not refer to houses other than houses suitable for the accommodation of the working classes. It refers to "houses", and, as I read this section, those houses may be houses suitable for the accommodation of the working classes or houses which are capable of becoming so suitable and the meaning of the word is not restricted in any sense to houses or buildings which either are not working class houses or could not be made into them. It is interesting to note in dealing with the defendants' contention, which is that s. 79 (4) relates only to houses acquired in pursuance of s. 73 (b), that the wording of s. 73 (b) is:

"to acquire any houses or other buildings which are, or may be made, suitable as houses for the working classes . . .",

and s. 79 (4) practically adopts the same words and says:

"Where a local authority acquire a house or other building which can be made suitable as a house for the working classes . . . they shall forthwith proceed to secure the alteration, enlargement, repair or improvement . . ."

The contention of the defendants is that, if a house is acquired under s. 73 (b) which is suitable to be used as a house for the working classes or can be made so suitable, then in those circumstances s. 79 (4) applies and the local authority must deal with that house in accordance with s. 79 (4); but if the local authority acquires an estate for the purpose of developing a housing site, the mere fact that there are buildings already on that estate, which might be used, or might be adapted to be used, as working class dwellings, does not in any way restrict the power of the local authority in settling their plans and drawing up their designs for the proper development of that estate. I have come to the conclusion that that is a proper view to take of s. 73 (b) of the Act and of s. 79 (4) and I have been fortified in that view by the decision of LLOYD-JACOB, J., in *Uttoxeter Urban District Council v. Clarke* (1), where a very similar point arose. LLOYD-JACOB, J., says ([1952] 1 All E.R. 1320):

"The first defendant's submission is, as I understand it, that because Heath House itself is a building on the land compulsorily acquired there is an obligation resting on the council under s. 79 (4) forthwith to secure, by alteration, enlargement, repair, improvement or adaptation, that it should be converted into suitable dwellings. That submission, in my judgment, is erroneous. As I read the section, it is directed to the instance where the local authority acquires a house for conversion, and it is by no means obligatory in respect of houses which are acquired as part of an estate. Accordingly, I do not think it right to infer that the failure of the council to convert Heath House into suitable dwellings is in itself an indication that the avowed purpose of their acquisition, viz., that it was to be for the purposes of Part V of the Housing Act, 1936, was erroneous."

That, I think, sums up the position here. Those words

"As I read the section, it is directed to the instance where the local authority acquires a house for conversion, and it is by no means obligatory in respect of houses which are acquired as part of an estate",

I think cover this situation exactly. I am quite satisfied on the facts put before me that this house was acquired by the local authority as part of an estate, which estate was to be developed by them into a housing estate for the housing of the working classes and which has, in fact, been so developed. It is said that the intention of the Act could not be such as to give a local authority the power to pull down and demolish working class dwellings if the object of the Act is to

ensure that working class dwellings are to be provided. The evidence here before me is that some nine dwellings have been demolished in the development of a site which has resulted in the provision of dwellings I think to the number of 180 or something of that kind. I am satisfied that the real position is that this land was acquired as a site for the erection of houses for the working classes and that in those circumstances s. 79 (4) has no application. Had this house been purchased under s. 73 (b) as a house either suitable or capable of being adapted for the purpose of dwellings for the working classes it might very well be that the only power which the local authority would have in relation to it would be to ensure that it was adapted and used for that purpose. That, I am satisfied here, was not the case and in those circumstances this action must fail.

I may say here that I am sure that everybody has very great sympathy for the plaintiff in that she has to leave this house which she and her husband have owned and occupied for a total period of some thirty years. I have no doubt that it has resulted and will result to some extent in hardship for her. It is, perhaps, unfortunate, that from time to time the rights of private individuals have to be sacrificed in the interests of public necessity. That powers which are exercised under these Acts should be exercised with the greatest possible care goes, of course, without saying and it is essential that the court should keep a careful watch on the way these powers which are provided by this and similar Acts are exercised. Having heard the evidence in this case, and having given the most careful attention to the arguments which have been put forward on behalf of the plaintiff, I am satisfied that, hard as it may be on the plaintiff, there was a proper exercise in the course of their public duty by the defendants of their powers under the Act, and, therefore, this action must fail.

Judgment for defendants.

Solicitors: *Hamblins, Grammer & Hamlin*, agents for *A. E. Hamlin*, Sheringham (for the plaintiff); *Solicitor, London County Council* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

WESTALL RICHARDSON, LTD. v. ROULSON.

[CHANCERY DIVISION (Vaisey, J.), May 18, 19, 27, 1954.]

Master and Servant—Worker—Holidays with pay—Cutlery industry—Mirror polisher—Wages Councils Act, 1945 (c. 17), s. 23 (1)—Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952 (S.I., 1952, No. 957), Part IV, paras. 6, 7.

The defendant was a mirror polisher engaged in the cutlery industry in Sheffield. He occupied part of a room (for which he paid rent) in a factory belonging to a company which, in common with other firms and persons, utilised his services. The defendant employed such assistants as he required and his methods of work, his working hours, and the wages he paid his assistants were entirely within his own control. He supplied his own tools, and the price paid by the company for each piece of work done by him was agreed between them. The defendant was assessed to income tax under sched. D in respect of his earnings, and was regarded as self-employed for the purposes of the National Health Service Act, 1946. The defendant claimed that the company was liable to provide him with holidays and holiday pay by virtue of the Wages Councils Act, 1945, s. 10 (1), and the Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952, schedule, Part II, Part III and Part IV.

Herein in relation to the company, the defendant did not work under a contract with an employer, but under a contract or series of contracts with a customer or client, and, therefore, he was not a "worker" within s. 23 (1) of the Act of 1945, and the provisions of that Act and of the order of 1952 were inapplicable.

FOR THE WAGES COUNCILS ACT, 1945, s. 23 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 180.

Cases referred to:

- (1) *Lecture League, Ltd. v. London County Council*, (1913), 108 L.T. 924; 77 J.P. 329; 44 Digest 1303, 75.
- (2) *Templeton v. Parkin (Wm.) & Co., Ltd.*, (1929), 140 L.T. 519; 22 B.W.C.C. 110; Digest Supp.

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ACTION.

Westall Richardson, Ltd., claimed declarations, inter alia, (i) that on the true construction of the Wages Councils Act, 1945, the defendant was not a "worker" within the meaning of s. 23 (1) of the Act; and (ii) that on the true construction of the Act and of the Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952 (S.I., 1952, No. 957), the company was not obliged to pay to the defendant holiday pay as specified in the order. The facts were agreed.

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The plaintiff company was a manufacturer of cutlery and carried on business at a factory in Sheffield. Since Jan. 12, 1953, the defendant, who was a mirror polisher of cutlery, occupied a portion of a room forming part of the company's factory under an oral weekly tenancy at £2 10s. per week inclusive to cover power, heat and light and the hire of machinery, the property of the company, which was installed in that portion of the room occupied by the defendant. The defendant also paid the company 2s. 6d. a week for certain clerical work performed by the company for him. The defendant carried on in the portion of the room occupied by him the mirror polishing of cutlery and for that purpose employed persons who varied in number from time to time, but at the material date numbered seven women and two men. The company, among other manufacturers, supplied the defendant with basic materials, viz., blades, with or without handles, and carving forks for further processing, or finishing, by the defendant, and entered into contracts with the defendant on the basis of the following terms which were customary in the cutlery industry and were expressly or impliedly agreed between them: (i) that the defendant processed the basic materials supplied to him by the company, using his own methods; (ii) that the defendant might employ in such processing and was responsible for and paid as many employees as he should choose and neither the defendant nor any employee of his was in any way controlled by the company: in particular, there was no control with regard to the number of hours worked or the wages paid or the period or periods within which such work was done by the defendant or his employees; (iii) that, subject to the payment of any statutory minimum remuneration fixed by any wages regulations order made under the Wages Councils Act, 1945, s. 10, and to allowing his employees the holidays and the holiday remuneration fixed by the Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952, also made under s. 10 of the Act of 1945, the defendant might make his own terms of employment with his employees and that the company had no voice in the fixing thereof; (iv) that the defendant might carry out the processes at that part of the company's premises of which he was the tenant or at such other place as he thought fit, and was free to sub-contract; (v) that the defendant bought his own tools and working materials; (vi) that the price paid to the defendant was fixed by the piece on the basis of quantities processed; (vii) that the defendant was free to work or carry out processes for persons or firms other than the company and was not obliged to work or carry out processes solely for the company; (viii) that the defendant was not obliged to give to the company any priority in point of time or otherwise over other persons, firms or companies for whom he might work for the processing of goods for the company; (ix) that the defendant processed goods for the company when and in what manner he chose and according to his own production methods without any supervision by the company; (x) that the company was entitled to deduct the rent of the room

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from the agreed price of the goods processed for it by the defendant; (xi) that the company made payment for goods processed on delivery after having made deductions as before stated; (xii) the company did not request the defendant to supply parts or materials for incorporation in any articles processed by the defendant. The defendant claimed that it was a further customary and implied term that he was required generally to execute personally some work and labour in carrying out the processes. The defendant was assessed to income tax, not on the basis of P.A.Y.E., but under sched. D, and rates of allowances for expenses were agreed by him and the Inland Revenue without any reference to the company. The defendant was not eligible for unemployment pay under the National Insurance Act, 1946, but was treated for the purposes of the Act as an employer. Similarly, for the purposes of that Act he was regarded as a self-employed person, and, further, was not an insured person for the purposes of the National Insurance (Industrial Injuries) Act, 1946.

Differences had arisen between the company and the defendant as to whether the company was obliged to pay to the defendant holiday pay in respect of annual holidays under the Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952, schedule, Part III, made pursuant to the Wages Councils Act, 1945.

Paull, Q.C., Lindner, Q.C., and Jenkin for the company.

Melford Stevenson, Q.C., and Platts-Mills for the defendant.

Cur. adv. vult.

May 27. VAISEY, J., read the following judgment. This action is said to be in the nature of a test case. While I can, of course, decide it as an issue between the plaintiff company and the defendant, I am not sure that what I say will afford any very clear guidance in other cases where the facts are not so similar as to be indistinguishable from the facts here. However, though I am doubtful whether I can formulate principles capable of other than limited application, there must be a good many cases very like this one, which may well be governed by the judgment which I am now delivering. The matter is concerned with a custom or practice in the cutlery trade as carried on at Sheffield, and the matter in dispute is as to the effect, if any, on the respective positions of the company and the defendant of the provisions of the Wages Councils Act, 1945, to which I will refer as "the Act".

The company carries on an extensive cutlery business at Sheffield, with the assistance of some eighty or ninety "in-workers" and four or five "out-workers", and the defendant is in relation to that business one of that class of persons who are described as "out-workers". That class, however, appears to include persons who carry on their activities, not in a uniform manner, but under a variety of conditions. In particular, an out-worker may sometimes have a business which, in the strict sense, is a one-man business, i.e., a business in which he, or sometimes it may be she, works alone as an individual. In other cases, such as the present, the out-worker is the head of what I understand is called a "team", and I think there may be a difference between the out-worker who works alone and the out-worker who works as leader of such a team. Again, different considerations may apply to the case of an out-worker who is, so to speak, a "tied" out-worker, equivalent to an in-worker working out, acting exclusively for one cutlery firm or company, as contrasted with an out-worker who habitually works for more than one such firm or company and might be described as a "jobbing" out-worker. But the facts in the present case are those with which I have to deal, and they are not in dispute. One special feature here is that the defendant is at present occupying a portion of a room forming part of the company's factory under a verbal weekly tenancy at a rent of £2 10s. a week, that sum being inclusive so as to cover power, light, heat and the hire of some machinery, which belongs to the company, installed in that portion of the room

occupied by the defendant with the rest of his team. In order to get the facts complete, I may add that the defendant also pays to the company 2s. 6d. a week in respect of accountancy or other clerical work which is carried out for him by members of the company's staff. The rest of the room (i.e., the part not occupied by the defendant) contains a piece of large machinery which is worked and used by in-worker employees of the company for processes with which the defendant has no concern. The work that the defendant carries on in the portion of the room occupied by him consists of the application to cutlery in manufacture of certain elaborate technical processes, which I need not describe in detail, known as "mirror polishing". The members of the defendant's team are persons who are admittedly in his employ. Their number varies, but, for the purposes of this action, they may be taken as consisting of seven women and two men. The system is that the company supplies the defendant with blades to be mirror polished, i.e., the blades are brought to the defendant in a partly finished state. The arrangement between the company and the defendant is said to accord with the recognised custom of the industry.

[HIS LORDSHIP referred to the terms on which the arrangement between the parties was made and the other facts stated above, and he continued:] The question is whether the company is, with regard to the defendant, liable to provide him with holidays, and holiday pay under the Act and the Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952, to which I will refer as "the regulation".

I must now turn to the provisions of the Act. It seems to me that the question in this case largely turns, or, it may be, wholly depends, on the definition of "worker" in s. 23 (1) of the Act, reading as follows:

" 'worker' means any person who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, be expressed or implied, oral or in writing and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour, except that it does not include any person who is employed casually and otherwise than for the purposes of the employer's business ".

Now, if the defendant is a worker within the meaning of that definition, I do not doubt that he is an "out-worker" within the meaning of that word as used in the cutlery trade in Sheffield. The definition seems to me to be not very easy to apply to the facts of the present case, or, alternatively, it is, perhaps, not easy to see whether or not it is applicable. Clearly, the defendant is a person who has entered into and works under a contract, but is that contract made with an employer? In other words, is this a contract between employer and employee, for I think that "an employer", in the definition, necessarily presupposes an employee. *Lecture League, Ltd. v. London County Council* (1) proves, if proof were needed, that the word "employment" is one of very wide significance. But the words "employer" and "employee" are much more restricted in their meanings. Thus, I may be said to "employ" my time or my talents without being in any proper sense an employer, and I may also be said to be employed in some pursuit or activity without being an employee. Therefore, I ask: Is the defendant an employee? If the defendant is not an employee, he must be, I suppose, an independent contractor and not under a contract of service, though working under a contract personally to execute some "work or labour", the last word being, in my judgment, a noun and not a verb, though the language appears to me to be not very elegant on either view. The problem seems to be just this. Is the out-worker defendant an employee or is he an independent contractor? It may be, though I do not wish to go beyond what I have to decide for the purposes of the present case, that an out-worker, working on his own account and without a team, and working exclusively for a particular cutler, might well be an employee, although equally an out-worker

as well; but in the present case the defendant is not in that position. He is a member and the head of his team, and, on the whole, it seems to me that he works, not under a contract with an employer, but under a contract or series of contracts with a customer or client. I can imagine many cases on the border-line where it may be doubtful whether a particular out-worker is or is not on the roll or list of employees of a manufacturer of cutlery, or whether he is one who contracts with that firm or company independently and at arm's length. In the case of the defendant, in my judgment, while there may be (and, indeed, I think there is) some element of service or servitude in his position, there is a far greater element of independence and freedom. In the case of other individual out-workers, the balance may incline the other way.

If that is right, there seems no point in my referring particularly to the sections of the Act to which my attention was drawn. Section 16 (1) provides:

"Where the immediate employer of any worker is himself in the employment of some other person and that worker is employed on the premises of that other person, that other person shall for the purposes of this Part of this Act be deemed to be the employer of that worker jointly with the immediate employer."

As to that sub-section, I think it is sufficient to say that it only operates where I can find an individual who is both a worker and an immediate employer, and the defendant here is not, in my judgment, such an individual. Section 13 (1) is covered by the same comment that there must be a worker and an employer before it applies.

I must say a few words about the regulation, but exactly the same point arises, viz., that it can only apply to a worker who has an employer and, therefore, only to an out-worker who has an employer. I do not doubt that the regulation may apply to cases in which the conditions of the contract between the parties involve the relationship of employer and employee, but it is necessary first to discover the existence of such a relationship before any attempt can be made to apply the regulation. I suppose that there may be cases where it is difficult to say whether a particular individual is an in-worker or an out-worker, but I find no such difficulty in the present case. The decision in *Templeton v. William Parkin & Co., Ltd.* (2) is certainly closely analogous to the present case, though it certainly does not, in my judgment, govern it. The "little master" in the cutlery trade has a position similar to, but not identical with, the out-worker, and that decision related to the Workmen's Compensation Act, 1925, which contains a definition of "worker" in terms which are by no means the same as those with which the present case is dealing.

My decision must be for the company. It seems to me to be unnecessary to incorporate in the judgment the detailed declarations asked for in the statement of claim, and that it will suffice for me to declare that the relationship between the company and the defendant is outside, and not affected by, the provisions of the Act.

Declaration accordingly.

Solicitors: *Bell, Brodrick & Gray*, agents for *Harold Jackson & Co.*, Sheffield (for the company); *Ellis, Bickersteth & Co.*, agents for *Elliott & Co.*, Sheffield (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re HARRISON'S SHARE UNDER A SETTLEMENT.

HARRISON *v.* HARRISON AND OTHERS.Re WILLIAMS' WILL TRUST. WILLIAMS *v.* RICHARDSON
AND OTHERS.Re ROPNER'S SETTLEMENT TRUSTS. ROPNER *v.* ROPNER
AND OTHERS.

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[CHANCERY DIVISION (Roxburgh, J.), May 7, 18, 19, 28, 1954.]

Practice—Order—Recall by judge.

At the time of the hearing of an application on behalf of infants and unborn and unascertained persons for the approval of the court to a scheme affecting the trusts of a settlement, there was before the House of Lords a similar case. The judge in chambers made an order approving the scheme, but before it had been drawn up the House of Lords announced its decision, which indicated that the court lacked jurisdiction to make the order which had been made. The judge thereupon recalled his order and invited the parties to argue further.

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HELD: the judge was entitled so to recall the order on his own initiative, and, in view of the fact that persons not parties to the application were affected by the order, it was his duty to do so.

Dictum of LORD WESTBURY, L.C., in *Re Risca Coal & Iron Co. Ex p. Hookey* (1862) (4 De G.F. & J. 458), considered.

Re Roberts ([1887] W.N. 231), followed.

D

Dictum of SIR GEORGE JESSEL, M.R., in *Re St. Nazaire Co.* (1879) (12 Ch.D. 91) and of FRY, L.J., in *Re Suffield & Watts. Ex p. Brown* (1888) (20 Q.B.D. 697), applied.

Cases referred to:

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(1) *Chapman v. Chapman*, [1954] 1 All E.R. 798.

(2) *Re Downshire's Settled Estates*, [1953] 1 All E.R. 103; [1953] Ch. 218.

(3) *Re Blackwell's Settlement Trusts*, [1953] 1 All E.R. 103; [1953] Ch. 218.

(4) *Re Yates' Settlement Trusts*, [1954] 1 All E.R. 619.

(5) *Re Risca Coal & Iron Co. Ex p. Hookey*, (1862), 4 De G.F. & J. 456; 31 L.J.Ch. 429; 6 L.T. 567; 45 E.R. 1261; Digest, Practice, 709, 3039.

(6) *Re Australian Direct Steam Navigation Co. Miller's Case*, (1876), 3 Ch.D. 661; *affd.* C.A., (1877), 5 Ch.D. 70; 9 Digest 453, 2943.

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(7) *Re St. Nazaire Co.*, (1879), 12 Ch.D. 88, 91; 41 L.T. 110; Digest, Practice, 815, 3759.

(8) *Re Roberts*, [1887] W.N. 231; Digest, Practice, 815, 3761.

(9) *Re Eyton (Adam), Ltd. Ex p. Charlesworth*, (1887), 36 Ch.D. 299; 57 L.J.Ch. 127; Digest, Practice, 815, 3760.

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(10) *Re Suffield & Watts. Ex p. Brown*, (1888), 20 Q.B.D. 693, 697; 58 L.T. 911; Digest, Practice, 815, 3762.

(11) *Preston Banking Co. v. Allsup (William) & Sons*, [1895] 1 Ch. 141, 144; 64 L.J.Ch. 196; 71 L.T. 708; Digest, Practice, 815, 3764.

(12) *Millensted v. Grosvenor House (Park Lane), Ltd.*, [1937] 1 All E.R. 736; [1937] 1 K.B. 717; 106 L.J.K.B. 221; 156 L.T. 383; Digest Supp.

H

ADJOURNED SUMMONSES.

By each of the three summonses application was made for the approval of the court on behalf of infants or unborn or unascertained persons to a scheme affecting the trusts of a settlement. As a similar case was being considered by the House of Lords (*Chapman v. Chapman* (1) ([1954] 1 All E.R. 798)), ROXBURGH, J., deferred considering the applications, but following the decision of the Court of Appeal in *Re Yates' Settlement Trusts* (4) ([1954] 1 All E.R. 619), His Lordship heard the applications in chambers and made orders approving each scheme.

After the decision in *Chapman v. Chapman* (1) was announced, His Lordship recalled the orders (which had not been drawn up) for further argument.

Raymond Jennings, Q.C., and *Jopling* for the plaintiff, *F. G. King* and *J. M. Price* for the defendants, in the first application.

T. A. C. Burgess for the plaintiff, *Winterbotham, Wigan, Robert S. Lazarus* and *D. A. Ziegler* for the defendants, in the second application.

D. A. Ziegler for the plaintiff, *J. G. Monroe* and *B. S. Tatham* for the defendants, in the third application.

Cur. adv. vult.

May 28. **ROXBURGH, J.**, read the following judgment. I have before me three applications for the approval by the court on behalf of infants, unborn and unascertained persons of three schemes affecting family trusts. They are schemes which, admittedly, could not be sanctioned if they were now brought before the court for the first time in the face of the decision of the House of Lords in *Chapman v. Chapman* (1). When these applications were ripe for hearing the argument in that case had been completed, but no decision had been given. I, accordingly, postponed consideration of them, believing that their Lordships might make observations on the cognate cases of *Re Downshire's Settled Estates* (2) and *Re Blackwell's Settlement Trusts* (3), but when I read in "The Times" newspaper on Mar. 2, 1954, a report of the decision of the Court of Appeal in *Re Yates' Settlement Trusts* (4), I thought that I ought to do what the Court of Appeal directed **HARMAN, J.**, to do. Accordingly, I heard these three summonses in chambers, and pronounced orders approving the three schemes in one case on Mar. 15, 1954, and in the other two cases on Mar. 17, 1954. When the decision of the House of Lords was made known on Mar. 25, 1954, none of these orders had been entered, and acting under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 110, I directed the registrars concerned not to proceed further with them, as I desired to hear further argument and to inform the parties accordingly. As a result, the parties are before me again at my invitation and on my initiative, and they have with one accord contended before me that I cannot, or, alternatively, ought not to, recall the orders which I pronounced, and hear further argument, but must or should allow them to be entered and thus perfected.

Mr. Jennings' able argument fell into three parts: (i) that no order pronounced in the circumstances of the present case could be recalled; (ii) alternatively, that no such order could be recalled on the initiative of the judge himself; (iii) alternatively, that in the present cases the orders ought not to be recalled.

Before I embark on these interesting submissions, I must clear away one point which counsel have successfully disposed of. These orders were made in chambers, and there are well-recognised differences between such orders and orders made in open court. When the jurisdiction of the Master of the Rolls and the Vice-Chancellors in chambers was created by s. 11 of the Act to abolish the office of master in ordinary of the High Court of Chancery (15 & 16 Viet. c. 80), it was provided (s. 15) that their orders made at chambers should have the force and effect of orders of the Court of Chancery. But at that time the Court of Chancery had appellate jurisdiction. When that appellate jurisdiction was for the most part transferred to the Court of Appeal by the Supreme Court of Judicature Act, 1873, s. 18, it was expressly provided by s. 50 that every order made by a judge of the High Court in chambers (with certain exceptions) might be set aside or discharged on notice by any Divisional Court or by the judge sitting in court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order is made may be assigned. The substance of this provision is now to be found in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 62. Accordingly, it comes about that this fragment of appellate jurisdiction to discharge an order

made in chambers, even after it has been perfected, still adheres to the Chancery Division. But I have been convinced that an appellate jurisdiction is never exercised on the initiative of the appellate tribunal itself. The question is really whether the judge who has tried a case retains sufficient control over it until the order has been perfected by entry, to enable him to recall the order which he has pronounced and to require further argument.

- A That a judge can do this on the initiative of a party must, I think, be treated as settled. I will refer to cases in which this has been done, and to many dicta justifying it. It is true, as Mr. Jennings pointed out, that LORD WESTBURY, L.C., in discussing the date from which an order takes effect, used strong words which might well have been used to justify the proposition that no order can be varied by the judge who pronounced it, even though not passed and entered. In
 B *Re Risca Coal & Iron Co. Ex p. Hookey* (5) LORD WESTBURY, L.C., said (4 De G.F. & J. 458):

- C “An order of the Court of Chancery, however long a time may elapse in the ministerial duty of drawing up that order and committing it to paper, is made to bear date on the day when it is pronounced by the court. That date appears in the document in which the order is recorded, and the principle, therefore, involves of necessity this consequence, that the order must be accepted for all purposes as having been made on the day on which it is dated . . . The principle which makes the order, whenever drawn up and entered, to bear date on the day when it is pronounced by the court, I hold to be one in perfect conformity with the whole theory of judicial procedure. The theory of judicial procedure is that the cogent and binding effect of the order begins immediately from the time when the order is pronounced by the lips of the judge, and if that could be done physically which legally is supposed to be done, and which one would desire to be done if it were possible, every order would be completed on the spot, written out by the judicial officer and in curia before the court rises, and delivered to the parties. That is the unquestionable theory of judicial procedure, and in conformity with that theory that is the time when the order is ‘made’, for the two words must be considered as equivalent and capable of being substituted the one for the other. The mere defining of the words of the court by writing and reducing them into a form in which they can be evidence is a ministerial operation which, according to the true theory, succeeds the delivery of the order by the judge, and must be in point of fact nothing
 D in the world more than the physical embodiment on the spot by the court
 E of the words which the judge has used”.

- But these weighty reflections have, I think, been outweighed by the manifest disadvantage of a rule which would prevent a judge from correcting a mistake which he had made when pronouncing an order though the mistake had been
 G discovered before the order was perfected. At best, such a rule would involve the parties in the expense of an appeal. At its worst, when unborn or unascertained persons were adversely affected, or when the mistake was known only to the judge himself, it would involve a miscarriage of justice.

- At any rate, judges have recalled such orders in cases reported and unreported. One of the earliest is *Re Australian Direct Steam Navigation Co. Miller's Case* (6).
 H On July 1, 1876, SIR GEORGE JESSEL, M.R., pronounced judgment to the effect that Captain Miller's name be placed on the list of contributories in the winding-up of the Australian Direct Steam Navigation Co., Ltd. Before the order was drawn up, the case was “re-heard in consequence of the attention of the court not having been called” to a relevant article of association, and on July 31, 1876, Captain Miller's name was ordered to be removed from the list. Truly, as Mr. Jennings says, the report does not fully disclose the circumstances in which the case was re-heard, and there may have been special circumstances,

but the fact remains that SIR GEORGE, in referring to this case in *Re St. Nazaire Co.* (7), says (12 Ch.D. 91):

"In *Miller's Case* (6) no order had been drawn up. A judge can always re-consider his decision until the order has been drawn up".

From this I infer that he did not consider that there were any special circumstances, or that any special circumstances were required, or that the power of re-hearing (until the order was perfected) was subject to any limitation whatever. A dictum, no doubt, but one of weight and venerable antiquity. Next comes what, I think, may fairly be called a clear decision on the point. This is *Re Roberts* (8). When an interpleader summons was heard in chambers, the judge barred the claimant under an erroneous impression as to the facts of the case. No order had been drawn up. There was a motion to discharge the order, but this procedure was barred by the Common Law Procedure Act, 1860, s. 17. After stating this in effect, KAY, J., went on to say that where an order had not been drawn up, whether it were an order made in chambers or in court, the judge had a right, if something was brought to his attention which he had not sufficiently considered, to stay the drawing up of the order and re-hear the matter before making a final order. He should, therefore, treat the matter as if the summons were adjourned into court, and now make an order in favour of the claimant. Again, I note the generality of this statement.

In the next case which was cited to me (*Re Adam Eglon, Ltd. Ex p. Charlesworth* (9)), one Banner was, on May 19, 1887, appointed liquidator in chambers. Before that order had been drawn up, a creditor applied to the judge in chambers to substitute one Chalmers as liquidator in the place of Banner, and an order was made accordingly on June 20, 1887. In the Court of Appeal the order of May 19, 1887, was treated as having been effective, though not drawn up, and the order of June 20 was treated as an order removing Banner from office, and, therefore, the decision has no direct bearing on the present case. But during the argument counsel submitted that a judge could not discharge in chambers an order made in chambers. Thereupon, FRY, L.J., interposed (36 Ch.D. 301):

"I have an impression that he can re-hear it before the order has been drawn up",

and CORTON, L.J., said (*ibid.*):

"I am disposed to hold that after an order has been pronounced, and nothing remains but to draw it up, it cannot be re-heard".

I am inclined to think that both the lords justices were referring to what could be done in chambers in contrast with court, but if their dicta were intended to be of wider application, they neutralise one another.

In *Re Suffield & Watts. Ex p. Brown* (10), the order had been perfected; but in the course of his judgment FRY, L.J., said (20 Q.B.D. 697):

"So long as the order has not been perfected the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end".

This was a dictum, but a weighty dictum, and it is to be noted that the power of re-considering the matter is not made to depend on any appeal or application, but simply on the circumstance that the jurisdiction of the judge which has been invoked by the parties to the suit does not pass away from him until the order has been perfected.

Later cases in the Court of Appeal indorse this dictum. Thus, in *Preston Banking Co. v. William Allsup & Sons* (11), A. L. SMITH, L.J., said ([1895] 1 Ch. 144):

"FRY, L.J., put the law on the right foundation when he held, in *Re Suffield & Watts* (10), that so long as the order has not been perfected,

the judge has a power of reviewing the matter, but when once the order has been completed the jurisdiction of the judge over it has come to an end ”.

And in *Millensted v. Grosvenor House (Park Lane), Ltd.* (12), FARWELL, J., sitting in the Court of Appeal, treated this matter as settled. In my judgment, it has now been settled for a long time.

This being so, I pass to Mr. Jennings' second contention, which was that once an order has been pronounced, the judge can only recall it on the application of a party. He pointed out that there was no reported case in which a judge had acted on his own initiative. But I would reply that as there are few reported cases in which an unperfected order has been recalled (though the power to do this is well settled), and as the cases in which one of the parties would not apply if there was any ground for making an application would be rare, I find nothing strange in this. This power to recall an unperfected order is not appellate in its nature, but exists because the jurisdiction which the parties have invoked is still continuing. There is no suggestion in any of the dicta that an application is necessary to confer or prolong jurisdiction which would otherwise be at an end. Indeed, the contrary seems to me to be implicit in them. Moreover, there are some cases (such as the present) where persons may be affected who are not parties, and it would be strange if the parties could combine by a conspiracy of silence to prevent a judge from correcting a mistake which might operate to the disadvantage of other persons concerned. Moreover, I can think of cases in which the mistake might be known only to the judge himself. Must he then summon the parties before him and invite one of them to make an application to him, confessing that he cannot otherwise rectify his mistake ?

It was argued that if the judge can act on his own initiative as well as on the application of a party, the area of uncertainty between the pronouncement and the perfecting of the order is thereby unduly enlarged. But the enlargement of the area is very small and is to be justified on exactly the same grounds as is its creation.

Mr. Jopling argued that the absence from the Rules of the Supreme Court of any provision for the intervention of the judge on his own initiative was significant. It would be, if there were any provision in those rules for the recalling of an order before it had been perfected on the application of a party. But as there is no such provision, that argument does not convince me. In my judgment, the judge can act on his own initiative.

Lastly, it was argued that in the present cases I ought not to intervene. In my judgment, when, owing to the special circumstances of these cases, the orders which I had pronounced sprang to my mind on reading that the House of Lords had decided that orders of that sort ought not to be made, and when I realised that persons who were not parties were affected by them, it was my plain duty to recall them. It was contended that these orders were necessarily beneficial to the infants, unascertained and unborn persons affected, but I cannot accept that proposition as axiomatic. It would be a matter for consideration at the re-hearing (if the question of jurisdiction could be surmounted) whether the schemes were in the changed circumstances still beneficial. *Chapman v. Chapman* (1) may have wider repercussions. I do not know.

Accordingly, I recall the three orders which I pronounced. I should have proceeded to re-hear the cases, but nobody wishes me to do so, because the result is a foregone conclusion. Accordingly, I now pronounce orders dismissing these three applications.

Orders accordingly.

Solicitors: *Theodore Goddard & Co.* (in the first application); *Pontifax, Pitt & Co.* (in the second application); *Tamplin, Joseph & Flux*, agents for *Darling, Heslop & Forster*, *Darlington* (in the third application).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MOOR v. MOOR.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Hodson, L.JJ.),
May 25, 1954.]

Divorce—Discretion—Exercise in favour of guilty party—Marriage broken down—Sanctity of marriage—Exercise of discretion by Court of Appeal—Matrimonial Causes Act, 1950 (c. 25), s. 4 (2).

In 1936 the wife left the husband. In 1938 she formed an association with a single man with whom she had since been living and to whom she had borne two children. In 1939 the husband formed an association with a single woman who bore him four children. On Oct. 25, 1953, the wife filed a petition for divorce on the ground of the husband's adultery and prayed for the exercise of the discretion of the court in her favour.

HELD: (i) the assumption that the utter break-down of the marriage is so strong an element in considering whether a decree should be granted that, where such a break-down has taken place, the discretion of the court ought always to be exercised in favour of a petitioner who has committed adultery is wrong, but the break-down of the marriage is a consideration to be balanced against the public policy which upholds the sanctity of marriage: dictum of Viscount SIMON, L.C., in *Blunt v. Blunt* ([1943] 2 All E.R. 78), referred to; and it is relevant to consider the circumstances in which the marriage broke down and which of the parties was the original wrongdoer.

(ii) by s. 4 (2) of the Matrimonial Causes Act, 1950, the discretion is committed to the judge at the trial and the Court of Appeal cannot substitute its own discretion for that exercised by the judge unless it is made plain that he has not exercised his discretion judicially, as by misdirecting himself in some material particular: in the present case there was no ground for the Court of Appeal to substitute its own discretion.

Divorce—Practice—Undefended suit—Leading questions—Function of judge.

PET SIR RAYMOND EVERSHED, M.R.: To adduce evidence in undefended suits for divorce in the form "Yes" or "No" in answer to a series of leading questions was irregular and had the effect of making the answers either not at all impressive or far less impressive than they otherwise would be, and it was for the trial judge to stop this irregular method of conducting such cases.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 4 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 394.

Cases referred to:

- (1) *Blunt v. Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 27 Digest, Replacement, 429, 3589.
- (2) *Wilson v. Wilson*, [1920] P. 20; 89 L.J.P. 17; 122 L.T. 223; 27 Digest, Replacement, 427, 3584.

APPEAL by the wife against an order of His Honour JUDGE KINGSLEY GRIFFITH, sitting as a special commissioner in divorce at Kingston-upon-Hull, dated Jan. 25, 1954, dismissing her petition for divorce.

The parties were married on Dec. 9, 1929, the wife being then about eighteen years of age and the husband about twenty years of age. They frequently quarrelled, and in 1936 the wife left the matrimonial home. In 1938 the wife met a bachelor with whom shortly thereafter she went to live, and she had since lived with him and borne two children. In and after 1939 the husband lived with the woman named, a spinster who had borne him four children. On Oct. 25, 1953, the wife filed a petition for dissolution on the ground of the husband's adultery with the woman named, and prayed for the exercise in her favour of the discretion of the court. The suit was undefended. On Jan. 25, 1954, the judge having heard the evidence, found the allegation of adultery by the husband proved, but he refused to exercise his discretion in the wife's favour

and dismissed the petition. The solicitors and counsel who appeared before the Court of Appeal were not those who appeared before the commissioner.

Laskey for the wife.

The husband did not appear.

SIR RAYMOND EVERSHED, M.R.: In 1936, according to the only evidence which is before the court, as a result of protracted quarrelling, the wife left the matrimonial home. No explanation whatever of her decision and conduct was given by her except that there had been a series of quarrels. By a question which was in a form so leading as to be quite inadmissible, she was asked: "Did you suspect that your husband was having relations with someone else?" to which she gave the, I assume, expected answer: "Yes". Having regard to the form of the question, the answer carried no weight and was of no value, the more so because it was not thought proper to make any inquiry whether she had any, and, if so, what, grounds for those suspicions. The wife made no attempt to return, to effect a reconciliation, or to make any application to the husband to support her.

[HIS LORDSHIP stated the facts and continued:] I have already referred to one question which was put during the course of the wife's evidence in a wholly irregular and improper form. From time to time, this court—and I think LORD MERRIMAN, P., also—has drawn attention to the way in which in cases of this character evidence is given by answering "Yes" or "No" to a series of leading questions, which every experienced advocate knows to be irregular and to have the effect of making the answers either not at all impressive or far less impressive than they otherwise would be. In spite of the attention which has been drawn to this matter, nobody, so far as I can see, has paid the slightest regard to what has been said, and I do not forget that the judges who try these cases might, I should have thought, be expected to have stopped this irregular method of conducting them. The impression left on my mind by the present case is one of a most casual presentation—a few leading questions asked and then the matter put before the judge with the suggestion that there was really nothing in it, and, of course, he would be bound to exercise his discretion in the wife's favour. But the judge refused so to exercise his discretion, saying:

"The question is whether or not the wife can come to this court and ask me to exercise my discretion in her favour, she being the party who began it, [meaning thereby, she being the party who first left and broke up the marriage, or, alternatively, who first started an adulterous association, or, perhaps, both]. She left her husband and formed another association. It seems to me that, if I exercise a discretion in a case like this, discretion becomes a rubber stamp and ceases to have any meaning whatever because it follows, or almost follows, in an undefended case, that since the husband has not troubled to defend he is also anxious that the marriage should be dissolved, and, therefore, in any undefended case there is no discretion if I apply the principles counsel asks me to apply. I refuse to exercise discretion."

It is not in doubt that this court cannot substitute its discretion for that exercised by the judge unless it is made plain that in some way he has exercised his discretion wrongly, that is to say, not judicially, as by misdirecting himself in some material particular. By s. 4 (2) of the Matrimonial Causes Act, 1950, the discretion is committed to the judge at the trial. I have been worried over the present case because I cannot help feeling that, if more care had been taken in presenting her case, the wife might have been able to give evidence which would have supplied the judge with a firm basis on which he might have exercised his discretion in her favour. As it was, I think the judge spoke truly when he said that the only evidence before him was the fact that the wife had first broken up the marriage by going off and leaving the husband and shortly afterwards

had started an adulterous association, without any explanation of the circumstances which led up to it.

Counsel for the wife before the judge drew attention to the fact that there had been no children of the marriage, and that she had had two children while living with another man. She omitted to prove that this man was willing to marry her, though I assume from what counsel has told us that that could have been established. No emphasis, however, was laid on the circumstances of the husband, though the judge pointed out, with some justice, that, possibly, the husband (who had been deserted) might, if he was anxious for his own sake and that of his children to regularise his own liaison with the woman named, himself present a petition. Sympathy for the wife and an extreme distaste for the way in which the case was presented and conducted, however, seem to me to be an insufficient basis for substituting the discretion of this court for that of the judge.

I felt inclined during the course of counsel's argument to say that there was sufficient unsatisfactory conduct of the case to justify us in ordering a new trial. On the whole, however—and in this matter I have been guided by my two brethren, whose experience is greater in these cases than mine—it seems to me that that would be merely a disguised way of indicating to some other commissioner that we thought the discretion might be exercised in another way. Indeed, I am not at all convinced on this evidence that there is enough to induce me to say that I should have so exercised it. The judge had, I think, no information before him which would have entitled him to take the view that the conduct of the wife, which alone was proved, was not a most serious obstacle in her path.

It is clear that, in arriving at his decision, the judge had in mind *Blunt v. Blunt* (1). In effect, he referred to it because he said:

“I think I remember a case in the House of Lords which said that the maintenance of marriage as an estate is just as strong a ground of public policy as the happiness of the individuals concerned”.

That is a reasonably accurate reference to the well-known passage in the speech of VISCOUNT SIMON, L.C., where he said ([1943] 2 All E.R. 78):

“To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.”

I think that sometimes it is assumed that the utter break-down of the union is so strong an element in the matter that the discretion ought always to be exercised in the petitioner's favour whenever that has occurred. I cannot accept that view. It seems, indeed, to me to be in conflict with what LORD SIMON says, namely, that that consideration must be “balanced” against the public policy which upholds the sanctity of marriage. I ask the question which, I think, the judge asked: If a wife says: “We had a lot of quarrels, the marriage was a failure, and so I walked out and started association with somebody else”, is the court then to say: “It is a long time ago, the marriage has broken down, so I will exercise my discretion”? I cannot say that the judge was wrong when he said: “No, I will not. If I do, I am just putting a rubber stamp on this discretion.”

I repeat that I feel sorry for the parties and for the six children who are the issue of these two associations. However, the husband may himself present a petition, and, as the judge indicated, in the circumstances he might well succeed in obtaining a decree. The costs, if he starts proceedings, would be no greater than if the court ordered a re-trial of this petition. I have come to the conclusion that it would not be right or in accordance with well-established principles for

the Court of Appeal to substitute its discretion for that of the judge on no ground other than that we might think that, if we had tried the present case and heard this evidence and no more, we might have granted a decree. In my judgment, the appeal fails.

DENNING, L.J.: I agree. The decision of the House of Lords in *Blunt v. Blunt* (1) marked a turning point in the way the court exercises its discretion in divorce cases. Whereas, previously, discretion was exercised in comparatively few cases, since that decision it has been exercised in most of the cases in which it has been sought. But it is important to remember that LORD SIMON, in delivering the unanimous judgment of the House of Lords, required the courts to maintain "a true balance" between the sanctity of marriage, on the one hand, and other social considerations, on the other hand. In applying that ruling in recent years, I am afraid that the fact that the marriage "has utterly broken down" has weighed heavily, whereas the sanctity of marriage has weighed lightly, in the scale. That is not the correct method of approach. A true balance must be kept. It is most important that the court should emphasise the sanctity of marriage. In the present case the judge found that it was the wife who was the party at fault in the first instance—that she left her husband and formed another association. If the judge thought, as he did, that he could not in her case exercise his discretion because of his feeling that the sanctity of marriage must be maintained, I do not think this court should interfere. For these reasons, I agree that this appeal must be dismissed.

D **HODSON, L.J.:** I also agree. If this court were to interfere with the discretion of the learned judge it would be substituting its discretion for that of the court to which the discretion has been entrusted.

The learned judge directed himself by reference, although not by name, to *Blunt v. Blunt* (1). He clearly had in mind the observations of LORD SIMON, with regard to the maintenance of marriage as an estate. LORD SIMON, in his speech ([1943] 2 All E.R. 78), confirmed the considerations which had been recognised by the court from the time at least of the Presidency of SIR HENRY DUKE (see *Wilson v. Wilson* (2)), but he added a fifth consideration, which has lately given rise to debate:

F "To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down."

G Nowhere did LORD SIMON say that it is irrelevant to consider the circumstances in which the marriage breaks down in the first place, or which of the parties was the original wrongdoer, and I think it cannot be fairly urged against the judge's judgment that in mentioning that as a matter which impressed him he had misdirected himself. The court will not lay down rules of an exhaustive character as to the exercise of discretion, nor am I seeking to say that in no case can a party who is the original wrongdoer rightly appeal to the court for the exercise of discretion.

H The circumstances of the original parting in the present case have called for anxious consideration, because the case was not properly presented to the court. The circumstances of the original parting were not dealt with by examination of the wife in such a way as to give any assistance to the court at all. These are the questions which were asked relating to the period in 1936 immediately before the separation:

"Q.—Did you suspect that your husband was having relations with someone else? A.—Yes. Q.—As a result of those suspicions did you leave your house in October, 1936? A.—Yes, sir."

The matter was left there and no ground for suspicion was sought to be established. The learned judge was left with the fact on the wife's own evidence that she had left her husband without any just cause and had not made any claim for maintenance against him, coupled with the statement of the husband which had been put in as a confession of his adultery: "My wife left me in October, 1936." The case having been presented in that way and the learned judge having had those facts put before him, exercised his discretion without, in my opinion, showing that he had acted on any wrong principle or had misappreciated the facts as disclosed to him in evidence. Therefore, I think, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Smith & Hudson*, agents for *Payne & Payne*, Hull (for the wife).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

THOMSON v. THOMSON AND WHITMEE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), May 26, 1954.]

Variation of Settlement—Jurisdiction of Divorce Division—Result of variation—reduction in tax payable—Matrimonial Causes Act, 1950 (c. 25), s. 25.

On Oct. 30, 1933, an ante-nuptial deed of settlement was made for the benefit of the wife and the children of the marriage, the fund being a policy of insurance on the husband's life. On Nov. 1, 1933, the parties were married. There were two children of the marriage, born on June 4, 1935, and Dec. 29, 1939. In March, 1945, two post-nuptial settlements were made for the benefit of the wife and the children of the marriage by the issue under the Married Women's Property Act, 1882, s. 11, of two policies, dated Mar. 26, 1945, and Oct. 3, 1945, on the husband's life. On July 19, 1945, a post-nuptial declaration of trust in favour of the wife and the children of the marriage was made by the husband and a bank, the fund being an invested capital sum. On Nov. 26, 1953, on the husband's petition, a decree nisi dissolving the marriage was made on the ground of the wife's adultery with the co-respondent. The husband applied to vary all four settlements by extinguishing the wife's interests as though she were already dead. It was admitted that one of the objects of the variation was to reduce the amount of tax payable on the income of the settlement.

Held: unlike the Chancery Division, the Divorce Division had an express power under the Matrimonial Causes Act, 1950, s. 25, to alter the trusts of an ante-nuptial or post-nuptial settlement; the fact that one of the results of the exercise of that power would be a reduction in the amount of tax otherwise payable to the Crown was not a consideration to be taken into account when deciding whether or not the court should exercise the power; and the variations would be made as sought.

Chapman v. Chapman ([1954] 1 All E.R. 798), distinguished.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 25, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 412.

Case referred to:

(1) *Chapman v. Chapman*, [1954] 1 All E.R. 798.

APPLICATION by the husband to confirm a report of Mr. Registrar RUSSELL, dated May 12, 1954.

On Oct. 30, 1933, an ante-nuptial deed of settlement was made between the husband and the wife and the trustees of the settlement whereby in consideration of the intended marriage a policy of insurance on the husband's life for £11,000 with profits, dated Oct. 16, 1933, was assigned by the husband to the trustees on trust for the benefit of the wife and the children of the marriage. The parties were married on Nov. 1, 1933, and there were two children of the marriage,

C.S.T., born on June 4, 1935, and M.W.H.T., born on Dec. 29, 1939. In March, 1945, a post-nuptial settlement was made by the issue under the Married Women's Property Act, 1882, s. 11, of a policy dated Mar. 26, 1945, on the husband's life assuring the payment of £10,000 without profits on the husband's death, subject to a special provision that the policy was issued under the said Act for the benefit of the wife if she survived the husband, but, if she should die in his lifetime, then for the benefit of the children. Subsequently, another post-nuptial settlement was made by the issue under the said Act of a policy dated Oct. 3, 1945, on the husband's life assuring the payment of £20,000 without profits on the husband's death, subject to a special provision similar to that affecting the policy dated Mar. 26, 1945. On Apr. 1, 1953, the policy dated Oct. 3, 1945, was altered, *inter alia*, by the reduction of the sum assured from £20,000 to £15,468 without profits. On Apr. 2, 1953, the policy dated Mar. 26, 1945, was altered, *inter alia*, by the reduction of the sum assured from £10,000 to £7,733. On July 19, 1945, a post-nuptial declaration of trust was made by the husband and a certain bank whereby, a capital sum of £100,000 having been paid by the husband to the bank, it was declared and agreed that the husband and the bank should hold that sum on trust for the benefit of the wife and children. The wife did not bring any fund into settlement by any ante-nuptial or post-nuptial settlement.

On Nov. 26, 1953, on the husband's petition, a decree nisi dissolving the marriage was pronounced on the ground of the wife's adultery with the co-respondent, and an order was made that the custody of the child, M.W.H.T., be granted to the husband, no order being made in respect of the child, C.S.T., on account of that child's age. The decree was made absolute on Jan. 11, 1954, and on Jan. 21, 1954, the wife married the co-respondent.

By notice dated Mar. 8, 1954, the husband applied to vary (i) the settlement dated Oct. 30, 1933,

"by extinguishing all the rights, powers and interests of the [wife] in, concerning and over the whole of the capital and income of the settled fund, so that with regard to the said settled fund the settlement may in all respects . . . be read as if the wife were dead and had died in the lifetime of the [husband]".

(ii) the policies dated Mar. 26, 1945, and Oct. 3, 1945,

"by deleting in the special provisions thereof the words 'for the benefit of [the wife] if she survives [the husband] but if she should die in his lifetime then'".

(iii) the declaration of trust dated July 19, 1945, by extinguishing all the interest of the wife so that

"the declaration of trust may in all respects be read as if the [wife] were dead and had died in the lifetime of the two children";

and, *inter alia*, that, in respect of the child, M.W.H.T., the income and accumulation which would enure to the benefit of that child should be dealt with by the trustees, as to a sum of £800 a year for his maintenance and education, and as to a further £800 for the purchase of an endowment policy, and that in respect of the child, C.S.T., a sum of £800 should be used for the maintenance and education of that child. By the notice the husband also asked that the costs of the application be paid by the co-respondent. The wife did not oppose the variations sought, but the co-respondent objected to paying the costs incurred on behalf of the children. By his report dated May 12, 1954, the registrar submitted that all four settlements be varied as asked and that the co-respondent should pay the costs of the husband and the children.

Victor Russell and *H. A. Rose* for the husband.

A. R. Ellis for the wife and the co-respondent.

Loudoun for the children.

DAVIES, J., stated the facts and continued: It is frankly pointed out that one of the objects of this proposed variation is to reduce the amount of tax that would otherwise be payable on the income of the settlement. I have no information before me as to the amount of the husband's income apart from the money comprised in the settlement, but I suppose one may hazard a guess that it is not inconsiderable. The danger that was apprehended was, first, that the substantial sum of money which would otherwise be the income of the two children would, since the fund came from the husband, their father, have to be aggregated with his income for the purposes of income tax and surtax, and, secondly, that if their income is deemed to be their father's income, they would not be able on attaining their majority to claim the amount of the tax paid in respect of what is their share. Obviously, therefore, apart from the fact that they could not claim the amount of tax paid, the tax payable would be at a higher rate than would otherwise apply.

There is no dispute that the proposed re-arrangement is wholly beneficial to the two children, but my attention had been called to *Chapman v. Chapman* (1), where it was decided that the Chancery Division had no inherent jurisdiction to interfere with and modify trusts for the purpose of reducing the incidence of estate duty. That case was cited to the learned registrar, and he has set out in his report his reasons for coming to the conclusion that s. 25 of the Matrimonial Causes Act, 1950, does expressly give to this Division the power of altering and interfering with the trusts of a settlement, a power which the House of Lords decided does not exist in the Chancery Division.

I fully agree with and adopt everything that the learned registrar said. The House of Lords decided that the Chancery Division has no inherent power to alter the trusts of a settlement, but this Division, by s. 25 of the Matrimonial Causes Act, 1950, has the express power to do so. That section provides as follows:

"The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit . . ."

The only passages in the speeches in the House of Lords to which, I think, it is necessary to call attention in order to point the difference which, in my view, plainly exists between the powers of the Chancery Division and of this Division, are as follow. LORD SIMONDS, L.C., said ([1954] 1 All E.R. 802), speaking of the Chancery Division:

"It is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt, and, if they do wrong, to penalise them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary. It was, I thought, significant that learned counsel was driven to the admission that, since the benefit of the infant was the test, the court had the power, though in its discretion it might not use it, to override the wishes of a living and expostulating settlor, if it assumed to know better than he what was beneficial for the infant."

But it is common knowledge that this court does exercise the power of overriding the wishes of a living and expostulating settlor if it thinks fit to do so. There is no doubt about that. It constantly happens. LORD MORTON OF HENRYTON propounded the first question which their Lordships had to consider in these words (*ibid.*, 806):

"My Lords, the first question which arises is solely one of jurisdiction, and may be stated thus: Had HARMAN, J., jurisdiction to destroy the trusts contained in cl. 3 of the 1944 settlement and the similar trusts created

by cl. 4 of the 1950 settlement if he came to the conclusion that the elimination of these trusts would result in benefit to the infant beneficiaries and to any after-born beneficiaries ? ”

LORD MORTON answered that question by saying: “ No ” with relation to the Chancery Division. It seems to me the answer to that question with relation to this Division must plainly be: “ Yes, in view of s. 25 of the Act of 1950.”

A Therefore, for these and the other reasons so clearly stated by the learned registrar, I have come to the conclusion that this court has the power, in contradistinction to the Chancery Division, which it is asked to exercise in the present case.

There is one other question. Is this court to hesitate to exercise the power by reason of the fact that one of the results of the exercise of the power will be a reduction in the amount of tax which would otherwise be payable to the Crown, consequent on treating the wife as having died ? It seems to me that it would be absolutely wrong that this court, if it has the power to re-settle these funds, should be deterred from exercising that power on some ground of public policy of this kind. The proposed variation will preserve for the benefit of the beneficiaries some of the funds which would otherwise be paid away in tax. I cannot

C see that the express power given to the court by s. 25 ought to be abandoned for that consideration. Therefore, I think the registrar's report on that part of the case ought to be confirmed.

On the question of costs, counsel for the co-respondent says that it is unfair that his client should have to pay the costs of this variation. Here is a large sum of money, he says, and the variation of the settlement is entirely for the benefit of the children, and will result to some extent in avoidance of taxation. I can see no reason for distinguishing this from any other case. Consequently, I confirm the registrar's report in every respect.

Order accordingly.

Solicitors: *Lewis & Lewis and Gisborne & Co.*, agents for *Hepworth & Chadwick*, Leeds (for the husband); *Ellis, Peirs & Co.* (for the wife and the co-respondent); *Lewis & Lewis and Gisborne & Co.* (for the children).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

CAMILLE AND HENRY DREYFUS FOUNDATION, INC. v.
INLAND REVENUE COMMISSIONERS.

COURT OF APPEAL (SIR Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.),
May 10, 11, 12, 13, June 3, 1954.]

Income Tax—Charity—Charity established abroad—Activities exclusively abroad
Tax on income arising in United Kingdom—Liability—Income Tax Act,
1918 (c. 40), s. 37 (b).

An institution established and carrying on the whole of its activities in a foreign country cannot be a "body of persons . . . established for charitable purposes only" within the meaning of s. 37 (b) of the Income Tax Act, 1918, which means bodies of persons subject to the jurisdiction of the courts of the United Kingdom, and, therefore, such an institution is not exempt from income tax in respect of royalties paid to it by a company resident in this country.

Decision of LAWRENCE, J., in *Inland Revenue Comrs. v. Gull* ([1937] 4 All E.R. 290), approved on different grounds.

Statute—Construction—Effect of subsequent enactment in pari materia with, but not amending, statute to be construed—Resolution of ambiguity.

Adoption of the construction of a statute by Parliament in subsequent enactments in *pari materia*, but not amending the statute in question, does not import an addition to or modification of the statute, but it can be looked at as a legislative interpretation to resolve any ambiguity in it.

Cape Brandy Syndicate v. Inland Revenue Comrs. ([1921] 2 K.B. 403), *Ormond Investment Co. v. Betts* ([1928] A.C. 143), and *Inland Revenue Comrs. v. Dowlall, O'Mahoney & Co., Ltd.* ([1952] 1 All E.R. 531), applied.

Reasoning of LAWRENCE, J., in *Inland Revenue Comrs. v. Gull* (*supra*), disapproved.

Foreign Law—Evidence of Foreign statute—Expert evidence—Meaning of common English words.

Under the Membership Corporation Law of New York State the purposes of a membership corporation were required to be of a "kindred or incidental nature", and if the main purpose was followed by later purposes not of a kindred or incidental nature those other purposes were to be rejected as entirely ineffective. The main purpose of such a corporation was "to advance the science of chemistry, chemical engineering and related sciences as a means of improving human relations and circumstances throughout the world", and a later purpose was "to promote any other scientific educational or charitable purposes." In an appeal against the refusal of its exemption from income tax in which the Crown contended that the later purpose was not charitable,

HELD: in arriving at their decision that the corporation was established for charitable purposes only on the ground that the later purpose was not of a kindred and incidental nature to the first and so was wholly ineffective, the Special Commissioners of Income Tax were entitled to hear the evidence of New York lawyers on the question whether the later purpose would be held to be kindred and incidental to the main purpose under New York law, since that was evidence as to the effect of foreign law and not merely as to the meaning of two common English words.

AS TO THE EXEMPTION OF CHARITIES UNDER SCHED. D TO THE INCOME TAX ACT, 1918, and s. 37 (b), see HALSBURY, Halsham Edn., Vol. 17, p. 315, para. 622; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.

AS TO EVIDENCE OF EXPERTS ON FOREIGN LAW AND THE CONSTRUCTION OF TERMS, see HALSBURY, Halsham Edn., Vol. 13, pp. 601-603, 613-616, paras. 669, 670, 685, 686; and FOR CASES, see DIGEST, Replacement Vol. 22, pp. 503, 613-615, Nos. 5571, 7067-7098.

FOR THE INCOME TAX ACT, 1918, s. 37 (b), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 31.

Cases referred to:

- (1) *Inland Revenue Comrs. v. Gull*, [1937] 4 All E.R. 290; 21 Tax Cas. 374; Digest Supp.
- (2) *Jefferys v. Boosey*, (1854), 4 H.L. Cas. 815; 24 L.J.Ex. 81; 23 L.T.O.S. 275; 10 E.R. 681; 42 Digest 618, 176.
- (3) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53; 42 Digest 649, 563.
- (4) *Re Robinson*, [1931] 2 Ch. 122; 100 L.J.Ch. 321; 145 L.T. 254; Digest Supp.
- (5) *Ormond Investment Co. v. Betts*, [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400; Digest Supp.
- (6) *Inland Revenue Comrs. v. Dordall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401; 33 Tax Cas. 259; 3rd Digest Supp.
- (7) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; 42 Digest 666, 765.
- (8) *A.-G. v. Clarkson*, [1900] 1 Q.B. 156; 69 L.J.Q.B. 81; 81 L.T. 617; 42 Digest 665, 751.
- (9) *Dore v. Gray*, (1788), 25 Term Rep. 358; 100 E.R. 193; 42 Digest 773, 2009.
- (10) *Shrewsbury (Earl) v. Scott*, (1859), 6 C.B.N.S. 1; 29 L.J.C.P. 34; 33 L.T.O.S. 368; 141 E.R. 350; *affd.* Ex.Ch., (1860), 6 C.B.N.S. 221; 29 L.J.C.P. 190; 141 E.R. 437; 42 Digest 774, 2024.
- (11) *Re Direct West End & Croydon Ry. Co. Ex p. Lloyd*, (1851), 1 Sim. N.S. 248; 61 E.R. 96; 42 Digest 611, 113.
- (12) *A.-G. v. Wood*, [1897] 2 Q.B. 102; 66 L.J.Q.B. 522; 76 L.T. 654; 21 Digest 14, 68.
- (13) *British Museum v. White*, (1826), 2 Sim. & St. 594; 4 L.J.O.S.Ch. 206; 57 E.R. 473; 8 Digest 257, 187.
- (14) *Penang & General Investment Trust, Ltd. v. Inland Revenue Comrs.*, [1943] 1 All E.R. 514; [1943] A.C. 486; 112 L.J.K.B. 356; 169 L.T. 93; 25 Tax Cas. 219; 2nd Digest Supp.
- (15) *Inland Revenue Comrs. v. Yorkshire Agricultural Society*, [1928] 1 K.B. 611; 97 L.J.K.B. 100; 138 L.T. 192; 13 Tax Cas. 58; Digest Supp.
- (16) *Wallace v. A.-G.*, *Jones v. Shadwell*, (1865), 1 Ch. App. 1; 35 L.J.Ch. 124; 13 L.T. 480; 21 Digest 63, 413.
- (17) *Colquhoun v. Haddon*, (1890), 25 Q.B.D. 129; 59 L.J.Q.B. 465; 62 L.T. 853; 2 Tax Cas. 621; 42 Digest 687, 1007.

APPEAL by the taxpayers, Camille and Henry Dreyfus Foundation, incorporated under the laws of the State of New York, and carrying on all its activities in the United States, from an order of WYNN-PARRY, J., dated Feb. 18, 1954, dismissing an appeal by Case Stated from a decision of the Special Commissioners of Income Tax that the foundation was not exempt, under s. 37 (b) of the Income Tax Act, 1918, from tax on royalties paid to it by a company resident in the United Kingdom.

The foundation appealed to the Special Commissioners against the refusal of the Commissioners of Inland Revenue to admit a claim to exemption from income tax for 1946-47 to 1950-51 inclusive under s. 37 (b) of the Income Tax Act, 1918, and s. 19 (1) of the Finance Act, 1925. The claim was refused by the Commissioners of Inland Revenue on the ground that: (i) the foundation was not established in the United Kingdom, and, accordingly, did not come within s. 37 of the Income Tax Act, 1918, and (ii) the foundation was not established for charitable purposes only within s. 37 (b). The foundation contended that, being a body of persons established for charitable purposes only, it was entitled to exemption from tax under s. 37 (b) of the Income Tax Act, 1918, notwithstanding

that it was established outside the United Kingdom. The Crown contended that (i), on the authority of *Inland Revenue Comrs. v. Gull* (1), it was precluded from exemption under that enactment because it was not a body of persons established in the United Kingdom; (ii) if it was not so precluded, it was not a body established for charitable purposes only within the meaning of the section. The Special Commissioners held on the first point that they were bound by the words of LAWRENCE, J., in *Inland Revenue Comrs. v. Gull* (1) ([1937] 4 All E.R. 293) ("... I feel constrained to hold that the exemption applies only to the income of bodies of persons or trusts established in the United Kingdom"), which they considered an essential part of the ratio decidendi of the case and not obiter dicta, and they dismissed the appeal. They held further, however, that, if they were wrong as regards the first point, the foundation was a body of persons established for charitable purposes only. WYNN-PARRY, J., upheld the decision of the commissioners on the first point and expressed no opinion on the second point.

Heyworth Talbot, Q.C., and Shelbourne for the foundation.

Borneman, Q.C., J. H. Stamp and Sir Reginald Hills for the Crown.

Cur. adv. vult.

June 3. The following judgments were read.

SIR RAYMOND EVERSHERD, M.R.: In this case the Camille and Henry Dreyfus Foundation, Inc., a corporation which, as its name indicates, is a foreign corporation, constituted according to the laws of the State of New York, and to which I will hereafter refer as "the foundation", has appealed against the refusal of the Commissioners of Inland Revenue to admit a claim on its part to exemption from income tax for the tax years 1946-47 to 1950-51 inclusive. In respect of each of those years the foundation was in receipt of large sums (the gross amount of which is over a quarter of a million pounds) being payments by way of royalties from an English company, British Celanese, Ltd. It is not in dispute that tax is properly payable by the foundation in respect of these sums unless relief therefrom is obtainable under s. 37 of the Income Tax Act, 1918. It is and has been the case of the foundation, however, that it is entitled to exemption on the ground that the sums in question form part of the income of a "body of persons . . . established for charitable purposes only" within the terms of s. 37 (b) of the Act, the income in question having in fact been applied exclusively for such purpose.

It has been conceded on the part of the foundation that by the phrase "for charitable purposes" is meant purposes which are by the law of the United Kingdom understood to be, or defined as being, charitable, i.e., within the scope and intendment of the preamble to the statute of Eliz. I; but it has been the foundation's case that, though "established" by the laws of New York State (i.e., constituted as a membership corporation according to New York law) and though carrying on all its activities in that State or in the United States of America, nevertheless the character of its activities, having regard to the terms (as interpreted according to the evidence of New York lawyers) of its certificate of incorporation, is such as to qualify them as charitable under our law. On this point the finding of the Special Commissioners was favourable to the foundation; and in the circumstances WYNN-PARRY, J., expressed no view on it. But the Special Commissioners also held that, in order to obtain the privilege of exemption under s. 37 of the Act, the "body of persons" claiming such privilege must be one "established" under and in accordance with the laws of the United Kingdom; in other words, the foundation, being a foreign corporation not subject to the jurisdiction of our courts, is ipso facto debarred from the benefits of s. 37. On this matter WYNN-PARRY, J., upheld the decision of the Special Commissioners, regarding himself as bound by the decision and reasoning of LAWRENCE, J., in *Inland Revenue Comrs. v. Gull* (1), referred to by the Special Commissioners in their Case Stated. In the cited

case, LAWRENCE, J., after indicating that he would himself have been disposed to construe the words any "body of persons . . . established" as comprehending a body established in fact, for the requisite purposes, in any part of the world, "felt constrained" by certain later Acts of Parliament, clearly proceeding on the basis of the more limited interpretation, to hold that the bodies of persons indicated in s. 37 were bodies established under and in accordance with our laws.

A As the matter is *res integra* in this court, it will be necessary for me at a later stage to express my opinion on the view taken by LAWRENCE, J., as it will also be desirable, having regard to the argument we have heard, for me to express my view on the validity of the finding of the Special Commissioners in the foundation's favour that its objects are exclusively charitable as understood by our law.

B The first question, being, as I have said, *res integra* in this court, is plainly a matter of the interpretation of the few relevant words in s. 37, and may, therefore, be said to fall within a small compass. We heard from both sides considerable argument on general considerations addressed to what was called the proper approach to the essential matter of construction. Thus, on the part of the foundation, we were reminded of the need in taxing statutes—indeed, C in all statutes—to interpret the words according to their ordinary sense and to avoid reading into the language used other words not clearly required by the context itself. It was also urged on us, as a matter of principle, fairness and sense, that, if (as in the present case) a non-resident was made liable to suffer tax on income arising in this country no less than a resident, then the non-resident like the resident should be entitled to the benefit of any relevant exemption. On the part of the Crown it was submitted that, since all taxation D was raised by Parliament for employment for the benefit of the kingdom, so the logic of exemption was *prima facie* to be found in the Parliamentary view that the income exempted would be used or applied in a manner so beneficial to the community as to outweigh the claim to tax it—a consideration which could have no place where the income belonged to a non-resident and was E used by him outside the United Kingdom. Counsel for the Crown also cited a number of cases, beginning with *Jefferys v. Boosey* (2), in support of the general proposition that, when Parliament imposes obligations or confers privileges on any classes of persons specified in its enactments, it must be taken *prima facie* to be confining its purpose to persons or bodies of persons resident in, or subject F to the jurisdiction of the courts of, the United Kingdom. The proposition, as such, is, no doubt, incontrovertible. But I cannot think that it plays a useful part in the solution of the present problem. The term "body of persons" is defined thus in s. 237 of the Act:

" 'Body of persons' means any body politic, corporate, or collegiate, and any company, fraternity, fellowship and society of persons, whether G corporate or not corporate."

The words in the definition are of very wide import. But even if, by application of the general principle above cited, they might otherwise *prima facie* have been confined to bodies of persons within the United Kingdom or subject to the jurisdiction of its courts, it is quite clear that they are in fact used (and appropriately used) in certain parts of the Act to comprehend foreign or wholly H non-resident bodies—see, for example, r. 1 of the All Schedules Rules when read together with para. 1 (a) (iii) of sched. D.

In these circumstances it does not appear to me that any *a priori* inference can be relied on in favour of limiting the term "bodies of persons" in s. 37. I have not, indeed, for my part, found any of the more general arguments to which I have alluded of material significance one way or the other in the present case. The answer to the problem posed must, in my judgment, depend on the true interpretation, according to ordinary principles, of the relevant phrase—

and, as I think, of the essential word therein "established"—in the context in which it is found in s. 37.

The section itself is the first of a group which follows the cross-heading "Relief to charities, friendly societies, etc.". It is s. 37 which picks up the word "charities" and I will return to it presently. Section 38 is concerned with the British Museum. Friendly societies form a part of the subject-matter of s. 39 and it is not in doubt that by friendly societies is meant societies constituted and regulated by, and subject to, our own laws. So, in the succeeding parts of s. 39 the bodies or corporations, anticipated by the word "etc." in the cross-heading, are also bodies or corporations constituted and regulated by, and subject to, the laws of the United Kingdom. The final section, s. 40, deals with penalties and is applicable to all the preceding sections in the group, including s. 37. The final sub-section, sub-s. (4), may be quoted in full:

"A person who makes a false or fraudulent claim for exemption under the said sections in respect of any interest, annuities, dividends or shares of annuities charged or chargeable under sched. C shall forfeit the sum of £100, and if such claim is made by any person in his own behalf he shall in addition be liable to be charged in treble the tax so chargeable."

As was observed during the argument, this sub-section with its penalty of treble tax would be, to say the least, administratively difficult, if not inappropriate, in the case of a non-resident. If, then, the "bodies of persons" referred to in s. 37 (b) include foreign or non-resident bodies, it must be conceded at least that they are in that respect alone of all the bodies and associations referred to in the group of sections.

I turn, then, next to the word "charities", which in the cross-heading must be taken to introduce them. And by "charities" must, I take it, be meant "charitable institutions". Now, to my mind, the words "charities" or "charitable institutions" in an ordinary context in an English Act of Parliament or any English document must (*prima facie* at least) mean institutions regulated by, and subject to the jurisdiction of, the laws or the courts of the United Kingdom and constituted for the carrying out of objects or purposes which, in the courts of the United Kingdom and nowhere else, would be held to be charitable. In my judgment, the two aspects or characteristics are almost inseparable. The law relating to charities or charitable trusts is a peculiar and highly complex part of our legal system. An Act of Parliament which uses the words "charity" or "charitable" must be intending to refer to that special and characteristic, if not in some respects artificial, part of our law.

Counsel for the foundation was not, I think, disposed to dissent from what I have so far said, and he agreed that the charitable purposes for which exclusively the "bodies of persons" must be "established" are purposes which would be "charitable" according to our law. But, none the less, he contended, there was nothing in the material language of s. 37 sufficient to justify any local limitation of the "bodies of persons" named. The result, in my judgment, would be at least awkward and artificial. There is contemplated, according to the argument, a "body of persons" established, i.e., constituted, according to the law of, say, the State of New York or of France or of any other country in the world, whose objects and the extent of whose powers would, therefore, depend on or be regulated by, and would have to be defined and interpreted by, the laws of that country. Yet those powers and objects, so regulated and interpreted, must find their place somehow within the scope and meaning of the Elizabethan preamble as expounded by the decisions of our courts. Counsel for the foundation says that the difficulty of the conception is, at most, administrative—the onus is on the foreign claimant for relief, and, unless he proves his case, he fails to obtain it. I will leave aside the administrative difficulty, great though I think it is and further enhanced by the condition at the end of the paragraph

“so far as the same are applied to charitable purposes only”,

meaning the sums liable to be taxed. In my judgment, it is in the conception itself—the conception of a corporation regulated according to the laws of a foreign country and carrying on the whole of its activities in that country and yet being able to show by reference to the standard of the Elizabethan preamble and to the decisions of our courts thereunder that it is “established for charitable purposes only”—that I find what appears to me to be an inherent incompatibility.

- A
- B “public”, what “community”, is contemplated? I confess I should have thought at first sight that the answer was the public, the community, of the United Kingdom. It is also a significant characteristic of our system that to the Attorney-General representing the Crown, as *parens patriae*, belongs the right and duty of invoking the powers of the courts to secure the due execution of charitable trusts—a power and duty which postulate that the charitable
- C institution itself should be subject to the jurisdiction of our courts. It is difficult to see how these principles or characteristics can have any application to a foreign institution conducting all its activities abroad. I cannot, however, find that the meaning and scope of the requirement of a “benefit to the community” has ever been judicially considered from this point of view. On the contrary, there are, undoubtedly, instances of trusts being held or regarded
- D as charitable which were exclusively for the benefit of objects outside the United Kingdom. *Income Tax Special Purposes Comrs. v. Pemsel* (3) is, indeed, one of them. It may be that, on very broad and general grounds, relief of poverty or distress in any part of the world, or the advancement of the Christian religion in any part of the world, would be regarded as being for the benefit of the community in the United Kingdom. I see formidable difficulties, however,
- E where the objects of the trust were, say, the setting out of soldiers or the repair of bridges or causeways in a foreign country. To such cases the argument of public policy (meaning United Kingdom public policy) might be the answer. A somewhat extreme case was that of *Re Robinson* (4), where MAUGHAM, J., after considering a number of authorities, appears clearly to have regarded a gift by a testator of his residue to the government of the German Reich for
- F the purpose of relieving German soldiers disabled in the first world war as a good charitable trust.

- But, though there are cases in the books in which the application of a fund for objects wholly outside the United Kingdom and the jurisdiction of its courts have been held to be valid charitable trusts, still, I think the question here is a rather different one. I have not yet considered the particular context of s. 37
- G of the Income Tax Act, 1918. I am considering what, as a matter of ordinary language and common sense, is intended (in the absence of a special context) by the phrase, in an English Act of Parliament or other document, “body of persons established for charitable purposes only”. In my judgment, applying the test I have formulated, once it is conceded that “for charitable purposes only” means “for purposes which are what the laws of the United Kingdom
- H define as charitable and hold to fall within the special and somewhat artificial significance of that word”, then it seems to me *prima facie* that a body cannot be “established” for such purposes unless it is so constituted or regulated as to be subject to the jurisdiction of the courts which can alone define and regulate those purposes. In my judgment, that view of the *prima facie* significance of the words is not affected by the existence of cases like *Re Robinson* (4). I could better understand it if, in order to qualify under the section, it was sufficient for a body of persons “established” according to the laws of country X to

show that it was so established exclusively for purposes which, by the law of country X, were "charitable". But that view is impossible for (as it is conceded) the word "charitable" is a term of art, significant only according to our laws, and it has not been suggested that it could be somehow applied by analogy in country X.

I come at last (as I should, perhaps, at first) to the context of the section itself and particularly to the use of the word "any" before "body of persons" on which the foundation has strongly relied. I set out the section in full:

"37. Exemption shall be granted—(a) from tax under sched. A in respect of the rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes only: Provided that any assessment upon the respective properties shall not be vacated or altered, but shall be in force and levied, notwithstanding the allowance of any such exemption: (b) from tax under sched. C in respect of any interest, annuities, dividends, or shares of annuities, and from tax under sched. D, in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only; (c) from tax under sched. C in respect of any interest, annuities, dividends or shares of annuities, in the names of trustees applicable solely towards the repairs of any cathedral, college, church or chapel, or any building used solely for the purpose of divine worship, and so far as the same are applied to those purposes."

In my judgment, the context of s. 37, so far from assisting or requiring that the relevant formula in para. (b) should be interpreted in accordance with the argument of counsel for the foundation, supports and emphasises the local limitation which, for reasons which I have already given, to my mind *prima facie* attaches to the words. It was conceded (as I understood) that since the lands, tenements, etc., mentioned in para. (a) were necessarily lands, tenements, etc., within the United Kingdom, so the words "any hospital, public school or almshouse" must have the same local limitation. And it was also conceded that by the words "any cathedral, college, church or chapel" and the general words which follow in para. (c) must have been meant any cathedral, college, etc., within the confines of the United Kingdom. It follows, then, that the wide meaning sought to be attributed to the relevant words in para. (b) must be justified by the words themselves, which the context is insufficient or inapt to restrict. But it is to be noted, first, that the vital phrase adds to the words "body of persons" the words "or trust". And the word "trust" is a word peculiarly referable to our own system of law. It is true that to other countries, which have adopted our own legal system and essential characteristics, the word "trust" would have a precise and certain significance. But if the foundation's argument is sound, the formula in question should have a universal application so that the term "body of persons or trust" would be intelligible in reference to countries other than those which have embraced our legal conceptions. Still more significant, to my mind, is the circumstance that the formula

"any body of persons or trust established for charitable purposes only" is followed by the alternative

"or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only".

It is, in my judgment, reasonably clear that the alternative was added in order

to cover those cases in which only a part of the income is, by virtue of the Act of Parliament or other instrument named, applicable to charitable purposes, in contradistinction to those bodies of persons or trusts which are exclusively established for such purposes. In my view, however, the alternatives are true alternatives; that is to say, the distinction is between institutions, in other respects alike, whose income is either wholly applicable to the purposes named, on the one hand, or, on the other hand, is so applicable as to the relevant part only. And since, in my judgment, it cannot be in doubt that by "Act of Parliament" is meant an Act of the United Kingdom Parliament, so it follows, in my view, that by "charter, decree, deed of trust, or will" is meant an instrument of the kind specified subject to, and taking effect according to, the laws of the United Kingdom. The alternative formula, therefore, must be regarded as wholly limited by reference to our local law. And if this is so, then, as it seems to me, the earlier phrase "any body of persons or trust established, etc." must be regarded as equally so limited.

In my judgment, therefore, the bodies of persons mentioned in the paragraph cannot comprehend foreign institutions such as the foundation. I have earlier stated my view that the essential word is "established". In my judgment, whatever might be the true significance of the four words "any body of persons" taken in isolation, those words in the context of para. (b) of s. 37 of the Act of 1918, and particularly when immediately followed by the words "or trust established for charitable purposes only" must be limited to bodies of persons so constituted and regulated as to be (in reference to the income in question) subject to the jurisdiction of the United Kingdom courts. I think that in the context the word "any" ceases to be able to confer an unlimited significance and becomes in effect no more emphatic than the indefinite article "a". A body such as the foundation, though incorporated under the laws of a foreign country and being, therefore, a foreign corporation, might derive all its income from the United Kingdom and carry on all its activities in the United Kingdom. In such case (though it is not necessary for me to decide the point) the foundation might successfully assert that it was "a body of persons established for charitable purposes only". But on the facts of this case, and since the activities of the foundation are carried out exclusively in America, the foundation fails, in my judgment, to bring itself within the terms of s. 37 of the Act and so fails to make good its claim to the exemption which that section confers.

In *Inland Revenue Comrs. v. Gull* (1) LAWRENCE, J., held that the trust in question, though for the benefit of persons in the province of Ontario, was, nevertheless, "established" in the United Kingdom, and, therefore, within the scope of s. 37 of the Income Tax Act. But that learned judge held—and it follows from what I have said that I think he rightly held—that the privilege of exemption conferred by the section could not be enjoyed by any body of persons established outside the United Kingdom. It does not appear, however, that the case of *Ormond Investment Co. v. Betts* (5) was cited to the learned judge. The speeches of the noble Lords in that case—and the speeches in the later case before the House of *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (6) —must be taken to have established clearly that an expression, explicit or implicit, by Parliament in a later Act of its intention in an earlier statute cannot be treated as altering, ex post facto, the effect of the earlier enactment according to the proper interpretation of the language therein used. To take but one example from these speeches, I cite the language of LORD BUCKMASTER in the earlier case ([1928] A.C. 154):

"I do not think that, in the circumstances of this case, the subsequent statute can properly be referred to for the purpose of interpreting the earlier. It is, of course, certain that Parliament can by statute declare the meaning of previous Acts. It would be competent for them to do so, even though their declaration offended the plain language of the earlier Act. It would be

an unnecessary step to take, unless it were intended, contrary to the general principles of legislation, to make the explanatory Act retrospective, seeing that the subsequent statute could by independent enactment do what was desired. It is also possible that where Acts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual, which is what the courts would desire to do, and it is also possible that, where a statute has created a crime or imposed a penalty, a subsequent Act showing that that crime was intended to have a limited interpretation or the circumstances regarded as narrow in which the penalty attached, would be used for the purpose of giving effect to the well-known principle of construction to which I referred at an earlier stage. But I find myself unable to accept what SARGANT, L.J., said, that the principles in certain cases are applicable to the construction of successive Acts of Parliament."

In so far, therefore, as LAWRENCE, J., expressed the view that the terms of s. 21 of the Finance Act, 1923, s. 32 of the Finance Act, 1924, and s. 21 of the Finance Act, 1925, effectively gave, retrospectively, an interpretation to the material terms of s. 37 of the Income Tax Act, 1918, which those terms would not otherwise bear, his reasoning would be in conflict with the decisions of the House of Lords to which I have referred. If I am right in the view which I have formed of the proper meaning of s. 37 (b) of the Act of 1918, it is unnecessary to pay any regard to the later statutes, and the point does not, therefore, arise. But if I am wrong, then, at least, in my judgment, the construction which I prefer is fairly open as an alternative to that for which counsel for the foundation has contended. And, in that event, it is equally clear, on the authority of the same cases, that the court will tend to adopt the construction which is in conformity with that inherent in the later legislation in *pari materia*—particularly where the later enactments are to be read as one with the original Act. So much clearly appears from the passage I have quoted from LORD BUCKMASTER'S speech in *Ormond v. Betts* (5) ([1928] A.C. 154).

Counsel for the foundation was able to make some criticisms of the drafting of the relevant sections of the later Acts. But their general sense cannot be in question. Section 21 of the Act of 1923 (passed following the establishment of the Irish Free State) was directed, beyond question, to preserving for the limited period stated in the section (which period was extended by the material sections of the later Acts) to "bodies of persons or trusts" established in what had become the Irish Free State the benefit of the exemption conferred by s. 37 of the Act of 1918. I quote the terms of s. 21 of the Act of 1923 in full:

"Subject as hereinafter provided, s. 37 of the Income Tax Act, 1918 (which grants exemption in respect of charities), shall, in the case of rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse in the Irish Free State, or vested in trustees in the Irish Free State for charitable purposes, and in the case of a body of persons or trust established in the Irish Free State for charitable purposes only, and in the case of income which according to rules or regulations established by Act of Parliament, charter, decree, deed of trust or will in the Irish Free State, is applicable to charitable purposes only, or which, in the names of trustees in the Irish Free State, is applicable solely towards the repairs of any cathedral, college, church or chapel, or any building used solely for the purpose of divine worship, apply, as respects income tax chargeable for the year 1923-24, as if the Irish Free State had not been constituted: Provided that this section shall not apply except where the lands, tenements, hereditaments, or heritages belonged to the hospital, public school, or almshouse, or were vested in the trustees, on Apr. 5, 1923,

or the interest, annuities, dividends, shares of annuities, yearly interest or other annual payment arise from investments which were held by the body of persons, trust, or trustees, or were subject to rules or regulations as aforesaid, on Apr. 5, 1923."

A In my judgment, whatever be the defects in drafting, it cannot be open to reasonable doubt that Parliament, in enacting the section cited, proceeded on the view of the interpretation of s. 37 (b) of the Act of 1918 for which the Crown contends. On any other view the new enactment was otiose and futile. I add that, as appears from the terms of s. 37 (1) and s. 38 of the Finance Act, 1950, Parliament has since remained consistently faithful to its interpretation of s. 37 of the Act of 1918.

B Having come to the conclusion, for the reasons I have given, that the appeal fails on the first point raised in the Case Stated, it is not strictly necessary for me to deal with the second, viz., the commissioners' finding that the activities of the foundation were and are "charitable" as that term is understood in English law. But since the matter has been argued, it seems to be desirable that I should express my view on it.

C The facts are fully stated in the Case and may briefly be recapitulated thus. The foundation was incorporated in the year 1946 in and according to the laws of the State of New York (in which State or elsewhere in the United States of America all its activities have always been conducted). It is a "membership corporation" within the meaning of the Membership Corporation Law of that State. By that law a membership corporation is defined (inter alia) as a "corporation not organised for pecuniary profit". By a later section of the same Act the purposes of such a corporation, if more than one, must be of a "kindred or incidental" character. So much is agreed. It is also not in dispute that, if by any part of its constitutional regulations such a corporation seeks to assume powers in excess of those permitted by the Membership Corporation Law, that part will be rejected as entirely ineffective. Similarly, it is agreed that, if some later paragraph of its certificate of incorporation (which corresponds with the memorandum of association of an English limited company) contains a purpose going beyond, or not "kindred or incidental" to, the main purpose earlier stated in the certificate, the later paragraph will be also treated as futile or repugnant and regarded as non-existent.

F In the circumstances, and having regard to the admissions made in argument on the part of the Crown, the sole question for determination is whether the Special Commissioners were entitled to find, as they did, that para. (b) of cl. 2 of the foundation's certificate of incorporation must be rejected as purporting to confer a power in excess of, or not "kindred or incidental" to, the purpose defined in para. (a) of the same clause. Paragraph (a), so far as it is necessary to recite it, is as follows:

G "To advance the science of chemistry, chemical engineering and related sciences as a means of improving human relations and circumstances throughout the world."

H The Crown has conceded throughout the present case, and I, therefore, assume for the purposes of this judgment, that the character of the purpose specified in this paragraph is such as would be held in our courts to be "charitable" by our law. Paragraph (b) of cl. 2 is:

"To promote any other scientific educational or charitable purposes."

The Special Commissioners accepted the evidence of the expert legal witnesses called before them by the foundation (and there was no evidence to the contrary effect called by the Crown) that para. (b), being neither kindred nor incidental to para. (a), had to be wholly rejected, with the result that the foundation's purposes were to be discerned exclusively in para (a).

The question posed, being one of foreign law, is *prima facie* a matter of fact for the final determination of the commissioners. The Crown has, however, concentrated its attack on the following passage in the Case:

"The purposes there stated are not of a nature kindred or incidental to the primary purpose set out in cl. 2 (a). They are accordingly not authorised by s. 10 of the Membership Corporation Law and are void and to be treated as surplusage. The use of the word 'other' negatives the idea that the purposes in cl. 2 (b) are of a nature kindred or incidental to those set out in cl. 2 (a). The 'other scientific . . . purposes' referred to could comprise any branch of science, e.g., medicine or anthropology, quite distinct from and unrelated to 'the science of chemistry, chemical engineering and related sciences'. Moreover, 'other . . . educational or charitable purposes' are in no sense kindred to or incidental to the 'science of chemistry, chemical engineering and related sciences', since they might well comprise purposes which had nothing whatever to do with those sciences."

It was not contended that in this paragraph the commissioners were stating their own reasons for the conclusion at which they arrived. The Crown's argument was that, although the passage cited was an epitome or representation of the evidence given by the two New York lawyers called for the foundation, the evidence went beyond the proper scope and competence of expert testimony, being no more than the opinion of the witnesses on the significance of the two common English words "kindred" and "incidental", which the court was free to reject and ought to reject.

I have been unable to accept this argument. Although it is true that "kindred" and "incidental" are words of ordinary usage in the English language, nevertheless in the context in which they appear in the Membership Corporation Law, they have, or are at least capable of having in some degree, the characteristics of terms of art. I think, therefore, that it would be competent to a New York lawyer to state, as an expert, his opinion on the question how in the circumstances of the present case they would be construed by the superior courts of New York State, and I think that the passage I have cited must be taken to represent such an opinion on the part of the witnesses.

In my judgment, therefore, the commissioners were entitled to accept that view of the effect of the law of New York State and, as a matter of fact, to conclude as they did. I add that in any event the Crown appears, having regard to the concessions made on its behalf, to be on the horns of a dilemma. Either para. (b) is kindred or incidental to para. (a) or it is not. If it is, then the "charitable" quality of the latter paragraph is not qualified or disabled by the former. If it is not, then (as the Crown agrees) para. (b) must be treated as struck out of the certificate. But, for the reasons which I have earlier stated, I think the Crown is entitled to succeed on the first point and that the appeal must be dismissed accordingly.

JENKINS, L.J.: This is an appeal by the Camille and Henry Dreyfus Foundation, Inc. (hereinafter called "the foundation"), a body incorporated in the State of New York in the United States of America as a membership corporation under the Membership Corporation Law of that State, from an order of WYNN-PARRY, J., dated Feb. 18, 1954, dismissing the foundation's appeal by way of Case Stated from a decision of the Special Commissioners to the effect that the foundation is not entitled to the exemption from income tax afforded to certain charitable institutions by s. 37 (b) of the Income Tax Act, 1918, and claimed by the foundation for the years 1946-47 to 1950-51 inclusive. The income in question consisted of certain royalties payable by British Celanese, Ltd., a company resident in the United Kingdom, under certain agreements, the benefit of which was on July 21, 1946, assigned by Dr. Camille Dreyfus to the foundation. This income was liable to income tax under Case III of sched. D, and tax was duly

deducted by British Celanese, Ltd. from the payments from time to time made to the foundation, the gross yearly amounts of which ranged from £51,792 in 1946-47 to £66,373 in 1950-51.

The income in question was by the express terms of the Act chargeable with the tax so deducted notwithstanding that the foundation was a foreign corporation resident abroad, for para. 1 of sched. D provides that:

- A "Tax under this schedule shall be charged in respect of— (a) The annual profits or gains arising or accruing . . . (iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom . . ."

That the foundation is for this purpose a "person" appears from r. 1 of the All Schedules Rules, which provides that:

- B "Every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of this Act",

and from the definition of the expression "body of persons" in s. 237 of the Act as

- C ". . . any body politic, corporate, or collegiate, and any company, fraternity, fellowship and society of persons, whether corporate or not corporate".

- D The foundation, however, contends that being a "body of persons" within the meaning of the Act for the purposes of liability to tax under Case III of sched. D., notwithstanding its foreign incorporation and residence, it should also be held to be a body of persons within the meaning of the Act for the purposes of the exemption from such tax afforded by s. 37 (b) of the Act, the further qualifications for exemption prescribed by the sub-section, to the effect that it should be "established", and established "for charitable purposes only", being satisfied as to the first by its incorporation in the State of New York and as to the second by the purposes of its formation as defined by its certificate of incorporation, which are claimed to be "charitable purposes only" within the meaning of the sub-section.

- E I should next refer to the terms of s. 37. The directly material provisions are those contained in para. (b), but in view of the course taken by the argument I had better read it in full.

- F "37. Exemption shall be granted— (a) from tax under sched. A in respect of the rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes only: Provided that any assessment upon the respective properties shall not be vacated or altered, but shall be in force and levied, notwithstanding the allowance of any such exemption: (b) from tax under sched. C in respect of any interest, annuities, dividends, or shares of annuities, and from tax under sched. D in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only: (c) from tax under sched. C in respect of any interest, annuities, dividends or shares of annuities, in the names of trustees applicable solely towards the repairs of any cathedral, college, church or chapel, or any building used solely for the purpose of divine worship, and so far as the same are applied to those purposes."

- H For reasons which will presently appear, I should add that s. 38 affords to the trustees of the British Museum the like exemptions "as are granted to charitable institutions under this Act", while s. 39 affords exemptions from tax to friendly societies, trade unions, savings banks, etc.

The objects of the foundation are set out in its certificate of incorporation, the material provisions of which are the following:

- "1. The name of the corporation is the Dreyfus Foundation, Inc.
2. The purposes for which it is formed are: (a). To advance the science of chemistry, chemical engineering and related sciences as a means of improving human relations and circumstances throughout the world: (1) by providing funds or services to and for individuals without regard to race, sex, creed, color or age, who have excelled or shown promising ability in such fields of science and who would benefit by such assistance in pursuing further their studies or research in such fields of science; (2) by providing funds or services to or for organisations which afford facilities for the production, collection or dissemination of beneficial information and the control of potentially harmful information relating to such fields of science; and (3) by engaging in any and all forms of activity which will employ the science of chemistry, chemical engineering and related sciences to serve or accomplish the purposes of the foundation, including the creation and maintenance of laboratories, research bureaus or agencies and facilities for the exchange, publication, distribution, coordination and control of scientific information; and (b). To promote any other scientific, educational or charitable purposes."

After setting out in para. 2 (c) the various incidental powers as regards the holding of property and so forth which need not be stated in detail, the document proceeds as follows:

- "3. No part of the net income of the corporation shall inure to the benefit of any private member or individual, and no member, director, officer or employee of the corporation shall receive or be lawfully entitled to receive any pecuniary profit of any kind therefrom, except reasonable compensation for services in effecting one or more of its purposes.
4. The territory in which the operations of the corporation are principally to be conducted is the United States of America, its possessions and dependencies, but the operations of the corporation shall not be limited to such territory.
5. The city in which its principal office is to be located is the city of New York, county and State of New York."

According to the evidence of two New York lawyers given before and accepted by the Special Commissioners, para. 2 (b) of the certificate of incorporation is under the relevant law of the State of New York void and of no effect, but this does not detract from the validity of the remaining provisions of the certificate which are to be construed as though the certificate had never contained the offending para. 2 (b). There was some argument as to the adequacy and admissibility of this evidence, to which I will presently return.

The foundation has at all material times been resident outside the United Kingdom, that is to say, in the State of New York, and while under para. 4 of the certificate its operations, though principally to be conducted in the United States of America, are not limited to that territory, it has never in fact conducted any of its operations in the United Kingdom.

Pursuant to the provisions of s. 19 (1) of the Finance Act, 1925, the foundation applied to the Commissioners of Inland Revenue for exemption from tax under s. 37 (b) of the Act of 1918. The claim was refused by the Inland Revenue Commissioners, their reasons for such refusal being: (a) that the foundation was not established in the United Kingdom and, accordingly, did not come within s. 37; and (b) that the foundation was not established for charitable purposes only within the meaning of s. 37. The foundation thereupon appealed to the Special Commissioners under the provisions of s. 19 (2) and (3) of the Act of 1925. The Special Commissioners likewise rejected the claim, expressing their decision thus:

- "1. There are two points which require determination, viz. (a) whether

A the foundation not being a body of persons established in the United Kingdom is thereby precluded from relief under s. 37: and (b) if the foundation is not so precluded, whether it is a body of persons established for charitable purposes only. 2. As regards the first point, after a careful review of the arguments addressed to us we have come to the conclusion that we are bound by the words of LAWRENCE, J., in *Inland Revenue Comrs. v. Gull* (1) ([1937] 4 All E.R. 293), viz. ‘ . . . I feel constrained to hold that the exemption applies only to the income of bodies of persons or trusts established in the United Kingdom ’. These words seem to us an essential part of the ratio decidendi of that case and not obiter dicta as was argued on behalf of the foundation. We therefore dismiss the appeal. 3. If we are wrong as regards the first point, we think that the foundation is a body of persons established for charitable purposes only.”

B At the request of the foundation the Special Commissioners stated a Case for the opinion of the High Court on the following questions of law:

C “ (a) whether the foundation not being a body of persons established in the United Kingdom is thereby precluded from exemption from tax under the provisions of s. 37, Income Tax Act, 1918; and (b) if the foundation is not so precluded, whether on the evidence set out in this Case it is a body of persons established for charitable purposes only within the meaning of the said s. 37.”

D The case came before WYNN-PARRY, J., who dismissed the appeal, holding that he should treat himself as bound to do so by the judgment of LAWRENCE, J., in the case referred to by the Special Commissioners of *Inland Revenue Comrs. v. Gull* (1). In that case LAWRENCE, J., against his own inclination felt himself ([1937] 4 All E.R. 293) “ constrained ” by the effect of the later enactments hereinafter mentioned “ to hold that the exemption ”, i.e., the exemption afforded by s. 37

E “ . . . applies only to the income of bodies of persons or trusts established in the United Kingdom ”,

F and, although he was able to decide in favour of the taxpayer on the ground that the trust there in question was in fact established in the United Kingdom, so that it was arguable that the views he expressed as to the scope of s. 37 were obiter inasmuch as they did not provide the basis of his actual decision, it is, as WYNN-PARRY, J., pointed out, clear from the report that the matter was fully argued before him on lines closely resembling those followed by the arguments used in the present case.

G The consideration which LAWRENCE, J., regarded as constraining him to construe s. 37 as he did was the legislative interpretation placed on s. 37 by s. 21 of the Finance Act, 1923, which provided for the exemption of charities in the Irish Free State in respect of income tax for the year 1923-4, and by s. 32 of the Finance Act, 1924, and s. 21 of the Finance Act, 1925, which respectively provided for a like exemption for the years 1924-5 and 1925-6, 1926-7 and 1927-8, and finally by the Finance Act, 1926, s. 23, and Part II of sched. II to that Act which provided under para. 3 of the latter that:

“ Section 21 of the Finance Act, 1925, which grants an exemption for charities in the Irish Free State, shall cease to have effect ”.

H To appreciate the force of this consideration it is necessary to read at length s. 21 of the Finance Act, 1923, which is in these terms:

“ Subject as hereinafter provided, s. 37 of the Income Tax Act, 1918 (which grants exemption in respect of charities), shall, in the case of rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse in the Irish Free State, or vested in trustees in the Irish Free State for charitable purposes, and in the case of

a body of persons or trust established in the Irish Free State for charitable purposes only, and in the case of income which according to rules or regulations established by Act of Parliament, charter, decree, deed of trust or will in the Irish Free State, is applicable to charitable purposes only, or which, in the names of trustees in the Irish Free State, is applicable solely towards the repairs of any cathedral, college, church or chapel, or any building used solely for the purpose of divine worship, apply, as respects income tax chargeable for the year 1923-24, as if the Irish Free State had not been constituted: Provided that this section shall not apply except where the lands, tenements, hereditaments or heritages belonged to the hospital, public school, or almshouse, or were vested in the trustees, on Apr. 5, 1923, or the interest, annuities, dividends, shares of annuities, yearly interest or other annual payment arise from investments which were held by the body of persons, trust, or trustees, or were subject to rules or regulations as aforesaid, on Apr. 5, 1923."

It is clear that, for the purposes of this section and the subsequent legislation on the same topic, it was assumed that the exemption afforded by s. 37 to bodies of persons or trusts established for charitable purposes only was limited to bodies of persons or trusts established in the United Kingdom, and that the secession of the Irish Free State from the United Kingdom would consequently have the effect of depriving bodies of persons or trusts established in the Irish Free State of the exemption in the absence of legislation continuing it in their favour. We were referred to a number of authorities regarding the effect (if any) on the construction of a given enactment of assumptions as to its meaning expressly or impliedly made in later legislation not amounting to an amendment of the earlier enactment. In *Ormond Investment Co. v. Betts* (5) LORD BUCKMASTER cited with approval ([1928] A.C. 156) the following passage from the speech of LORD STERNDALÉ, M.R., in *Cape Brandy Syndicate v. Inland Revenue Comrs.* (7) ([1921] 2 K.B. 414):

"I think it is clearly established in *A.-G. v. Clarkson* (8), that subsequent legislation on the same subject may be looked to in order to see the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier."

Having cited this passage, LORD BUCKMASTER observed ([1928] A.C. 156):

"This is, in my opinion, an accurate expression of the law, if by 'any ambiguity' is meant a phrase fairly and equally open to divers meanings, but in this case the difficulty is not due to ambiguity but to the application of rules suitable for one purpose to another for which they are wholly unfit."

In the same case, LORD ATKINSON said this (*ibid.*, 164):

"SARGANT, L.J., seems to hold that a legislative interpretation of the statute of 1918 is to be found in this s. 26 of the Act of 1924, and, therefore, the case comes within a well-recognised principle dealing with the construction of statutes—namely, that where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute. Many authorities have been cited by [counsel] on behalf of the appellants on this point. He referred to MAXWELL ON STATUTES. In *Dore v. Gray* (9) it was laid down that an Act of Parliament does not alter the law by merely betraying an erroneous opinion of it; but where it is gathered from a later Act that the legislature attached a certain meaning to certain words in an earlier cognate Act this would be taken as

a legislative declaration of its meaning. In the case of the *Earl of Shrewsbury v. Scott* (10) COCKBURN, C.J., said (6 C.B.N.S. 180): 'I quite concur in the argument that a mistake as to the state of the law on the part of the legislature in a private Act of Parliament—may, I may say upon the authority of the case . . . of [*Ex p. Lloyd* (11)] even in a public Act—any legislation founded on such mistake, would not have the effect of making that the law which the legislature had erroneously assumed to be so.' In *A.-G. v. Wood* (12), VAUGHAN WILLIAMS, J., in giving judgment is reported to have said ([1897] 2 Q.B. 110): 'I wish to add that I do not think that the fact that s. 14 of the Finance Act, 1896 . . . contains an enactment in the sense of the construction which I am now putting on s. 5 (3) of the Act of 1894 shows that that construction is wrong because, if it were right, the amending Act might be said to be useless. The amending Act may be merely declaratory to clear up doubts, and, even if not so intended, the presence of the section in the later Act cannot determine the construction of the earlier.' "

In *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (6) LORD REID said ([1952] 1 All E.R. 541):

"The question is, therefore, narrowed down to this: Does para. 5 of Part I of sched. VII to the Act of 1939, reinforced by para. 8, contain or require the implication of an enactment that certain Dominion taxes are to be deductible in computing profits for United Kingdom excess profits tax? I think that the question is a difficult one, but I have come to be of opinion that it does not. Paragraph 5 is very misleading, but to mislead a taxpayer is not the same thing as to entitle him to relief. It may well be that these paragraphs show that Parliament was under a misapprehension as to the existing law at the time, but it does not necessarily follow that if Parliament had been correctly informed it would have altered the law."

In the same case, LORD RADCLIFFE observed (*ibid.*, 544):

"The beliefs or assumptions of those who frame Acts of Parliament cannot make the law."

In *Pemsel's* case (3) the question arose whether the general exemptions from income tax afforded to charities by s. 88 and s. 105 of the Income Tax Act, 1842, were impliedly confined to a narrower range of purposes than those included in the full legal definition of charity by the special exemption afforded by s. 149 to the British Museum. It was argued for the Crown (3 Tax Cas. 57):

"The charitable purposes of the Income Tax Acts cannot be the same as those of the statute of Elizabeth, because there are matters specifically dealt with by the Income Tax Acts which certainly would have come within the terms of the statute of Elizabeth. Section 149, 5 & 6 Vict. c. 35, makes a special exemption in favour of the British Museum, whereas by a decision given in the year 1826, *British Museum v. White* (13), it had been settled that the British Museum is a charity within the statute of Elizabeth."

This argument was thus dealt with by LORD HERSCHELL (*ibid.*, 89):

"I ought, perhaps, to notice the argument presented to your Lordships, that some more limited meaning of these words is suggested by the provisions in connection with which they are found, and the specific exceptions contained in the statute. I think that an argument derived from the specific mention of certain subjects in the exemptions found in a taxing Act is of little weight. Such specific exemptions are often introduced ex majori cautela to quiet the fears of those whose interests are engaged or sympathies aroused in favour of some particular institution, and who are apprehensive that it may not be held to fall within a general exemption."

In the present case it was pointed out by counsel for the Crown that the provisions in the Finance Acts of 1923, 1924, 1925 and 1926 in regard to the exemption of Irish charities are to be construed as one with the Income Tax Act, 1918, and he referred us to the following passage from the speech of VISCOUNT SIMON, L.C., in *Penang & General Investment Trust, Ltd. v. Inland Revenue Comrs.* (14) ([1943] 1 All E.R. 516):

"The appellants, quoting *Ormond v. Betts* (5), are driven to contend that this is an erroneous assumption made by the legislature as to the previous state of the law—a contention particularly difficult to sustain in a Finance Act which is to be read with previous Finance Acts as a single code; but for the reasons above given, the assumption is correct."

Having regard to the nature of the later enactments here in question, passed as they were to meet the peculiar situation created by the secession of the Irish Free State from the United Kingdom, and designed as they were to preserve until such time as other arrangements were made the exemption theretofore enjoyed by charitable institutions in that part of Ireland, I find it impossible to regard them as additions to or modifications of the income tax code which operated by way of necessary implication to restrict the application of the exemption provided for by s. 37 (b) to bodies and trusts established in the United Kingdom, if apart from those enactments the exemption was not on its true construction so restricted. The framers of these enactments used language at least suggestive of a definite view that, on the true construction of s. 37 (b), the exemption would be lost by charities in the Irish Free State unless expressly preserved. If a definite view to that effect is rightly to be imputed to the legislature, then I think the case would be within the principle stated by Lord STERNDALÉ, M.R., in the *Cape Brandy Syndicate* case (7) that ([1921] 2 K.B. 414):

"... subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier."

On the other hand, it is, perhaps, arguable that these enactments may have been the product of nothing more than a doubt as to how, in view of the secession of the Irish Free State from the United Kingdom, charitable institutions in that part of Ireland would stand as regards exemption from income tax, and were passed simply and ex abundanti cautela for the purpose of removing that doubt and preserving the status quo, and if capable of being so explained they could not be regarded as throwing any light on the construction of s. 37. In my view, however, the former explanation is to be preferred to the latter, as I find it difficult to reconcile the proviso to s. 21 of the Act of 1923, which limits its application to cases in which the property producing the income in question was held by the body of trustees concerned on Apr. 5, 1923, or the language of the repeal contained in para. 3 of Part II of sched. II to the Act of 1926:

"Section 21 of the Finance Act, 1925, which grants an exemption for charities in the Irish Free State, shall cease to have effect",

with anything short of a positive assumption or belief that, on the true construction of s. 37 of the Act of 1918, charities established in the Irish Free State were definitely not entitled to claim exemption under that section. Accordingly, I think that the enactments relating to Irish Free State charities, while not directly altering the construction or effect of s. 37 of the Act of 1918, can properly be regarded as providing a legislative interpretation of s. 37 to which recourse may legitimately be had for the purpose of resolving any ambiguity there may be in the construction of s. 37 itself.

Counsel for the foundation contends that there is no such ambiguity, that the language of s. 37 is on the face of it apt to include a body of persons established

in any part of the world for charitable purposes only, and that there is no justification for reading into the plain terms of the enactment, in its application to bodies of persons, an implied restriction of its scope to bodies established in the United Kingdom. The main points of his argument may be thus summarised:

- (i) The expression "body of persons" is not a term of art, as is shown by the wide definition of that expression contained in s. 237 of the 1918 Act, which contains nothing necessarily confining it to bodies constituted in the United Kingdom. Moreover, as appears from r. 1 of the All Schedules Rules, read in conjunction with para. 1 (a) (iii) of sched. D, a foreign body of persons is a body of persons within the meaning of the Act for the purposes of the charge to tax under Case III of sched. D. (ii) Again, the word "established" is not a word of art. It means no more than "formed with some degree of permanence" and has for instance been held satisfied in the case of an unincorporated voluntary association: see *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (15), and, in particular, ATKIN, L.J. ([1928] 1 K.B. 629). There is no reason for holding that it is not satisfied in the case of a body, such as the foundation, incorporated under the law of a foreign State. (iii) Admittedly, the words "for charitable purposes only" must mean "exclusively for purposes which are recognised by the law of the United Kingdom as charitable". But this presents no insuperable difficulty, although it necessarily involves in the case of a foreign body of persons a twofold inquiry, to ascertain first what the purposes of the body are according to the relevant local law, and, secondly, whether those purposes are charitable under the law of the United Kingdom. The fact that the purposes of the foreign body may be pursued wholly abroad is immaterial, provided that they are of such a character that a trust for their pursuit outside the United Kingdom would be recognised under the law of the United Kingdom as a charitable trust. It is well settled that "charitable purposes" under our law are not confined to charitable purposes within this realm: see *Re Robinson* (4), which case also shows that our courts will give effect to a trust for charitable purposes to be carried out abroad even where the trustee is a foreign person or institution outside the jurisdiction of those courts. (iv) There is no room here for the application of the general principle of construction relied on by the Crown and deducible from such cases as *Jefferys v. Boosey* (2), *Wallace v. A.-G.* (16), and *Colquhoun v. Heddon* (17), to the effect that general words in an Act of the United Kingdom Parliament, should, unless the Act expressly declares otherwise, be construed as referring only to persons, matters or things within the jurisdiction of that Parliament and not as purporting to deal with persons, matters or things outside such jurisdiction, for s. 37 is an exempting section, and its scope should, therefore, be regarded as limited and defined by reference to the incidence of the tax from which it provides exemption. If a foreign body suffers under the Act income tax of one of the kinds referred to in s. 37, there can be no good reason for construing that section as excluding it from the exemption merely on the ground that it is a foreign body. (v) The construction contended for on the part of the foundation not only gives literal effect to s. 37, but produces a rational result in that it makes the exemption co-extensive with the liability to tax.

I agree that the general principle deducible from (for example) *Colquhoun v. Heddon* (17), cannot of itself provide any sufficient ground for limiting the exemption afforded by s. 37 in the way contended for by the Crown. Where an Act of the United Kingdom Parliament imposes a tax on income arising in the United Kingdom, makes the tax equally exigible whether the person entitled to the income is British or foreign, resident or non-resident, and affords an exemption from the tax to persons fulfilling specified conditions which do not expressly include citizenship of or residence in the United Kingdom, there can, in my view, be no justification for the implied exclusion from the benefit of the exemption of a foreign non-resident who has suffered, or apart from the exemption would suffer, the tax, and who satisfies all the express requirements of the exempting

provision, merely on the grounds that he is a non-resident foreigner. In the course of the argument I ventured to put the question whether, if s. 37 had included a provision granting exemption from tax under sched. D "to any blind person", the exemption could be claimed by a blind citizen of a foreign State not resident in the United Kingdom. I understood counsel for the Crown to concede that my imaginary exemption could be claimed by such foreign and non-resident blind person, but junior counsel for the Crown distinguished this hypothetical case from the case now before us on the ground that the hypothetical condition of exemption, namely, blindness, involved a characteristic which could equally be possessed by persons of all nationalities and in all parts of the world, whereas the conditions of exemption prescribed by s. 37, as it actually stands, involve characteristics which can only be possessed by institutions governed by the laws of the United Kingdom, and are peculiar to those laws. This shows, I think, that any territorial or jurisdictional restriction on the scope of s. 37 must be found in the construction of the section itself and the objects and conditions of the exemption which it confers rather than in the application of the general restrictive principle to which I have referred.

There is, however, one reason underlying that principle which can, I think, properly be taken into account in reaching any conclusion on the construction of s. 37, and that is the great administrative difficulty which must inevitably attend the world-wide application of the exemption. If any institution in any part of the world can lay claim to the exemption on the ground that it is established for exclusively charitable purposes, adjudication upon foreign claims for exemption will, as counsel for the foundation admits, involve the twofold process of ascertaining the relevant foreign law as to the purposes which the institution concerned is empowered to pursue and then determining whether those purposes, considered, I suppose, in relation to the manners, customs, beliefs and social conditions obtaining in the foreign country concerned, are charitable purposes within the meaning of our law. This would be liable to give rise in many cases to an abstruse and controversial inquiry, hardly to be answered short of litigation in the courts. The present case is relatively simple owing to the affinity of United States law to our own, but that is an accidental circumstance which does not displace the possibility, or, indeed, probability, of acute difficulty in many other cases. The following passage from the speech of Lord Cranworth, L.C., in the succession duty case of *Wallace v. A.G.* (16) (1 Ch. App. 7) is not without relevance here:

"By s. 2 of the [Succession Duty Act, 1853] every disposition of property by reason whereof any person shall on the death of another *become entitled* to any property shall be deemed to confer on the person *so becoming entitled*, a succession, and on that succession the duty is imposed by s. 10. The question, therefore, is whether, where a person domiciled abroad makes a will giving personal property in this country by way of legacy, the legatee is a person *becoming entitled* to that property within the true intent and meaning of s. 2. I think not. I think that in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country. Any wider construction would give rise to difficulties hardly to be surmounted. In collecting the duties, the officers of the revenue will in general find no difficulty, supposing the duties to be imposed only on persons entitled under our own laws. The officers know, or must be supposed to know, what these laws are with respect to the persons liable by our laws to the duties to be levied. But who the parties entitled under a foreign will are, is a question which no knowledge of our laws will enable them to solve. It can only be ascertained by evidence in every case showing what the foreign law is and who is entitled under it. In some cases this may admit of little or no doubt, but in others it may be a matter of great

difficulty, and in no case can the officers safely act until the rights of parties have been ascertained litigiously."

A There is one other general consideration to which I should advert. Counsel for the Crown propounded the proposition that the reason for the exemption afforded to charities by s. 37 was that the legislature thought fit to forego the tax on income devoted to charitable purposes because income spent on those purposes is spent for the benefit of the public, just as the tax is levied for the benefit of the public, so that the tax foregone goes to increase the benefit derived by the public from the furtherance of the charitable purpose. To this they added the further proposition that the relevant public for the purposes both of tax and of charity is the public in the United Kingdom, and invited the conclusion that the exemption afforded by s. 37 should be held limited to charities benefiting the United Kingdom public, or in other words, charities established in the United Kingdom. I can give very little weight to this argument. It is, of course, axiomatic that no object is held charitable under our law unless it is for the benefit of the community, or, as is sometimes said, for the benefit of the public or a section of the public. One might expect that the community, or public, or section thereof, some benefit to whom is held to be an essential ingredient in all charity, should be the community, or public, or section thereof, existing in our own country, and not a foreign community or foreign public. But the authorities do not bear this out, for, as counsel for the foundation has shown, there are many instances in which purposes have been recognised as charitable notwithstanding that they were to be pursued wholly abroad. This appears from *Re Robinson* (4), and the cases there cited, and, indeed, an instance of it is provided by *Pemsel's* case (3) itself. It does not necessarily follow that all purposes which, if carried out in, and for the benefit of the inhabitants of, the United Kingdom, would be charitable under our law are recognised as charitable when carried out in, and for the benefit of the inhabitants of, a foreign country. Indeed, there are some which could not well be so recognised, for instance, a trust for the improvement of the efficiency of the army of a foreign State, or for the reduction of the national debt of a foreign State. I need not pause to consider which should and which should not be so recognised, or whether the element of public benefit in those which are so recognised should be looked on as consisting in the direct benefit provided for the foreign public concerned, or in some secondary and indirect benefit in the shape (for instance) of moral improvement, assumed to be conferred on the public at home. It is here only necessary for me to observe that it cannot be maintained that no purpose is recognised as charitable under our law unless it is carried out in, and for the benefit of the public, or some section of the public, of, the United Kingdom. This, I think, suffices to dispose of the general proposition I am now considering as an aid to the construction of s. 37.

G H Turning now to the language and context of the section itself, I observe, as to the context, that s. 37 is the first of a fasciculus of three sections, of which the second provides exemption for a particular British institution, viz., the British Museum, while the third provides exemption for certain friendly societies, trade unions and savings banks, etc., the institutions referred to being unquestionably institutions formed and existing in, and under the laws of, the United Kingdom. Such being the context of the section as a whole, I observe further that the particular exemption here in question falls under the second of three heads of exemption for which the section provides. The first head (subpara. (a)) exempts

"... the rents and profits of any lands . . . belonging to any hospital, public school or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes only."

I can hardly doubt that the hospitals, public schools or almshouses to whose lands this exemption relates are charitable institutions of those respective

descriptions existing and legally recognised as such in the United Kingdom, and I think it is at all events plain that the trustees, to lands vested in whom this exemption refers, are trustees holding the land in question as trustees of charitable trusts taking effect and enforceable under the law of the United Kingdom, whether the purposes of such trusts are to be pursued in the United Kingdom or abroad. The third head (sub-para. (c)) exempts

"any interest . . . in the names of trustees applicable solely towards the repairs of any cathedral, college, church or chapel, or any building used solely for the purposes of divine worship, and so far as the same are applied for those purposes."

Here, too, I can hardly doubt that the buildings referred to are buildings of those respective descriptions in the United Kingdom, particularly having regard to the special meanings attached to the terms "cathedral" and "college" under our law. And I think it is at all events plain that the trustees in whose names the "interest", etc., stands must be trustees of a trust taking effect and enforceable under the law of the United Kingdom.

Coming last to the material head of exemption (sub-para. (b)), I find it extends to any interest, etc.

"forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only."

Ex concessis, "charitable purposes" in sub-para. (b), as also in sub-para. (a), means purposes which are charitable according to the law of the United Kingdom. "Act of Parliament" clearly means "Act of the United Kingdom Parliament". "Charter" clearly means royal charter granted by the sovereign of the United Kingdom. "Decree" clearly means "decree of a court of the United Kingdom". As appears from what I have said regarding the references to "trustees" in the other two paragraphs, I think that "trust" and "deed of trust" in this sub-paragraph must be taken as referring to trusts taking effect and enforceable under the law of the United Kingdom, and I think that similarly "will" must in the context mean a will so taking effect and enforceable. Counsel for the foundation was, I think, disposed to concede all this, at all events to the extent of agreeing that the second branch of the exemption, introduced by the words "or which", could hardly be applied to an institution formed, resident and operating wholly outside the United Kingdom, governed by regulations deriving their validity wholly from the law of a foreign country, and in no way subject to the jurisdiction or control of our courts. But he submitted, nevertheless, that this did not destroy the claim of the foundation under the first branch of the exemption as a "body of persons . . . established for charitable purposes only". His argument depended to some extent on splitting up the first branch of the exemption, ignoring the words "or trust"; taking the phrase "body of persons" and claiming that the foundation answered that description; then taking the word "established" and claiming that the foundation answered that description also; and finally taking the phrase "for charitable purposes only" and seeking to satisfy that condition by showing that the objects of the foundation as defined in its certificate of incorporation would, if contained in an English trust deed or memorandum of association, be held by our courts to be exclusively charitable objects. With respect, I think this is a wrong method of approach. The phrase to be construed is the whole phrase "body of persons or trust established for charitable purposes only", and it must be construed in its context. Whether the claim for exemption is made on behalf of a body of persons or on behalf of a trust, the body or trust must be shown to be "established for charitable purposes only" and that requirement must have the same quality

A in the case of a body of persons as it has in the case of a trust. I have already expressed the view that "trust" in an Act of the United Kingdom Parliament means a trust taking effect and enforceable under the law of the United Kingdom. It follows that, in my opinion, a "trust established for charitable purposes only" must here mean a trust taking effect and enforceable under the law of the United Kingdom, and creating an obligation enforceable in the courts of the United Kingdom to apply its funds for purposes which are, according to the law of the United Kingdom, exclusively charitable. I can attribute no different meaning to the phrase "established for charitable purposes only" when applied to a body of persons. So applied, I think it is only satisfied by a body of persons which is under the law of the United Kingdom subject to an obligation enforceable in our courts to apply its funds for purposes which are according to that law exclusively charitable.

B Accordingly, I would hold that the foundation is not "established for charitable purposes only" within the meaning of s. 37 (b) of the Income Tax Act, 1918. I am fortified in this conclusion by the consideration that an exemption substantially in this form has appeared in income tax legislation ever since 1799, at which date there was no question of taxing, and, therefore, none of exempting, C non-resident foreigners. I also find some support for my view in the administrative difficulties attending the other construction, to which I have already adverted, and to which I might add the difficulty of ascertaining whether a foreign allegedly charitable institution is in fact applying its income in accordance with its avowed objects. Finally, if I have rated the case against the foundation too high, I think it can hardly be denied that the question is left at least in a state of ambiguity which can properly be resolved by reference to the legislative D interpretation placed on s. 37 by the above-cited enactments concerning charities in the Irish Free State.

E My conclusion on this part of the case makes it strictly unnecessary for me to express any view on the question whether the objects of the foundation as expressed in its certificate of incorporation are exclusively charitable purposes according to the law of the United Kingdom. As I understood, the charitable character of the foundation's objects was only challenged on the part of the Crown with respect to cl. 2 (b) of the certificate of incorporation. It was contended by counsel for the Crown that the object stated in cl. 2 (b), "To promote any other scientific, educational or charitable purpose" was not necessarily or exclusively a charitable object. But the evidence of New York law accepted by the Special F Commissioners was to the effect that this clause was void and should be ignored as mere surplusage. It was sought to surmount this evidence by saying that it was merely an expression of the opinion of the two New York lawyers who gave evidence on the matter. These witnesses deposed to the content of the New York Membership Corporation Law, and, in particular, s. 10 of that law, which provides that:

G "five or more persons may become a membership corporation for any lawful purpose, or for two or more such purposes of a kindred or incidental nature, except a purpose for which a corporation may be created under any general law other than this chapter."

Their evidence as to the effect of that provision was expressed in these terms:

H "To be valid, therefore, all the purposes of a corporation formed under the Membership Corporation Law must be of a kindred or incidental nature."

They expressed the opinion that according to this test cl. 2 (b) was void on the ground that the purposes stated therein were not of a nature kindred or incidental to the primary purpose set out in cl. 2 (a). They added, however, that the certificate of incorporation, apart from the contents of cl. 2 (b), which were void, was

not otherwise affected and remained valid. The Special Commissioners' finding on this part of the case was in these terms:

"The construction, meaning and effect of the certificate of incorporation should, in our view, be determined by reference to the law of the State of New York. We accept the evidence given before us that under the law of that State the provisions of sub-para. (b) of para. 2 of the certificate are void and inoperative, leaving the provisions of sub-paras. (a) and (c) as the only operative parts of the paragraph. The provisions of sub-para. (c) are machinery provisions and the substantive purposes of the foundation are accordingly to be found in sub-para. (a). There can be no doubt, in our view, that the purposes there set out are charitable purposes only according to English law."

It was urged on the part of the Crown that this finding should be rejected on the ground that the witnesses' evidence to the effect that the purposes stated in cl. 2 (b) were not of a nature kindred or incidental to the primary purpose in cl. 2 (a), was mere matter of opinion and not evidence of New York law. I cannot accept this objection. In my view, it is well within the competence of a witness as to the operation of a given instrument under foreign law to state the content of the relevant law and to add his opinion as to the effect attributable under that law to the instrument in question. No doubt, his opinion might be challenged or displaced by the contrary opinion of some other competent witness. But that is a matter of weight, not admissibility, and, the Special Commissioners having accepted the uncontradicted evidence of the witnesses of New York law in the present case, I can see no reason for disturbing their finding. This cannot, however, affect the result, and, answering as I do the first question in the case adversely to the foundation, I hold that this appeal fails and should be dismissed.

HODSON, L.J. : The question raised on this appeal is whether Camille and Henry Dreyfus Foundation, Inc., is exempt from income tax. The foundation has been since the year 1946 in receipt of royalties from British Celanese, Ltd., a company resident in the United Kingdom, from which income tax has been deducted at source. The foundation claims under the provisions of s. 37 (b) of the Income Tax Act, 1918, as a "body of persons . . . established for charitable purposes only" to recover the tax from the Inland Revenue Commissioners. The claim has been resisted on the ground that the foundation is not established for charitable purposes only within the meaning of s. 37, and also on the ground that the foundation is not established in the United Kingdom and, accordingly, is not within the exemption, whether or not it is a charity.

The Commissioners for Special Purposes decided in favour of the foundation that it was established for charitable purposes only, but decided against the foundation on the second point. In deciding the second point they followed the decision of **LAWRENCE, J.**, in *Inland Revenue Comrs. v. Gull* (1), who, in the course of his judgment, had said ([1937] 4 All E.R. 293):

"... I feel constrained to hold that the exemption applies only to the income of bodies of persons or trusts established in the United Kingdom."

On appeal, **WYNN-PARRY, J.**, arrived at the same conclusion, feeling, as I think rightly, that he should follow the direction of law which **LAWRENCE, J.**, had given after argument and full consideration on the point, even though the conclusion at which **LAWRENCE, J.**, arrived in that particular case would have been the same had the direction been otherwise, for he upheld the finding of the commissioners that the trust in question was established in the United Kingdom.

The argument of counsel for the foundation is in essence a simple one. He says that the words used are "any body of persons" without geographical or other limitation, save that which is contained in the words "established for charitable purposes only". He relies on the general principle that the words

must be taken as they stand with nothing added to them. He asks with some force why in principle should not his clients, if they are charities, not be exonerated by the United Kingdom legislature in the same way as charities established in the United Kingdom are exonerated. It would, he says, be capricious for Parliament to act in an inconsistent manner when United Kingdom charities, on the one hand, and foreign charities, on the other, are concerned, and he maintains that the plain words of the Act lead to no such capricious conclusion.

- A So far as *Gull's* case (1) is concerned, he relies on LAWRENCE, J.'s decision in so far as the learned judge rejected many of the arguments then and now advanced by the Crown, but he says that the learned judge erred in feeling himself constrained by the language of what have been called the Irish Free State sections in later Income Tax Acts, to find in favour of the Crown on this point.
- B These sections are s. 21 of the Finance Act, 1923, s. 32 of the Finance Act, 1924, and s. 21 of the Finance Act, 1925, which confer exemption on the income of a

“body of persons or trust established in the Irish Free State for charitable purposes only.”

- C Counsel for the foundation argued that these sections were passed either *ex abundanti cautela* or on an erroneous assumption as to the effect of s. 37 of the Income Tax Act, 1918. Section 21 of the Finance Act, 1923, has been repealed by the Statute Law Revision Act, 1950, having ceased to have effect by virtue of para. 3 of Part II of sched. II to the Finance Act, 1926.

- D The presence of s. 21 of the Act of 1923 cannot, in my opinion, be explained on the ground that it was inserted *ex abundanti cautela*, particularly having regard to the fact that it has now been repealed, having previously ceased to have effect as above stated. This treatment of the Irish Free State charities by the legislature is not consistent with an opinion held by Parliament that these charities were always within the scope of s. 37 of the Act of 1918 and that the inclusion of Irish Free State charities in the later legislation can be explained in the same way as LORD HERSCHELL dealt with the special exemption in favour of the British Museum contained in the Income Tax Act, 1842, when he said in *Pemsel's* case ([1891] A.C. 574):

“Such specific exemptions are often introduced *ex majori cautela* to quiet the fears of those whose interests are engaged or sympathies aroused in favour of some particular institution, and who are apprehensive that it may not be held to fall within a general exemption.”

- F Section 21 of the Act of 1923 must, I think, be taken as a legislative interpretation of s. 37 (b) of the Act of 1918, which can be used if the language of the latter is ambiguous: see *Ormond Investment Co. v. Betts* (5), per LORD BUCKMASTER ([1928] A.C. 156), approving LORD STERNDAL in the *Cape Brandy Syndicate* case (7) ([1921] 2 K.B. 414). Counsel for the foundation argued that, on the true construction of s. 37 of the Income Tax Act, 1918, foreign charities were plainly within its scope, and sought to dispose of the Irish Free State legislation by resort to the “erroneous assumption” argument which has found expression in a number of tax cases including those last cited and culminating in *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (6). As to this argument, a warning note was sounded by LORD SIMON in *Penang & General Investment Trust, Ltd. v. Inland Revenue Comrs.* (14) where he said ([1943] 1 All E.R. 516):

“The appellants, quoting *Ormond v. Betts* (5), are driven to contend that this is an erroneous assumption made by the legislature as to the previous state of the law—a contention particularly difficult to sustain in a Finance Act which is to be read with previous Finance Acts as a single code

I find it impossible to say that the language employed in s. 37 of the Act of 1918, so clearly carries the interpretation contended for by the foundation that

the erroneous assumption argument ought to be entertained in this case. On the other hand, although I would follow the legislative interpretation to be found in the Irish Free State sections if there were a real ambiguity, I base my judgment on the interpretation of the section itself in its context against the background of its own history. Taking the phrase as a whole, that is to say, "any body of persons or trust established for charitable purposes only", the inclusion of the word "trust" denotes something characteristic of our law, and the expression "body of persons" should not be construed in isolation.

When one looks at the following words, "Act of Parliament", "charter", "decree", "deed of trust" or "will", all of these, with the exception of "will", point to the law of the United Kingdom. "Act of Parliament" must mean Act of the Imperial Parliament; "charter" must mean charter of the United Kingdom; "decree" must mean decree of the courts of this country; and "deed of trust" must refer to a trust constituted and enforced by our law.

In my opinion, the language of the other parts of s. 37, both those which precede and those which follow sub-para. (b), lead to the same conclusion, as also do s. 38 and s. 39, part of the same group of sections brought together in the Act under the cross-heading "Relief to charities, friendly societies, etc." The word "charity" itself has a special significance in English law and nothing in these sections points to foreign charities. Sections 37, 38 and 39 are brought together in the Act of 1918, having been collected from the Income Tax Act, 1842, where they appeared in different parts of the Act. These provisions replace those contained in the Act of 1799, passed at a time when there was no question of either taxing or giving exemption to non-resident foreigners. Section 5 of this Act provided as follows:

"Provided also and be it further enacted, that no corporation, fraternity or society of persons established for charitable purposes only, shall be chargeable under this Act, in respect of the income of the corporation, fraternity or society."

As I indicated above, I rest my judgment on the interpretation of the section in its context and against its historical background, but I find some support for the conclusions which I have reached in the practical difficulties involved in the contrary view. The Commissioners of Inland Revenue would, indeed, be set a difficult task if they had to apply the law of any part of the civilised world in order to ascertain the purposes for which a particular body of persons was established before applying the law of this country as to whether those purposes were charitable within the meaning of our law. Again, the difficulty of insisting on proof that income had been applied for charitable purposes only would be great. The observations of the Lord Chancellor, LORD CRANWORTH, in *Wallace v. A.-G.* (16) (1 Ch. App. 7) cited by JENKINS, L.J., are, I think, relevant in this connection. I agree, therefore, that the appeal fails, although, for the reasons given by the other members of the court, I am of opinion that the finding of the Special Commissioners that the objects of the foundation are exclusively "charitable" as understood by our law is not assailable.

Appeal dismissed.

Solicitors: *Linklaters & Paines* (for the foundation); *Solicitor of Inland Revenue*.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. PULLMAN CAR CO., LTD.

[CHANCERY DIVISION (Harman, J.), May 25, 26, 1954.]

A *Profits Tax—Computation of profits—Deduction of “interest payable out of the profits”—Interest on cumulative income stock—Interest payable “to the extent to which the net profits . . . shall be sufficient”—Deficiency out of net profits of succeeding years “if and so far as the same shall suffice”—Finance Act, 1937 (c. 54), sched. IV, para. 4.*

B Under a scheme of reduction of capital confirmed by the High Court, a company issued, inter alia, cumulative income stock in substitution for cumulative preference shares. The stock was required to be redeemed in accordance with the terms of the scheme, which provided for a sinking fund for the purpose, and until such redemption interest thereon at the rate of five per cent. per annum was payable “only to the extent to which the net profits . . . shall be sufficient”, any deficiency being carried forward and being “payable out of the net profits for the succeeding year or years if and so far as the same shall suffice for the purpose”.

C **HELD:** the holder of the income stock was not a member of the company but was in the position of a debenture holder, and the interest was “interest payable out of the profits” of the company and not a “payment of dividend or distribution of profits”, within the Finance Act, 1937, sched. IV, para. 4, and it was, therefore, deductible in computing the company’s profits for the purposes of profits tax.

D *A. W. Walker & Co. v. Inland Revenue Comrs.* ([1920] 3 K.B. 648) and *Inland Revenue Comrs. v. Mashonaland Ry. Co., Ltd.* (1926) (12 Tax Cas. 1159), distinguished.

FOR THE FINANCE ACT, 1937, sched. IV, para. 4, see HALSBURY’S STATUTES, Second Edn., Vol. 12, p. 382.

E Cases referred to:

- (1) *A. W. Walker & Co. v. Inland Revenue Comrs.*, [1920] 3 K.B. 648; 90 L.J.K.B. 287; 12 Tax Cas. 297; Digest Supp.
 (2) *Inland Revenue Comrs. v. Mashonaland Ry. Co., Ltd.*, (1926), 12 Tax Cas. 1159.
 F (3) *Madras & Southern Mahratta Ry. Co., Ltd. v. Inland Revenue Comrs.*, (1926), 12 Tax Cas. 1111.

CASE STATED by the Special Commissioners of Income Tax.

G The respondent company appealed against two assessments to profits tax made on it for the chargeable accounting period from Oct. 1, 1948, to Sept. 30, 1949, in sums of £14,000 and (an additional assessment) £7,250. Under a scheme of reduction of capital of the company confirmed by the High Court in 1938, five per cent. cumulative income stock was issued to holders of seven per cent. cumulative preference shares in substitution for those shares in accordance with an instrument which provided for the eventual redemption of the stock and for the payment of interest of five per cent. per annum thereon, with a proviso that the interest should be payable only to the extent to which the net profits should be sufficient to pay it and was to be cumulative, i.e., if the net profits for any year were insufficient the deficiency was to be carried forward and to be payable out of the net profits for the succeeding year or years if sufficient for the purpose. The company contended that interest paid to the holders of the income stock should be deducted in computing the profits of the company for the purposes of profits tax, by virtue of the Finance Act, 1937, sched. IV, para. 4, and that in any event it did not form part of the gross relevant distributions to proprietors of the company within s. 35 and s. 36 of the Finance Act.

1917, and in particular was neither a dividend nor a cash bonus within s. 36 (1) (a). The Crown contended that the interest was not interest within the paragraph, or, alternatively, if it was such interest, its payment was a payment of dividend or distribution of profits within the proviso to the paragraph, and that it was, therefore, not allowable as a deduction in computing the company's profits for the purposes of profits tax. The Crown submitted further that the interest, in so far as it was paid to persons who were registered as members of the company at the date of payment, should be included in the gross relevant distributions to proprietors of the company by virtue of s. 35 and s. 36 of the Finance Act, 1947. The commissioners held that the interest was "interest payable out of the profits" of the company within the Finance Act, 1937, sched. IV, para. 4, and was not a "payment of dividend or distribution of profits" within para. 4, proviso, sub-para. (a), such interest being interest on loan capital of the company, payable out of its profits. Such interest was, therefore, deductible in computing the company's profits for purposes of profits tax. The Crown appealed.

Millard Tucker, Q.C., and Sir Reginald Hills for the Crown.

Heyworth Tulbot, Q.C., Borneman, Q.C., and H. M. Allen for the respondent company.

HARMAN, J.: This is an appeal by the Crown against the decision of the Special Commissioners on a profits tax appeal by the Pullman Car Co., Ltd. The commissioners allowed the appeal, holding that, in computing its profits tax liability, the company was entitled to deduct sums paid to holders of its income stock in respect of its financial year 1948-49, this sum being described by the company as "interest". The income stock came into existence as a result of a scheme of reduction of the company's capital sanctioned by the High Court in 1938. It was redeemed in 1948. Immediately before the scheme came into force, the company's capital consisted of 625,000 seven per cent. cumulative preference shares of £1 each, the interest on which was six years in arrear, and five hundred thousand ordinary shares of £1 each. The company was advised that its main asset, namely, Pullman cars, was much over-valued. The object of the reduction was to reorganise the balance sheet on a realistic basis. It is thus described in a circular sent to shareholders in 1938:

"Under the scheme it is proposed that the book value of the cars and equipment be reduced by £533,617, this amount to be provided as to £450,000 by reducing the existing five hundred thousand ordinary shares of £1 each by 18s. per share to five hundred thousand ordinary shares of 2s. each entitled to one vote per share, and as to £83,617 by appropriating part of the balance now standing to the credit of profit and loss account. The scheme further provides for the re-constitution of the preference share capital and the variation of the rights attaching thereto as follows:—
1. For the present issue of 625,000 seven per cent. cumulative preference shares there will be substituted:—£437,500 five per cent. cumulative income stock and 187,500 A ordinary shares of £1 each".

The necessary resolutions were passed and the sanction of the court to the reduction was obtained. The ordinary shares were reduced to 2s. in the usual way, but the preference shares were treated differently, 14s. nominal of each share being replaced by the income stock and 6s. nominal by new A ordinary shares. The income stock was created by what is called an instrument, from which I take the following:

"This instrument . . . entered into May 4, 1938, by the Pullman Car Co., Ltd. . . . witnesseth and the company hereby agrees with all persons whose names are for the time being entered in the register hereinafter mentioned as holders of the said stock (and to the intent that such persons shall be entitled

to enforce the provisions of this instrument as against the company) and declares as follows ”.

Then there is a definition clause and so on. Paragraph 4 provides:

“ The stock shall be held subject to the conditions set forth in the schedule hereto . . . ”

A Paragraph 5 provides:

“ As and when the stock or any part thereof ought to be redeemed or paid off in accordance with the conditions set forth in the said schedule hereto the company shall pay to the stockholders or to those whose stock ought to be redeemed or paid off the full amount of the stock held by them respectively or as the case may be such part of the stock as in accordance with the said conditions ought to be redeemed or paid off and such payment shall operate in satisfaction of the amount of the stock so redeemed or paid off and the company shall in the meantime until the stock is redeemed or paid off but subject as hereinafter provided pay to the stockholders interest on the stock held by them respectively at the rate of five per centum per annum calculated from Oct. 1, 1937. Provided always that the interest on the stock shall be payable only to the extent to which the net profits of the company (calculated as hereinafter mentioned) for the year ending on Sept. 30, 1938, and for each succeeding year ending on a Sept. 30 shall be sufficient to pay such interest and so that such interest shall be cumulative that is to say that if and so far as the net profits for any such year as aforesaid shall be insufficient for the payment thereof the deficiency shall be carried forward and shall be payable out of the net profits for the succeeding year or years if and so far as the same shall suffice for the purpose.”

Up to March, 1939, the full interest (so-called) was duly paid, but it then fell into arrear. Payments were resumed in 1947, and by September, 1948, two and a half years' arrears remained. Stock was from time to time redeemed, and the whole was paid off by the end of that year together with the so-called interest. It is in respect of interest payments in 1948 that the question arises, the company maintaining and the Crown denying that the “ interest ” payments were in law interest or other annual payments payable out of the profits of the company within the meaning of para. 4 of sched. IV to the Finance Act, 1937. This statute created the national defence contribution, which was re-named profits tax in 1946. Section 19 (1) of the Act provides:

“ There shall be charged, on the profits arising in each chargeable accounting period falling within [the years of charge] . . . a tax . . . ”

Section 20 (1) is in these terms:

“ For the purpose of the national defence contribution, the profits arising from a trade or business in each chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of sched. IV to this Act.”

In sched. IV I find an elaborate code altering to the extent stated the usual income tax principles under sched. D. Paragraph 4, which is the relevant one, is in these terms:

“ The principles of the Income Tax Acts under which deductions are not allowed for interest, annuities or other annual payments payable out of the profits . . . shall not be followed: Provided that nothing in this paragraph shall authorise any deduction in respect of—(a) any payment of dividend or distribution of profits . . . ”

To that I must add s. 14 (1) of the Finance (No. 2) Act, 1940, which by way of precaution provides as follows:

"No deduction in respect of any interest, annuity or other annual payment shall, by virtue of . . . para. 4 of sched. IV to the Finance Act, 1937, be allowed in computing the profits of a trade or business for the purposes of excess profits tax or the national defence contribution unless the interest, annuity or other annual payment would, on income tax principles, be an allowable deduction in computing profits but for the express provision contained in para. (1) of r. 3 of the Rules Applicable to Cases I and II of sched. D that no deduction is to be made in respect of any annual interest or any annuity or other annual payment payable out of the profits or gains."

Thus, in order to qualify the payment must be such as but for para. (1) of r. 3 would be a payment deductible for income tax purposes.

It is the Crown's contention that the so-called interest is in truth a distribution of profits. Therefore, it is necessary to analyse the position of the income stockholders. It seems clear to me that a holder of this stock is not as such a member of the company. He is a person towards whom the liabilities of the company are defined by the so-called instrument, and not otherwise. These obligations consist of a covenant to redeem under certain conditions, and in the meantime to pay, but only if and when the profits allow it, what is called interest. The stockholder is in fact and in law in the position of a debenture holder. He has, it is true, no charge in respect of either payment, but that is not essential, though usual in a debenture. There is a sinking fund, and there are terms of redemption, and the schedule to the instrument reads much like a debenture trust deed.

Why, then, is the so-called interest any different from ordinary debenture interest? Because, says the Crown, its payment is contingent on the earning of sufficient profits. It is argued that to procure such a payment is really to confer on the promisee a share in the profits of the concern, and the performance of that promise is in truth a distribution of profits, or, alternatively, is in the nature of a dividend. Therefore, so ran the argument, even if it should be conceded that the payments are interest and so forth within para. 4, they are excluded by the proviso (a) as being a distribution of profits.

I find this argument entirely unconvincing. It seems to me that holders of income stock are in the position of people who have lent money to the company, and they are not proprietors nor sharers in the profits as such. True, in the absence of profit no interest becomes payable, but that is only the measure of the company's liability. I find nothing strange in the conception of a debenture holder whose right to interest is so limited, and am of the opinion that the commissioners were entirely in the right in finding as they did in the Case:

"We hold that the 'interest' paid to the holders of income stock of the company in the chargeable accounting period in question was 'interest payable out of the profits' of the company within para. 4 of sched. IV to the Finance Act, 1937, and was not a 'payment of dividend or distribution of profits' within sub-para. (a) of the proviso to the said para. 4."

It was suggested to me that of the two expressions in the proviso the first, namely, "payment of dividend", was intended to apply to corporations and the other, "distribution of profits", to unincorporated concerns. This, I think, may well be so, but it is unnecessary for me to decide it. It is said, however, by the Crown that I am precluded from coming to the conclusion which I would otherwise have reached by two cases which were decided by ROWLATT, J., one in 1920 on similar words relating to excess profits duty, and the other in 1926 on other but not materially different words in connection with corporation

profits tax. I need hardly say any decision of that judge on this subject merits most careful attention.

A The former case, *A. W. Walker & Co. v. Inland Revenue Comrs.* (1), is concerned with the terms of a loan made to a firm of corn merchants, who, under an agreement made in 1914, had agreed in consideration of a loan of £4,000 to pay the lender while it was outstanding £200 a year, and in addition three-twentieths of the profits of the firm between £1,000 and £3,000, i.e., a maximum of £300. The document provided that this should not constitute a partnership. The firm was allowed only the £200 as a deduction in computing its profits, and appealed, claiming that the extra £300 was also interest on the borrowed money. This claim was rejected by the learned judge. Among other things, this was said (12 Tax Cas. 301):

B "For excess profits duty, generally speaking, the profits of a trade or business are calculated as if for income tax, but there is an exception made with regard to deduction of interest on money borrowed for the purpose of the trade or business in para. 2 of Part I of sched. IV to the Finance (No. 2) Act, 1915." That says that 'the principle of the Income Tax Acts under which deductions are not allowed for interest on money borrowed for the purpose of the trade or business, or for rent or royalties, or for other payments income tax on which is collected at the source (not being payments of dividends or payments for the distribution of profits)' is not to be followed. Therefore it comes to this that interest on money is deductible but distribution of profits is not deductible. Now I have come quite clearly to the conclusion that the commissioners are right here. They have allowed the £200 a year which is interest on money, and they have disallowed the other £300, which seems nothing but giving the lenders a share of the profits *eo nomine*. They both, of course, are in consideration of the loan; that is why they are paid, there is no doubt about that, but they are different things, and the people who have lent this money have got interest and they have got a share of the profits – that is the long and short of it. They have got interest which is payable to them as a debt, it matters not whether the concern prospers or languishes; they have got the other thing, which is a share of what the business earns, and that is not interest, that is simply a share of the profits. If there are profits they get a share, if there are no profits they do not get anything. It is simply, as it says in the agreement, a share of the profits."

F That case seems to me distinguishable from the present, though it has, no doubt, a superficial resemblance in that the amount of the return which the lender gets on his loan depends in both cases on the prosperity of the borrower. In *Walker's* case (1) the lender, as the provision excluding partnership shows, was made a quasi-proprietor. He did get interest on his money to the tune of £200 whether the business prospered or no, but he was made a sharer *quoad ultra*. The two rights stand clearly distinguished on the document of loan. In the present case the stockholder is in no sense a proprietor or member of the company. He is simply a debenture holder whose right to interest is contingent.

G In the other case, *Inland Revenue Comrs. v. Mashonaland Ry. Co., Ltd.* (2), the facts are far different from those I have here to consider. The Mashonaland Railway Co. had provided a sum of £800,000 to enable another company, the Beira Co., to build a railway. The latter company in return was under a liability to pay an annual sum out of its earnings, or if insufficient the whole of its earnings, to the Mashonaland Co. This was called a rentcharge. The question was whether this sum was 'a payment for distribution of profits', those being the relevant words in the statute. ROWLATT, J., held that it was, and followed his own decision in *Walker's* case (1). He said (12 Tax Cas. 1168):

"The question here is, in my opinion, whether this is a distribution of profits. They are profits, because they are income tax profits, but is this a distribution of profits? I do not quite know what other payments, income tax on which is collected at the source, may be left in that expression after you have taken out the exceptions, but it does seem to me that I cannot avoid saying this is a distribution of profits. 'Distribution' is what it turns on. Does that mean something merely by way of a dividend (saying the same thing very much over again), something in respect of which there is no consideration except the subscription of shareholders' capital, or something of that sort? I do not think I can so limit it, and I think I am bound by my own decision in the *Mahratta* case (3) and, more particularly, in *Walker's* case (1). In *Walker's* case (1), for facilities afforded to the company, a gentleman was awarded three-twentieths of the profits, and I said: 'He is given a share of the profits without being made a partner. He has a share of the profits limited to three-twentieths.' Here they have a share of the profits limited to £42,500. I do not think you can state it more clearly than that, and therefore it seems to me I am bound by my own decision and, if that principle is wrong, recourse will have to be had to another court to put it right."

No other court has been asked to put it right. But the facts in that case, particularly the terms of the instrument which created the loan, are so different from those in the present case that it seems to me, with all respect to those who urge to the contrary, that I get no help from it, and do not feel constrained by it to alter the opinion which I have formed, that the payments here in question are interest on money and not distribution of profits. I, therefore, dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Ashurst, Morris Crisp & Co.* (for the company).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

SINASON-TEICHER INTER-AMERICAN GRAIN CORPORATION
v. OILCAKES AND OILSEEDS TRADING CO., LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), May 26, 1954.]

Sale of Goods—Payment—Bank guarantee—Time for issuing guarantee.

A *Arbitration—Case stated by arbitrator—Right to raise before court point not raised before arbitrator.*

B On Aug. 11, 1952, the sellers, an American company, agreed to sell to the buyers, an English company, for United States dollars a quantity of Canada feed barley for shipment during October/November, 1952, c.i.f. Antwerp/Hamburg range buyers' option, for re-sale in Germany for sterling. Payment was to be net cash in London on first presentation of documents, and the buyers were to issue a guarantee to the sellers through their London bank that the documents would be taken up on first presentation. No time was expressed in the contract as to the date on which the guarantee was to be furnished. At the beginning of September the sellers began calling for the guarantee from the bank, and when, by Sept. 10, it had not been supplied, they purported to cancel the contract. On Sept. 16 the buyers accepted the repudiation, but claimed that the cancellation was wrongful. The matter having gone to arbitration, the sellers claimed, inter alia, that the buyers were under an obligation to issue the guarantee as soon as possible after the date of the contract and that a reasonable time for its issue had elapsed by Sept. 10. At the hearing of a Case stated by the arbitrators, the sellers contended, alternatively, that, as the buyers did not accept the repudiation until Sept. 16, that was the date to be considered in determining whether a reasonable time had elapsed for the issue of the guarantee.

E HELD: (i) under the terms of the contract, the guarantee required from the bank was a limited, and not a general performance, guarantee, the event which was guaranteed being merely that the documents would be taken up on first presentation, but, commercially speaking, the guarantee was sufficiently similar to a letter of credit for the same principles to be applied in considering its effect; as the contract did not mention the time within which the guarantee was to be issued, it had to be provided within a reasonable time, which had to be measured in relation to the event which was guaranteed, viz., the presentation of the documents, and the guarantee had to be provided before some event, such as the shipment, which led up to the presentation of the documents; the first shipment date was to be Oct. 1, 1952, and a reasonable time for issuing the guarantee had not arrived by Sept. 10, 1952; and, therefore, the sellers were not entitled to treat the contract as determined on that date and were liable to the buyers in damages.

F (ii) as the point whether a reasonable time for the issue of the guarantee had elapsed by Sept. 16 had not been raised before the arbitrators, the sellers were not entitled to raise it before the court.

G (iii) although the buyers had kept the contract alive until Sept. 16 despite the sellers' repudiation on Sept. 10, the buyers were not obliged to behave in precisely the same way as if the sellers had not repudiated: *Braithwaite v. Foreign Hardwood Co.* ([1905] 2 K.B. 543), applied; and, accordingly, H they were not under an obligation to tender a guarantee between Sept. 10 and Sept. 16; and, therefore, assuming that the sellers were entitled to raise the point that Sept. 16 was the date to consider in measuring whether a reasonable time had elapsed for the issue of the guarantee, their contention failed.

Cases referred to:

- (1) *Parra & Co., S.P.A. v. Thurmann-Nielsen*, [1952] 1 All E.R. 492; [1952] 2 Q.B. 84; 3rd Digest Supp.
- (2) *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K.B. 543; 74 L.J.K.B. 688; 92 L.T. 637; 39 Digest 416, 495.

SPECIAL CASE stated by the appellate tribunal of the London Corn Trade Association, Ltd., under the Arbitration Act, 1950, s. 21 (1) (b).

On Aug. 5, 1952, the Bank of England issued a notice (F.E.C. 461) stating that they were prepared for a certain time to consider applications by residents of the United Kingdom acting as principals to purchase raw materials from residents of the American Account Area and Canada for re-sale to countries belonging to the European Payments Union. On Aug. 6 an application was made on behalf of the buyers, Oilcakes and Oilseeds Trading Co., Ltd., of London, to the Foreign Exchange Control, Bank of England, for permission to purchase for re-sale, *inter alia*, a quantity of Canada feed barley at a c.i.f. cost of United States \$1,490,000 for sale in West Germany for a sterling return of £580,000. On Aug. 8 the bank approved the application in principle, subject to the terms of Notice F.E.C. 461.

By Aug. 9 the sellers, Sinason-Teicher Inter-American Grain Corpn., of New York, had started discussions in Germany, through their agents, Lichtenstein and Mannheim (referred to hereinafter as "L. & M."), with Bayerische Getreide-Commissions Gesellschaft G.m.b.H. (referred to hereinafter as "B.G.C."), who were interested in buying a cargo of Canadian barley for payment in sterling. As the sellers required payment in dollars, advantage had to be taken of the switch transaction under the provisions of Notice F.E.C. 461, which was the type of transaction in which the buyers were also interested. On Aug. 9, Commissionen Internationale Futtermittel G.m.b.H. (referred to hereinafter as "C.I."), who were organising the switch transaction, informed the buyers of their intention to make an offer to the sellers through B.G.C. The buyers did not object, and B.G.C. were authorised by C.I. to make the offer on behalf of the buyers. On Aug. 11 B.G.C. made an offer to the sellers through L. & M., and the sellers accepted. On the same day L. & M. advised B.G.C. of the acceptance. Also, on Aug. 11, L. & M. sent a sale note to B.G.C., confirming that they had intervened in the transaction set out therein, *viz.*, the sale by the sellers to the buyers, through L. & M.'s agency, of about nine thousand five hundred tons, at 1,016 kilos a ton, of No. 2 Canada feed barley for shipment during October/November, 1952, at a price of U.S. \$75.15 per thousand kilos net in bulk, delivered weight, c.i.f. Antwerp/Hamburg range at buyers' option, discharging expenses for sellers' account. Payment was to be net cash in London on first presentation of documents, and the buyers were to issue a guarantee to the sellers through their London bank that the documents would be taken up on first presentation. The conditions and arbitration were to be London Corn Trade Association Contract No. 27, if cargo, or Contract No. 30, if parcel, the material conditions and rules printed on each of these contracts being identical. Two German firms guaranteed to the sellers the orderly liquidation of the contract. On the same day (Aug. 11), C.I. sent a sale note to the buyers stating that they had acted as intermediaries in a transaction between the buyers, who, under that contract, were sellers, and B.G.C., or a first class Bavarian buyer, for nine thousand five hundred tons of No. 1 or No. 2 Canada feed barley, at sellers' option, for delivery October/November, 1952, from Canada, at a price of £27 7s. 6d. per thousand kilos, c.i.f. Antwerp/Hamburg. Payment was to be made in the German English Clearing, net cash against documents on first presentation in London. Arbitration was to be according to London Corn Trade Association Contract No. 27 or No. 30. These two contracts closed the switch transaction. Also on Aug. 11, the sellers made out a contract, as between themselves and the buyers, in similar terms to those of the sale note to the buyers from L. & M.,

but it was not sent to L. & M. until Aug. 19. In the meantime, on Aug. 12, L. & M. advised the sellers that the guaranteeing bank in London was Hambro's Bank. On Aug. 22 L. & M. sent to B.G.C. copies of the contract drawn up by the sellers, and on Aug. 25 C.I. sent two copies to the buyers, who were asked to sign one form and return it direct to the sellers. This the buyers did, but the signed form was never received by the sellers.

A Neither the contract drawn up by L. & M. nor that drawn up by the sellers contained a provision as to any specific date by which the guarantee by the London bank should be furnished. The sellers purported to require the guarantee by Sept. 1, then by Sept. 2, and finally by Sept. 9. The buyers never agreed to a fixed date for the provision of the guarantee. On Sept. 9 Hambro's Bank sent a cable to the sellers stating that the buyers had instructed them to issue a guarantee in the sellers' favour covering about nine thousand five hundred tons of Canada feed barley, subject to Bank of England approval, and that they would cable details as soon as possible. On the same day the approval of the Bank of England was obtained. On Sept. 10 Hambro's Bank cabled to the sellers a form of letter of credit substantially in the terms of the guarantee required by the sellers except in regard to a matter of insurance. On the same day the sellers sent a cable to the buyers saying that, as the previous day's cable from Hambro's Bank

"did not contain payment guarantee therefore our deadline given for supplying performance guarantee expired without performance and we cancel deal last night."

D The buyers immediately cabled a reply to the sellers saying that the sellers' cable was incomprehensible as no deadline in barley contract had been received or accepted, that, anyhow, a guarantee had been cabled, and that they insisted on execution of the contract. The sellers replied that they had nothing to add to their previous cable and considered the deal cancelled. On Sept. 11 the buyers cabled to the sellers giving them twenty-four hours within which to recognise the contract, and saying that they would otherwise be forced to claim arbitration. E As they received no reply, on Sept. 15 they again sent a cable requiring within twenty-four hours a binding declaration that delivery would be executed according to the contract, but again there was no reply.

The buyers having claimed arbitration, arbitrators were appointed, who failed to agree and appointed an umpire. On Apr. 14, 1953, the umpire awarded that the sellers were in default. The sellers appealed from the award to the appellate tribunal of the London Corn Trade Association, Ltd., who found that the buyers' obligation was to provide a bank guarantee within a reasonable time before Oct. 1, 1952, and that such reasonable time had not arrived by Sept. 10, 1952. The questions of law for the opinion of the court were whether, on the true construction of the documents and the facts as found, (i) the contract date was Aug. 11, 1952, and (ii) the sellers were entitled to treat the contract as determined. Depending on how the court answered these questions, the tribunal made various awards. During the course of the hearing it was conceded that the contract date was Aug. 11, 1952.

T. G. Roche for the sellers.

Eustace Roskill, Q.C., and R. A. MacCrindle for the buyers.

H **DEVLIN, J.:** This Special Case stated by the appeal committee of the London Corn Trade Association raises a point on a contract, made in August, 1952, between American sellers and English buyers, for the sale c.i.f. of Canadian barley. The terms of the contract required that a quantity of barley should be shipped October/November, 1952, and the clause which related to the payment is as follows:

"Net cash against documents on first presentation in London. The

buyers give the sellers through their London bank the guarantee that the documents will be taken up on first presentation ”.

Below that there is, in addition, a provision that there shall be a guarantee by certain German concerns to whom the barley would ultimately go. They were to guarantee “the orderly liquidation of the above contract ” by the buyer.

The date of the contract was Aug. 11, 1952, and about the beginning of September the sellers began calling for the guarantee from the London bank which was provided for by the contract. When, by Sept. 10, it had not been supplied, they purported to cancel the contract, alleging that they were entitled so to do. The main dispute which took place before the appeal committee was whether the sellers were entitled to cancel the contract. The English buyers contended that the cancellation was wrongful and they claimed damages accordingly. The committee made their award on the basis that the cancellation was wrongful and assessed the damages. The question of law which is submitted in the Case is whether the sellers were entitled to treat the contract as terminated. That raises quite a short point which can be put in this way. There is no time expressed in the contract as to the date on which the guarantee was to be furnished. Therefore, it follows (and both sides are agreed on this) that the guarantee must be furnished within a reasonable time. The question is: How is a reasonable time to be measured? It is on that point that the parties differ.

The sellers’ contention, as stated before the appeal committee and repeated here, was that the buyers’ obligation was to secure that the guarantee was given as soon as reasonably possible. The buyers’ contention was put in the alternative. First, they submitted that their obligation in relation to the bank guarantee was to cause it to be opened so that it should be available to the sellers by the first shipment date under the contract, namely, Oct. 1, 1952, and, as support for that submission, they relied on the decision of the Court of Appeal in *Pavia & Co., S.P.A. v. Thurmann-Nielsen* (1). Alternatively, they contended that their obligation in relation to the guarantee was to cause it to be opened so that it should be available to the sellers within a reasonable time before the first shipment date, namely, Oct. 1, 1952, and that such reasonable time had not arrived by Sept. 10, 1952. Those two contentions are based on the submission that a bank guarantee is to be treated for this purpose as being in the same position as a letter of credit, and that the obligation on a buyer to provide a London bank guarantee is to be measured, so far as time is concerned, by the same principles as would apply to a letter of credit. In the *Pavia* case (1) the question was whether a buyer was entitled to wait until he had some reasonable notice or some reasonable ground for thinking that the seller was about to ship, or whether he was obliged to open the letter of credit by the first date of the shipment period provided for in the contract. The Court of Appeal held that the latter was the true view and that a buyer was not entitled to say, once the shipping period had begun: “I am not going to open my letter of credit until there is a reasonable possibility, or some notification by the seller, that he is going to ship”. Accordingly, on that basis, the buyers in this case framed their first contention that the bank guarantee need not be opened before Oct. 1, 1952, i.e., the first date of the period of shipment.

I do not think that the *Pavia* case (1) really deals with the question whether the first date of the shipment period is the last date by which the credit has to be opened. It may very well be argued, for example, that, if the first available date for shipment is Oct. 1, then the buyers are entitled to tender any bill of lading which bears the date of Oct. 1. That means that the goods may be actually loaded on the ship before Oct. 1. It means, certainly, that they will have to be brought down to the docks before Oct. 1, and it might be said that a buyer was entitled to know before he embarked on those operations which led directly to the performance of his obligations under the contract that his payment was secured by the credit for which he stipulated. I do not think the *Pavia* case (1)

decided that point one way or the other. No doubt, it was with that in mind that the buyers framed their contention in the alternative and said that, at any rate, they were not obliged to give a guarantee until within a reasonable time before the first shipment date. In view of the findings of the appeal committee, to which I shall later refer, that Sept. 10 was not a reasonable time, it is unnecessary for me to determine which of the two views is correct. The alternative contention in this case is quite sufficient for the buyers.

A I shall now consider the alternative contention of the buyers which makes it clear what the difference is between the two parties in the method which they propose should be adopted for settling a reasonable time. The sellers want to count forward, as it were, from the date of the contract. They say that the obligation on the buyer in a contract of this sort is to set about getting the bank guarantee as soon as possible; that he must, of course, have a reasonable time within which to do it, but that one counts the reasonable time from the date of the contract when the obligation to provide the guarantee arose. The buyers, on the other hand, say that one counts back from the date which the guarantee is intended to cover; that the guarantee is a guarantee for payment on presentation of documents, and that a buyer would not be obliged to furnish the guarantee until that date draws reasonably near. It is to be assumed that the guarantee is not going to be of service to the seller, at any rate not the sort of service which the contract contemplates, until he really begins to need it, and he does not begin to need it until a reasonable time before the first date of shipment. The buyers relied, of course, on the decision in the *Pavia* case (1), and submitted that a bank guarantee in this contract was really exactly the same as a letter of credit, that the best sort of bank guarantee which could have been obtained would have been a confirmed irrevocable letter of credit, and that, if that had been given, then the principle on which the beginning of the period was to be determined was settled by the *Pavia* case (1). I think that the buyers' view is the right one.

Counsel for the sellers contended that a bank guarantee is something essentially different from a letter of credit, and that the sellers wanted the guarantee in order to give them security. They wanted to know at the earliest possible moment that, when they tendered documents, payment would be secured or they would have the protection of a bank guarantee in respect of it. They might, he said, want to do all sorts of things, and it was not merely a question of arranging to put the goods on board. They might want to make arrangements to buy the goods or they might have opportunities to sell them more profitably to someone else, and they would want to know at the earliest possible moment that they were secured against any possible default by the buyers. That, I think, is tantamount to saying that the guarantee which was to be supplied by the bank was what might be described as a performance guarantee. I think that the answer to that lies in a consideration of the terms of the contract. One must see whether what one might call a performance guarantee is the sort of thing which the bank is intended to supply. I do not think that it is.

G Counsel for the buyers pointed out the different language which is used in the contract in relation to the guarantee which the bank had to give and in relation to the guarantee which was given by outside German guarantors, which was, quite plainly, a performance guarantee. It was described as a guarantee for "the orderly liquidation" of the contract. The guarantee which was to be furnished by the bank was a much more limited thing. It was a guarantee which went, not to the whole performance of the contract, but only to one part of it, namely, that the documents would be taken up on presentation. Counsel for the sellers submits, and I have no doubt that he is right, that, as a matter of law, a bank guarantee is not the same as a letter of credit. Under a letter of credit the bank itself actually undertakes to pay against documents which are to be presented to it. If it is a confirmed irrevocable letter of credit, it creates a direct relationship between the bank and the seller, and the bank becomes directly liable to the

seller for the fulfilment of the obligations which it has undertaken in the letter of credit. In a bank guarantee, looked at from the legal point of view, the bank becomes liable only indirectly or secondarily as a guarantor if the buyer fails to fulfil his obligation. The contract does not provide for the documents being presented to the bank; it provides for the bank's guarantee that the documents will be taken up on the first presentation. I think that those distinctions are perfectly true, but, commercially speaking, it seems to me that the two documents should be treated in the same way, and what is a reasonable time for tendering the documents is a question of fact to be measured in the light of commercial considerations and what the commercial purpose of the contract is. A confirmed irrevocable letter of credit fulfils all the purposes of a bank guarantee, and far more than a bank guarantee, but I think that a bank guarantee is sufficiently analogous to a letter of credit for it to be said that the same sort of principles ought to be applied in measuring the time.

One might look at it in another way. Having taken the view which I have taken, that the bank guarantee is not a general performance guarantee, but only a guarantee of a limited performance, then one asks oneself what is the event which is being guaranteed, and the event is that the documents will be taken up on first presentation. Plainly, the guarantee must be there before the documents are presented. Equally, it is not enough to tender, say, the day before. The time must be long enough to be effective in relation to the event which is guaranteed, the first presentation of the documents. You may take it one step back, you may take it two, three or four steps back. You may say that the guarantee must be not immediately before the documents are presented; it must be before some event which obviously leads up to the presentation of the documents, such as the shipment. You may go back along the chain so far as it is commercially proper to go, but still the relation which is borne between the time of tendering the guarantee and the event which is guaranteed must be measured in that way. It is not, therefore, in my judgment, a guarantee which is measured from the fact that the contract has been entered into. It is to be measured in relation to the event which is guaranteed. That is the measure for which the buyers have contended, and, I think, rightly. Accordingly, I think that their construction of the contract is the right one and that the appeal committee were right when they accepted it, and their finding of fact and their conclusion of law in para. 14 of the Case disposes of the matter. They said:

"In so far as it is a question of fact we find, and in so far as it is a matter of law we hold, that the buyers' obligation was to provide a bank guarantee within a reasonable time before Oct. 1, 1952, and that such reasonable time had not arrived by Sept. 10, 1952".

That, I think, was a correct conclusion, and I would, therefore, answer the question which is addressed to me by saying that the sellers were not entitled to treat the contract as determined on Sept. 10, and, accordingly, that the award should be upheld.

Counsel for the sellers, however, in the course of his final address, produced another point rather in the nature of a second string in case his first point was not going too well, and it was on these lines. He said that, in fact—and it is, indeed, a fact found by the case—although on this view the sellers wrongfully repudiated the contract on Sept. 10, the buyers did not accept the repudiation until Sept. 16. Accordingly, he said, the true question is not whether, working backwards from the first date of shipment, one should go as far back as Sept. 10: Sept. 10 becomes irrelevant, and the true question is whether a reasonable time had elapsed if it were calculated from Sept. 16. He submits that there is no finding of fact on that point and that it might very well be that the arbitrators would have held, if, for example, a guarantee had been tendered on Sept. 15, that that was too late as it had run the shipment date too close. I think there are two answers to that point. The first is that it is plain that it was not taken below, in the sense that

the appeal committee's attention was never directed to the question whether they should apply their minds to what was a reasonable date on the basis of Sept. 16. They applied their minds entirely on the basis of Sept. 10. It is important in these cases that parties who are going to argue points of law before the court should get the facts found which they want found for the purpose of arguing the point of law which they want to submit to the court. Arbitration has great advantages and it also has some disadvantages. Splitting up questions of fact and of law may be one of the disadvantages, but nothing can be more unfortunate than if cases are constantly to go back from the court to the arbitrator because in Cases Stated there is found to be some fact which the arbitrator has not found and might have found. If it is some fact that the arbitrator has been asked to find, then, no doubt, it goes back, but parties, who frame questions of law, ought, in my judgment, to make quite plain to the arbitrator the point on which they want facts found for the purpose of arguing the question of law. They are lay arbitrators and cannot be expected to realise for themselves all the facts to which a point of law might conceivably give rise. It would be very unfortunate if applications for sending cases back on those grounds were lightly entertained.

Counsel for the sellers plainly argued that on Sept. 10 the sellers were entitled to rescind. If he wanted to put forward the alternative case, namely, that, if they were not entitled to rescind on Sept. 10, then they were entitled to rescind on Sept. 16 as no guarantee had been tendered by then, I think it was his duty—I am not saying this in any derogatory sense, because these points often arise as afterthoughts when, after the committee's findings have been seen, they are not so favourable to one as might be desired—to say to the appeal committee that, alternatively, he argued that the sellers were entitled to repudiate on Sept. 16. It was then for him to satisfy the committee that by Sept. 16 the guarantee had not been tendered, and that, therefore, the sellers were entitled to repudiate as at that date. It is quite plain that the committee thought that the only material date was Sept. 10. The buyers made their contention, saying that on Sept. 10 they still would have been within time to tender the guarantee, and it is plain that the appeal committee were never asked to say whether they would also have been in time on Sept. 16. It is plain also, I think, from their findings that, had they been asked, they would at any rate have said that the time had not expired by Sept. 10, and lasted some days after that. Whether it would have lasted so long as Sept. 16 is not plain. The whole contention which the sellers were putting forward was that they were entitled to treat the contract as determined on Sept. 10. If they wanted the matter raised, it was their duty to raise the question clearly and to say that they were entitled to treat the contract as determined on Sept. 10 or, alternatively, on Sept. 16. If that had been done, the attention of the arbitrators might have been directed to the importance of making another finding of fact. I do not, therefore, think that on any view I could go into this point, nor would I be prepared, for the reasons which I have given, to send the case back to the arbitrators.

I am fortified in that conclusion by the fact that I think it would be a bad point anyway. If the contention had been put before the arbitrators, if it had been said to them: "Alternatively, we were entitled to rescind on Sept. 16 and the buyers ought to have tendered the guarantee before that date", the buyers' answer would have been: "Up to Sept. 10 we were not obliged to tender a guarantee because it was too early. Between Sept. 10 and Sept. 16 we were not obliged to tender a guarantee because you intimated quite plainly that you would not accept one if tendered". That is shown, I think, by the facts which are annexed to the Case to be the true position. It is, no doubt, true that, if one party repudiates a contract, as the sellers did on Sept. 10, the buyers, the other party in this case, are not obliged to accept the repudiation. They can keep the contract alive. If they keep the contract alive, they keep it alive for the benefit

of both parties. If, therefore, the sellers, on Sept. 15, had changed their minds and said: "We think we were quite wrong about time, it ought to be worked backwards and not forwards; now tender", it would have been no answer, of course, for the buyers to say: "But you have already repudiated". The buyers had kept the contract alive, but it does not mean that, if they chose to keep it alive, they were obliged to behave in precisely the same way as if the sellers had not repudiated. That is to confuse two things. It is, I think, plainly established by *Braithwaite v. Foreign Hardwood Co.* (2) that that is not the case. If the seller's repudiation is such as to display an attitude which shows that he is, in effect, saying to the buyer: "Although you are keeping the contract alive, even if you perform your next obligation and tender your documents, I cannot accept them", the buyer is relieved from the obligation of making an empty and formal tender. He may, if he wishes for his own purposes, keep the contract alive and still claim that he is relieved from the obligation of making an empty and formal tender. I think that, in the present case, the attitude of the sellers, as shown in their cables, was quite plainly that. In the period that elapsed between Sept. 10 and Sept. 16 they were not saying: "If you tender your guarantee now we will look at it and see if it is all right", or anything of that sort. What they were saying was that they had cancelled on Sept. 10 and that they took their stand on the fact that they had cancelled on that date. That, I think, made it quite plain that they were waiving any obligation that there might be on the buyers' part to tender during the period between Sept. 10 and Sept. 16. If, therefore, the question had arisen, if the sellers had sought to prove repudiation by saying: "You did not tender by Sept. 16", the answer would have been: "We were not obliged to tender by Sept. 10, and between Sept. 10 and Sept. 16 you waived any obligation to tender, so it is irrelevant to inquire whether or not we were obliged to tender before Sept. 16." I think, therefore, that that additional point fails. The result is that I answer the second question in the negative. The first question does not arise, and I uphold the award.

Award upheld.

Solicitors: *Thomas Cooper & Co.* (for the sellers); *Richards, Butler & Co.* (for the buyers).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

WEST v. WEST.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Hodson, L.J.J.),
May 26, 1954.]

Husband and Wife—Maintenance—Application to High Court—Neglect to maintain—Reasonable belief in wife's adultery—Dismissal of petition for divorce based on that adultery—No retrospective effect—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

By an originating summons, dated Mar. 16, 1953, the wife applied for an order of maintenance under s. 23 (1) of the Matrimonial Causes Act, 1950. On Mar. 18, 1953, the husband presented a petition for divorce on the ground of the wife's adultery with E.N. On Feb. 12, 1954, the petition was dismissed on the ground that the wife had not committed adultery.

HELD: the finding of fact on Feb. 12, 1954, that the wife had not committed adultery was conclusive to prevent the husband after that date trying to establish a bona fide and reasonable belief in that adultery, but it had no retrospective effect so as to prevent the husband justifying his failure to maintain the wife before that date; up to the dismissal of the petition on Feb. 12, 1954, the husband was entitled to refuse to maintain the wife; and the wife's summons should be dismissed.

Allen v. Allen ([1951] 1 All E.R. 724), applied.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410.

Cases referred to:

- (1) *Allen v. Allen*, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest, Replacement, 84, 633.
- (2) *Everitt v. Everitt*, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279; 27 Digest, Replacement, 348, 2881.
- (3) *Wood v. Wood*, [1947] 2 All E.R. 95; [1947] P. 103; [1948] L.J.R. 784; 111 J.P. 428; 27 Digest, Replacement, 320, 2667.

APPEAL by the husband against an order of His Honour JUDGE REWCASTLE, Q.C., sitting as a special commissioner in divorce at Birmingham, dated Feb. 15, 1954.

On Mar. 16, 1953, the wife issued an originating summons applying for an order for maintenance under the Matrimonial Causes Act, 1950, s. 23 (1), on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for her. On Mar. 18, 1953, the husband filed a petition for dissolution of the marriage on the ground of the wife's adultery with one E.N. By an affidavit dated Mar. 31, 1953, the husband stated that he contested the wife's summons on the ground that she had committed adultery with E.N., and the summons was adjourned until after the hearing of the divorce petition. On Feb. 12, 1954, the petition came before the commissioner who found that the wife had not committed adultery and dismissed it. On Feb. 15 the wife's summons came before the commissioner who found that the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife and ordered that the matter be referred to the registrar for investigation as to the means of the parties, the husband meanwhile to pay to the wife £4 per week. The husband appealed.

D. P. Draycott for the husband.

William Latey, Q.C., and *C. A. Beaumont* for the wife.

SIR RAYMOND EVERSLED, M.R., stated the facts and continued:
At the beginning of his judgment, the commissioner said:

"The husband says, I think justifiably, that up to the decision on his

petition for divorce on Feb. 12, 1954, he had reasonable grounds for suspecting that his wife had committed adultery with the co-respondent in that suit."

In that state of affairs it was contended on behalf of the husband that, although after the finding of fact on Feb. 12, 1954, it was no longer open to him to say that he reasonably believed the wife to be an adulteress, still he was entitled to allege and prove, if he could, such reasonable belief up to that date. On the other hand, it was contended that *Allen v. Allen* (1) in effect decided that once, on the trial of a petition, a charge of adultery is rejected, the party alleging it is thereafter estopped altogether from setting up that adultery or his belief in that adultery in any proceedings and in relation to any period of time—in other words, that such a finding acts retrospectively to disqualify the party against whom it operates from asserting that he ever honestly and reasonably believed in the adultery. The learned commissioner accepted the latter view, and it is against that decision that this appeal is made.

In my judgment, the commissioner was wrong in the view he took. *Allen v. Allen* (1) might appear to be a strong case to persons not very well versed in the workings of our system. The wife had first taken proceedings for restitution of conjugal rights against her husband, and the husband, in answer to that petition, pleaded and proved that he had reasonable belief that the wife was an adulteress and so justified his withdrawal from cohabitation. Later, the husband petitioned for the dissolution of the marriage on the ground of the wife's adultery, the reasonable belief in which he had established in his wife's proceedings, but he then failed to establish adultery. The question then arose whether the husband could still persist in claiming a reasonable belief in the adultery as an answer to proceedings for maintenance by the wife, notwithstanding that his petition had been dismissed. What he said was: "True, I failed to discharge the onus of proof which lies on me of proving adultery, but I may still fairly claim that I reasonably and bona fide believe that my wife has committed adultery, and, indeed, in a proceeding which she brought some time earlier it was held that I could reasonably so believe." This court, however, came to the conclusion that, once there had been a decision on the question of fact whether or not adultery had been proved, and that decision was favourable to the alleged adulterer or adulteress, there was no room left for belief.

The leading judgment in *Allen v. Allen* (1) was delivered by HOBSON, L.J., and in the course of it he cited ([1951] 1 All E.R. 728) with approval a passage ([1949] 1 All E.R. 913) from the judgment of LORD MERRIMAN, P., when sitting as President of a division of this court in *Everitt v. Everitt* (2):

"In *Wood v. Wood* (3) I called attention ([1947] 2 All E.R. 97) to this sort of position—a confession by the wife of adultery with every circumstantial detail fully justifying the husband's belief in the fact that she had committed adultery and, so long as that belief subsisted, entitling him to withdraw from, or to refuse to resume, cohabitation, but there might come a moment when, in spite of her confession, or, indeed, because of her oath that her confession had been false, and supported with equally circumstantial detail, a judge might hold that, not only was the charge of adultery not proved, but the wife had not, in fact, committed adultery. From that moment the fact has been ascertained and there is no longer any room for the belief, but that [the ascertainment of the fact] does not act retrospectively or retroactively. So long as the belief is reasonably and properly held, the husband's conduct and their respective rights in relation to cross charges of desertion are regulated by the existence of the belief, though there may come a moment beyond which that is no longer possible."

HOBSON, L.J., applied that reasoning to the question of maintenance, and there is no doubt, I think, that *Allen v. Allen* (1) is authority for the view, binding

on this court, that a finding that there has been no adultery is conclusive to prevent the husband thereafter, in respect of any later period, establishing a bona fide and reasonable belief in the adultery. But the finding does not operate retrospectively to prevent a husband saying: "Until the court so found I believed bona fide and reasonably that my wife was committing adultery", and for that reason justifying an alleged desertion or failure to maintain.

A That being, as I think it is, the law, and the commissioner having found as a fact that the husband justifiably took the view that, until the hearing of the petition, his wife had committed adultery, it seems to me that on Feb. 15, 1954, the husband was entitled to say that he had an answer to the summons and was entitled to have it dismissed. But, from Feb. 12, 1954, he was no longer able to refuse to maintain his wife in the absence of some fresh ground of justification. I think that the appeal should succeed, and that the summons
B should be dismissed.

C DENNING, L.J.: To succeed the wife had to show that before the issue of the summons on Mar. 16, 1953, her husband had been guilty of wilful neglect to provide reasonable maintenance for her, but her husband proved that at all material times before the summons he had reasonable ground for believing her to have been guilty of adultery. That meant that he was not then bound to, and was, therefore, not guilty of wilful neglect to, maintain her. After the hearing of the divorce suit, it was another matter. I agree that the appeal should be allowed.

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Underwood & Co.*, agents for *J. Foley Eggington & Co.*, Sutton Coldfield (for the husband); *Golding, Hargrove & Palmer*, agents for *D. Wood & Co.*, Birmingham (for the wife).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

A. & J. MUCKLOW, LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (SIR RAYMOND EVERTSHED, M.R., JENKINS and HODSON, L.JJ.),
May 17, 18, 19, 20, June 3, 1954.]

*Surtax Company Undistributed profits "Available for distribution" —
Income for broken period before winding-up resolution—Finance Act, 1927* A
(c. 10), s. 31 (4)—*Finance Act, 1922* (c. 17), s. 21 (1), proviso.

In its four and half years of life up to Apr. 30, 1943, a company had accumulated a balance on profit and loss account of £145,000. From May 1 to Dec. 8, 1943, it earned a profit of over £14,000. On Dec. 9, 1943, a resolution was passed for the voluntary winding-up of the company and the bulk of its assets were sold to a new company having somewhat wider B objects, the whole of the consideration of the sale being distributed to the two shareholders, who used them to take up shares in the new company. £35,000 of the capital assets of the original company was withheld from the sale and paid by the liquidator to those shareholders, who put it on deposit to guarantee an overdraft of the new company. It was found that the object of the reconstruction was in no way to avoid tax. The Special C Commissioners of Income Tax made a direction under s. 21 (1) of the Finance Act, 1922, that income of the company for the accounting period ending on Apr. 30, 1943, and for the period from May 1 to Dec. 8, 1943, be treated as income of the members for purposes of surtax, but on appeal held that there had been no unreasonable withholding of the company's income from distribution in respect of the former period for which it discharged D the direction, but that there had been such unreasonable withholding in respect of the second.

HELD: (i) the commissioners' finding was a finding of fact reached without misdirection or the application of any wrong principle and on sufficient evidence, and was, therefore, conclusive.

(ii) the provision in s. 31 (4) of the Finance Act, 1927, that a company's E income from the end of its last accounting period up to the date of a winding-up resolution should be deemed to be income "available for distribution" did not require any such income not distributed necessarily to be deemed to have been unreasonably withheld from distribution so that a surtax direction must automatically be made, but left it open to the company to show that there had been no such withholding. F

Dicta of LORD HANWORTH, M.R., and of SLESSER, L.J., in *H. Collier & Sons, Ltd. v. Inland Revenue Comrs.* ([1933] 1 K.B. 500, 503, 504), not followed as being made obiter and per incuriam.

AS TO UNDISTRIBUTED PROFITS OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 289-294, paras. 574-580; and FOR CASES, see DIGEST Supps., G Income Tax.

FOR THE FINANCE ACT, 1922, s. 21 (1), and FOR THE FINANCE ACT, 1927, s. 31 (4), see HALSBURY'S STATUTES Second Edn., Vol. 12, pp. 237 and 289.

Cases referred to:

- (1) *Collier (H.) & Sons, Ltd. v. Inland Revenue Comrs.*, [1933] 1 K.B. 488; 103 L.J.K.B. 33; 148 L.T. 199; 18 Tax Cas. 83; Digest Supp. H
- (2) *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.*, [1942] 1 All E.R. 619; [1942] A.C. 643; 111 L.J.K.B. 546; 167 L.T. 45; 24 Tax Cas. 328; 2nd Digest Supp.
- (3) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 38 B.W.C.C. 48; 2nd Digest Supp.

- (4) *Colville Estate, Ltd. v. Inland Revenue Comrs.*, [1930] 2 K.B. 393; 100 L.J.K.B. 101; 144 L.T. 28; 15 Tax Cas. 485; Digest Supp.
 (5) *Montague Burton, Ltd. v. Inland Revenue Comrs.*, (1935), 152 L.T. 8; *affd.* H.L., (1936), 105 L.J.K.B. 236; 154 L.T. 355; 20 Tax Cas. 48; Digest Supp.

A APPEAL by the taxpayer company from an order of HARMAN, J., dated Nov. 17, 1953, dismissing an appeal by Case Stated from a decision of the Special Commissioners of Income Tax, holding that the company had acted unreasonably in refraining from making a distribution of profits and upholding a surtax direction of the commissioners under s. 21 (1) of the Finance Act, 1922.

B The Special Commissioners made the surtax direction in respect of the company's accounting year ending on Apr. 30, 1943, and of the period from May 1, 1943, to Dec. 8, 1943, the day before the passing of a resolution for the voluntary winding-up of the company. The commissioners found that there had been no unreasonable withholding of the company's income from distribution for the year ended Apr. 30, 1943, but held that they were bound by s. 31 (4) of the Finance Act, 1927, to find that the income for the period May 1 to Dec. 8, 1943, had been so unreasonably withheld and they confirmed the direction in respect
 C of that period. On appeal by the company in respect of the second part of the decision, HARMAN, J., held ([1952] 2 All E.R. 1094) that s. 31 (4) of the Act of 1927 did not mean that any income for such a period not distributed must of necessity be deemed to have been unreasonably withheld from distribution and remitted the case to the commissioners for a new finding. The commissioners
 D found that they could not find any circumstance or combination of circumstances making it reasonable for the company to refrain from making a distribution for the second period and they again upheld the direction. The company appealed. HARMAN, J., held that there was evidence to support the commissioners' finding of fact and that they had not misdirected themselves in law and he dismissed the appeal.

E *Millard Tucker, Q.C.*, and *G. B. Graham* for the company.
Heyworth Talbot, Q.C., and *Sir Reginald Hills* for the Crown.

Cur. adv. vult.

June 3. The following judgments were read.

F SIR RAYMOND EVERSLED, M.R.: Section 21 of the Finance Act, 1922, opens with the following preamble:

"With a view to preventing the avoidance of the payment of supertax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows: "

Sub-section (1) of the section is, so far as relevant, in the following terms:

G "Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period . . . for which accounts have been made up, distributed to its members in such manner as to render the amount distributed
 H liable to be included in the statements to be made by the members of the company of their total income for the purposes of supertax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for purposes of assessment to supertax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members . . . Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the commissioners shall have regard not only to the current requirements of the

company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

The section was amended by s. 31 of the Finance Act, 1927, sub-s. (4) of which reads:

"Where an order has been made or a resolution passed for the winding-up of a company to which the said s. 21 applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for winding-up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company, and, as respects that period . . . the said section shall apply as if the words 'within a reasonable time' in sub-s. (1) of the said section were omitted therefrom."

It is not in doubt that the company, A. & J. Mucklow, Ltd., was at all relevant dates a company to which s. 21 of the Act of 1922 applied. The company went into voluntary liquidation on Dec. 9, 1943. Directions were made, as contemplated by the section, (a) in respect of the company's last full financial year which ended on Apr. 30, 1943, and (b) in respect of what has been called the "broken period" from May 1 to Dec. 8, 1943. The company appealed against both these directions to the Special Commissioners. The commissioners discharged the first direction (relating to the year ended Apr. 30, 1943) and the Crown have not challenged the propriety of the discharge. As regards the broken period, the commissioners confirmed the direction, but, at the company's request, stated their conclusion in the form of a Case Stated.

HARMAN, J., before whom the Case came, was uncertain whether or to what extent the commissioners had based their conclusion on the view that, in the case of a broken period up to a company's liquidation, a direction, once given, operated necessarily and automatically to the full extent of the income treated as available, and on the further view that the case of *H. Collier & Sons, Ltd. v. Inland Revenue Comrs.* (1) in this court so decided, HARMAN, J., being of opinion (for which he stated his reasons) that s. 21 (as amended) did not make a direction relating to a broken period so inescapable or "automatic" and that *Collier's* case (1) was not a binding authority to that effect, referred the matter back to the commissioners. They, after a further review of a number of relevant matters and considerations, reported to the learned judge:

"After carefully considering the whole of the facts we were unable to find any circumstances or combination of circumstances making it reasonable for the company to refrain from making a distribution. We, therefore, conclude that the company acted unreasonably in so refraining, and we find that it did not distribute 'a reasonable part of its actual income' for the period in question."

In the opinion of HARMAN, J., this was a finding of fact justified by evidence and not disqualified by any misdirection in law. He, therefore, dismissed the company's appeal.

It will have been noticed that the period with which we are concerned is that from May 1 to Dec. 8, 1943, a period beginning more than eleven years ago. It is, indeed, nearly four years since the validity of the two directions came before the Special Commissioners. I am not criticising anyone concerned at any stage; for I have no grounds on which to base any criticism, other than the mere fact of the passage of the years. Both counsel for the company and counsel for the Crown regretted the delay. Where the question involved is (as I assume it for the moment to be) the question of fact: Aye or no, has a "reasonable" part of the company's income been distributed?, it is so plainly wrong (and not less wrong though both parties were content) that such a question should not be investigated till years after the event—when some of the witnesses might, indeed,

be no longer available—that I have felt bound to draw attention to so remarkable a lapse of time.

A I have also been somewhat disturbed by the form of the Case and the later
 report of finding. In those documents the commissioners touched on a number
 of matters and considerations and I am not satisfied that all of them were pertinent
 to the question to be determined. In any case, HARMAN, J., was at the first
 hearing before him left sufficiently uncertain of the commissioners' intention on
 matters of fact that he referred the case back to them; and on the second hearing,
 both the company and the Crown were able to contend that the commissioners'
 findings were in their own favour. I hope I shall, in the circumstances, be forgiven
 if I emphasise, in cases of this character, the advantage and desirability of clear
 expressions by the commissioners of their findings of fact. And I venture to add
 B that, if the method is adopted of reciting the effect of a witness's evidence, the
 conclusion on the commissioners' part that the evidence is accepted "with a
 grain of salt", though lively as a form of expression, leaves an appellate court
 uncertain whether or to what extent the evidence should be treated as having
 been rejected. In the present case the costs of two hearings before the com-
 missioners, two hearings before the judge, and one hearing of several days in
 C the Court of Appeal, have eventually to be borne by one party or the other.

I have said that the Case Stated touched on many matters of fact. To my
 mind, the essential facts are these. During the short life of about four and a
 half years during which the company's activities were, inevitably, restricted
 by the war, its resources, nevertheless, greatly increased. No dividends were
 ever declared and on Apr. 30, 1943, the accumulated balance to the credit of
 D the company's profit and loss account was over £145,000. It has been decided
 that the uncertainties and possible requirements of the future justified the two
 brothers, who were the sole directors and shareholders, in their decision to make
 no distribution for the year then ended. During the period from May 1 to
 Dec. 8, 1943, a further sum of profit was earned of over £14,500 which amount
 must (it is conceded) be treated as having been, within the terms of s. 31 (4) of
 E the Finance Act, 1927, "available for distribution to the members" in respect
 of that broken period. The bulk of the company's assets were then sold to a
 new company (A. & J. Mucklow & Co., Ltd.) having somewhat wider objects
 than those of the selling company. The whole of the consideration for the
 assets sold was distributed to the two shareholders and used by them in taking
 up shares in the new company. But there was excluded from the sale cash (or
 F its equivalent) amounting to £35,000 and this sum was also paid by the liquidator
 to the two shareholders who (see para. 20 of the Case Stated)

"... put it on deposit to guarantee an overdraft of the new company".

We were informed that the whole sum still remains so deposited. But it always
 was and is the property of the two brothers, and there is not even any evidence
 G that it was any part of the terms of the sale that that sum or any sum should be
 provided to secure the new company's banking account.

If, therefore, the commissioners found and intended to find as a fact that, of
 the £14,500 income of the broken period available for distribution, the company
 did not distribute a reasonable part of it, there was, in my judgment, plainly,
 evidence to support such a finding. And I agree with HARMAN, J., that the
 H commissioners did so find and intend to find. Nor do I think that there was
 any material misdirection on their part. The commissioners had found in the
 company's favour as regards the financial year ended Apr. 30, 1943. They also
 acquitted the company and its directors of having deliberately sought to avoid
 surtax, but rightly regarded that fact, notwithstanding the terms of the preamble
 to the section, as not being conclusive. On the other hand, it is clear from their
 report of finding that, as regards onus of proof, they had in mind the speech of
 LORD ATKIN in *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.* (2)

([1912] 1 All E.R. 625). They followed the directions given to them by HARMAN, J., in his first judgment that the circumstances mentioned in the proviso to s. 21 (1) of the Act of 1922 were not intended to be exhaustive, that the "direction" was not inescapable or mandatory, and that *Collier's case* (1) did not require them so to regard it; and, finally, they took the view (as HARMAN, J., in my opinion rightly, had intimated to them) that a mere desire on the part of the two director-shareholders to support or to be able to support the needs of the new company—if and so far as it was present to their minds—was an extraneous and irrelevant consideration. In these circumstances I cannot regard the final paragraph of their report (which I have already cited) as otherwise than a clear, and also a justifiable, and, therefore, conclusive, finding of fact adverse to the company within the meaning of s. 21 (1) of the Act of 1922, as amended.

I have had the advantage of reading the judgment about to be delivered by JENKINS, L.J., who has set out more fully the relevant facts. I respectfully adopt his reasons for dismissing the present appeal on this short ground, and I do not desire further to elaborate my own.

The result is sufficient to dispose of the appeal. But the further point was taken by the Crown and fully argued before us (to which some reference has already appeared), viz., that, in the case of the broken period ending with the liquidation of a company within s. 21 (1) of the Finance Act, 1922, the effect of the amending of s. 31 (4) of the Finance Act, 1927, is to render a direction once given inescapable or (to use the words used during the argument) "mandatory" and "automatic". That is to say, it was argued by the Crown that the provisions of the original section, expressed to create liability for taxation only when the company was shown not to have distributed a reasonable part of its income, were inapplicable in the case of a direction relating to a broken period—such direction ipso facto creating liability to taxation in respect of the whole income. It was, moreover, contended by the Crown that we were in any case bound so to hold by the judgments of the majority of this court in *Collier's case* (1). As both these contentions have raised matters of general importance I have thought it desirable to give my reasons, in agreement with HARMAN, J., for rejecting both of them.

The first contention rests on the view that the phrase "deemed to be income . . . available for distribution to the members" means in its context "income which ought to have been distributed". I have (with all respect to two of the judgments in *Collier's case* (1) and to the arguments of the learned counsel for the Crown) been wholly unable to accept this argument. The relevant amendments introduced into s. 21 (1) of the Act of 1922 by s. 31 (4) of the Act of 1927 were clearly designed to prevent avoidance of the impact of the former section by the expedient of liquidation. The conception of the income earned up to the date of liquidation being "deemed to be available for distribution" is, no doubt, artificial—for unless the company and its directors resolve before actual liquidation to make a distribution by way of dividend, it will be too late afterwards. And as a practical matter, in many cases (at least), it will not be easy to see on what grounds of the kind contemplated by the original section a company on the eve of liquidation will reasonably have declined to make any distribution. Nevertheless, I confess that I have been unable to see any ground in the context for construing the formula used in s. 31 (4) of the Act of 1927—a formula commonly used and well understood in relation to company matters—in other than its ordinary sense, i.e., income which the company can in fact, and properly, pay out by way of dividend to its members.

The formula is twice introduced by the amending s. 31. By sub-s. (1) (which I quote more fully hereafter) it is provided, by way of qualification to the proviso in sub-s. (1) of the original section, that income applied or applicable for certain specified purposes (which might otherwise be regarded as bringing the income

within the scope of the proviso) should be deemed to be available for distribution so that its non-distribution in fact cannot be justified as falling within the proviso. In this instance I can see a somewhat more forceful argument for suggesting that the formula is being used otherwise than strictly in its ordinary meaning, but the argument is not, in my judgment, strong enough—certainly not strong enough to give to the phrase an unusual and special meaning in sub-s. (4).

A If Parliament had intended by the amendment to create an “automatic” liability for tax it would surely have sought—and found without difficulty, e.g., by reference to the preamble to the original section itself—appropriately clear language. Our attention was drawn to more than one instance in later statutes in which such intention had been clearly expressed. Thus, by s. 14 (1) of the Finance Act, 1939, dealing with investment companies, it is provided in unambiguous terms that

“ . . . the whole of the actual income . . . shall . . . be deemed for the purposes of assessment to surtax to be the income of the members of the company . . . ”

C Counsel for the Crown attributed these instances of clear language to mere improvement in drafting technique, and I am not seeking to construe the language of an Act of 1927 by invoking the terms of later enactments. But to the somewhat cynical argument of the Crown one answer appears to me to be that, in an enactment described by LORD ATKIN in *Pattorini's* case (2) as penal in its effect, clear language is required to impose liability: and I should be loth to derive obliquely from language which, ordinarily understood, could not have so far-reaching an effect, a result which, I venture to think, would occur to no one on a first reading and which would have the somewhat capricious consequence that those against whose companies a direction had been made would have no answer or effective means of challenge, while others would escape liability for no better reason than that, in their cases, no direction had in fact been made.

E Counsel for the company sought further to meet the Crown's argument by a close analysis of the “mechanics” contained in sched. I to the Act of 1922 as amended*, contending that those provisions were wholly inconsistent with the view that a “direction” once made as regards a broken period was “automatically” effective and left no room for challenge on the part of the taxpayer. In the circumstances, I have not found it necessary to pursue the matter into these legislative by-ways. I express no view on them, therefore, save to say that, as at present advised, I doubt whether these “mechanical” provisions carry the matter further one way or another, for I am not satisfied that the “other periods” mentioned (which, according to counsel for the company, referred to, or at least included, “broken periods” of the kind under consideration) do more than include periods, not being yearly periods, in respect of which companies carrying on as going concerns may make up their accounts. I reject, therefore, the argument of counsel for the Crown based on the construction of the relevant sections—if I am free so to do.

H That leaves the further question—as I think, the much more difficult question—what precisely was decided by *Collier's* case (1), and whether, having regard to the principles stated by this court in *Young v. Bristol Aeroplane Co., Ltd.* (3), that decision is now binding on this court. *Collier's* case (1) was like the present in that, before FINLAY, J., at first instance, and the Court of Appeal, only the income of the “broken period” was in question. That “broken period” was from immediately after the end of the company's last financial year, namely, Sept. 1, 1928, until the date of the company's going into liquidation, namely, Dec. 20, 1928. There was, however, one special feature in the case around

*By Finance Act, 1927, s. 31 (7) (8), s. 38 (1) (b), s. 42 (7), s. 46, sched. V, pt. III; Finance Act, 1936, s. 20 (5); Finance Act, 1937, s. 14 (2), sched. III.

which the whole of the argument of the appellant company (for the Crown were not called on to argue) turned in the Court of Appeal, namely, that on Nov. 16, 1928, the company had agreed to sell its assets and undertaking to the purchasing company and it was part of that contract (by cl. 8) that the company should from the close of business on Aug. 31, 1928, be deemed to have been and to be carrying on the business on behalf of the purchasing company. The Crown made no claim in respect of the company's income from and after the date of the contract (Nov. 16). The contest was confined to the period from Sept. 1 to Nov. 15 (inclusive).

The appeal of the company against the direction made on the company had gone pursuant to sched. 1 to the Finance Act, 1922, for hearing before the Board of Referees, and from the board (which confirmed the direction) on a Case Stated to FINLAY, J. The terms of the Case Stated are fully set out in 148 L.T. 200 et seq. The contentions of the company and the Crown were set out in the Case and I shall later return to them. FINLAY, J., decided the case adversely to the company on the simple ground that whether the company had "not . . . distributed . . . a reasonable part" of its actual income was a question of fact which the board had decided, on evidence, and had, therefore, conclusively decided, against the company. It seems to me manifest that FINLAY, J., did not regard a direction in respect of a broken period as, per se, conclusive, though he did not decide the case on that ground. I am content to repeat the citation taken by HARMAN, J. (148 L.T. 204):

"You get the winding-up resolution on Dec. 20, and thereupon the section says that the income of the company for the period from the end of the last year shall, for the purposes of the section, be deemed to be income available for distribution to the members of the company. That does not, of course, mean that you are without any more examination to say that it has become obnoxious to the section. What it means is that it is income which you are entitled to treat as income of the company, and, therefore, as income which, if the other conditions of the section are fulfilled (that is to say, if there has been what I may call the unreasonable withholding of it) is income as to which the appropriate machinery may be brought into operation."

The report in the LAW REPORTS sets out ([1933] 1 K.B. 496, 497) the argument of the learned counsel for the appellant company, which fell into two parts. The first part was to this effect: that the question under s. 21 of the Act of 1922 (as amended) fell to be determined at the end of the broken period, namely, on Dec. 20, 1928; and that on that day there was no income capable of being subject to a valid direction for the company had, on the previous Nov. 16, parted wholly with it from Sept. 1 onwards. At that point in the argument SLESSER, L.J., is reported as interjecting the question (in effect): "Do not the terms of s. 31 (4) of the amending Act require the conclusion that the income of the period is to be deemed income available for distribution?" The learned counsel then passed to the second part of his argument—namely, accepting SLESSER, L.J.'s inference from the terms of the section, still, having regard to the contract, it could not at the end of the period have been reasonable to distribute any part of such income.

I have already observed that the court dismissed the appeal without calling on the Crown to argue. The court consisted of LORD HANWORTH, M.R., and SLESSER and ROMER, L.J.J., of whom the last named clearly, as I think, rested his conclusion on the same ground as had FINLAY, J. After observing that, in his opinion, the words of s. 31 (4) of the Act of 1927 were too strong for the appellant company's counsel, he said ([1933] 1 K.B. 505):

" . . . all we have to consider is whether it was open to the Board of Referees to come to the conclusion that a reasonable part of that income had not been distributed to the members. As the income is to be deemed to be income available for distribution to the members, and on that

hypothesis there was no conceivable reason why the income should not have been distributed amongst the members, it is clear that the commissioners could find, as they did in fact find, that it was unreasonable not to have so distributed it, in other words, that a reasonable part of that income had not in fact been distributed amongst the members ”.

A Respectfully agreeing, as I do, with the view of the construction of the relevant parts of s. 21 of the Act of 1922 and s. 31 of the Act of 1927 which underlies ROMER, L.J.’s conclusion, I add only that his reasoning appears no less applicable to the present case. There is no hint or trace of acceptance by ROMER, L.J., of the argument that, in the case of a broken period, a direction is “ automatic ” or inescapable. But did LORD HANWORTH, M.R., and SLESSER, L.J., on the contrary, so hold ?

B With every respect to LORD HANWORTH’S judgment, I am bound to say that I find it, as did HARMAN, J., somewhat obscure. And if he took the view attributed to him, at least he nowhere said so in terms. On the other hand, I think it is impossible to avoid the conclusion that SLESSER, L.J., did deliberately so conclude. It seems to me clear that SLESSER, L.J., regarded the formula “ income available for distribution ” as meaning, according to its ordinary usage, or at least in the context of s. 31 (4) of the Finance Act, 1927, not only available, C i.e., “ capable of being properly distributed ” but also “ which ought to have been distributed ”. Thus, in the second paragraph of his judgment (*ibid.*, 502) he says that if the phrase is to be read in its ordinary meaning “ the direction is clear ”—which I think must mean “ the commissioners’ direction is mandatory ”. So, at the end of his judgment, after considering the possible case in which any D distribution would be “ unlawful ” (on which he expresses no view), he concludes (*ibid.*, 504):

“ He [FINLAY, J.] seemed to be of opinion that the commissioners must still consider what was a reasonable part of the income for distribution under the Act of 1927, and decided the case, as I understand him, as a question of fact. Because I have arrived at a different view of the law on that matter, E and agree with the Master of the Rolls in thinking that the words of sub-s. (4) are to be read in the sense which I have indicated, I have thought it right in courtesy to the learned judge to give full expression to my opinion.”

By the passage last cited, SLESSER, L.J., is rejecting altogether the necessity of applying, in the case of a broken period, any test of reasonableness. He is, F however, also attributing to FINLAY, J., the view that the commissioners had the positive duty of discovering what was the reasonable part of the income which the company ought to have distributed—an attribution which shows, as later appears, that the lord justice had fallen into an error, and an error which, I think, went to the root of his judgment. I have already given my reasons for thinking that the phrase “ income available for distribution ” means no G more and no less than what it says, and with all respect to SLESSER, L.J., I have been unable to see how its “ natural or ordinary ” meaning can be other than I have stated. But has it a special meaning in its context in these enactments ? It is, I think, here that the clue to SLESSER, L.J.’s judgment can be found: and to understand it it is necessary to cite from s. 31 (1) of the Act of 1927 which SLESSER, L.J., himself quoted (*ibid.*, 503):

H “ Sub-section (1) of s. 21 of the Finance Act, 1922, shall have effect as if at the end thereof there were added as a new paragraph the following:—
‘ For the purpose of this sub-section any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company and not as having been applied or being applicable to the current requirements of the company’s business or to such other requirements as may be necessary or advisable for the maintenance and development of that business.’ . . . ”

There then follows a list of certain "applications" which are by the effect of the sub-section taken out of the benefit of the proviso to the original sub-section and declared, even though they may have been in fact expended, still to be "available for distribution" among the members.

Now, SLESSER, L.J. (see *ibid.*, 502, 503), had observed that, under the original sub-section of the Act of 1922, it was the commissioners' duty to arrive at the "notional" figure which ought to have been distributed—that being, as he thought, the limit of liability for taxation—arrived at, in the light of the proviso, by reference to the test of reasonableness. He said (*ibid.*, 503):

"... the words 'income available for distribution to the members' do not occur in the Act of 1922 for the reason, as I think, that the legislature was there dealing only with that part of the income which was deemed to be a reasonable part *ascertained as in that section provided*."

There then follows in the judgment the reference to s. 31 (1) of the Act of 1927 and the conclusion is stated in the following passage (*ibid.*, 504):

"That points to a complete and exhaustive antithesis between the income being available for distribution among members of the company on the one hand, and money applied to the requirements of the company's business or requirements for maintenance and development of the business on the other hand. If that be a right view, and it is consistent with and supports the other views which the Master of the Rolls has expressed, it follows that, when the statute of 1927 speaks of 'income available for distribution to the members of the company,' it is an express provision that the ascertained income shall be deemed to be available for distribution regardless of whether it is a reasonable part within the meaning of the earlier Act."

From the passages I have quoted from SLESSER, L.J.'s judgment I have for my part come to the conclusion that his acceptance of the conception of the "mandatory" character of a direction in the case of a broken period depended on the view which he took of the meaning of the phrase "income available for distribution"; and that the latter view in turn depended on his opinion that the phrase was introduced so as to be applicable only in those cases in which the assumed duty of the commissioners to ascertain the "notional" or reasonable amount which ought to have been distributed was excluded. It is conceded that SLESSER, L.J., fell into error in supposing that, in cases falling under the original Act, the commissioners had a duty to ascertain any "reasonable" figure which fixed the limits of tax liability. *Coleville Estate, Ltd. v. Inland Revenue Comrs.* (4) was not cited to the Court of Appeal in *Collier's case* (1). In *Coleville's case* (4) it had been clearly held that, if in such a case as I am supposing (i.e., one falling under the terms of the original Act of 1922) a company had not distributed a reasonable part of its actual income, then the members were liable to be taxed in respect of the *whole* of that income and not a reasonable part only of it; and that view of the section was later approved in the House of Lords in *Fattorini's case* (2); see per LORD ATKIN ([1942] 1 All E.R. 624), per LORD MACMILLAN (*ibid.*, 627), and per LORD WRIGHT (*ibid.*, 629).

It was argued that the error into which the learned lord justice fell was, nevertheless, not essential to the ratio of his decision of the case. As a matter of strict logic, it may be that the conclusion was independent of the false premise. The question is, however, not whether, as a matter of logic, the conclusion depended on the premise, but whether SLESSER, L.J., thought that his conclusion followed from the antithesis which he had earlier stated. And I am very far from satisfied that, if it had not been for his view of the effect of the original section and of the contrast which he consequently discerned from the introduction of the formula "available for distribution, etc.", he would ever have formed the view which he did of the meaning of that formula. For my part, therefore, I should be prepared to hold that the judgment of SLESSER, L.J., if it would otherwise be authoritative, can be reviewed in this court (within the principle of *Young v.*

Bristol Aeroplane Co., Ltd. (3)) on the ground that it was delivered, in this essential respect, *per incuriam*, or that a material part of the reasoning on which the conclusion rests is inconsistent with later pronouncements (in *Falloon's* case (2)) of the House of Lords.

I return to the judgment of LORD HANWORTH, M.R. I have already ventured respectfully to make the criticism that the judgment is somewhat obscure and to observe that certainly the learned Master of the Rolls, if he did accept the argument for the "automatic" effect of a direction in respect of a "broken period," nowhere so stated in clear terms. Without multiplying citations I take one passage which seems to come most near to the language of SLESSER, L.J. ([1933] 1 K.B. 500):

"I have come to the conclusion that, in the case where there has been a winding-up order or resolution, we are bound by the direct and simple words of s. 31 (4). In such a case the income of the company is to 'be deemed to be income of that period available for distribution to the members of the company,' and the section explicitly eliminates in such a case the words 'within a reasonable time'. The effect of taking out those words is that you get a hard and fast terminus ad quem, to which regard is to be had. You are not to allow a period during which there can be a determination whether the company shall or shall not divide a reasonable part of its actual income. I think the elasticity originally given by s. 21 (1) in regard to the part of the profits which was reasonably distributable, has also been eliminated."

I was at one time inclined to think that LORD HANWORTH had been disposed to base his conclusion, rather, on the view that by Dec. 20, 1928, it had become too late in any event for the company to justify, or to determine on, non-distribution. And if LORD HANWORTH's ratio differed from that of SLESSER, L.J., then the latter would stand alone and would not, I apprehend, be binding on this court. But clearly SLESSER, L.J., had no doubt of the unanimity on this essential point between himself and LORD HANWORTH; and I think that view must be accepted. But I think also that the disabling quality in SLESSER, L.J.'s judgment must, as a consequence, equally affect that of the Master of the Rolls.

But there remain the further points. First, a conclusion on this point was not essential to the result of this case. Secondly, as I have earlier stated, the "mandatory" argument found no place among the Crown's contentions before the Board of Referees. The case of the Crown (see para. (d), 148 L.T. 202) was that the company had not distributed a reasonable part of its income *either* for the last of the company's financial years *or* for the broken period—not materially distinguishing between the two. In my judgment, these circumstances, together with the circumstance that the Crown was not called on to argue in the Court of Appeal, support the view which I have formed that the judgments of the majority of the Court of Appeal may fairly be regarded as having, in the material respect, been given *per incuriam*. But my conclusions on these matters do not affect the result of this appeal which, for reasons earlier given, must, in my judgment, be dismissed.

JENKINS, L.J.: This is an appeal from an order of HARMAN, J., dated Nov. 17, 1953, affirming a decision of the Special Commissioners, which upheld a direction made against the appellant company under s. 21 (1) of the Finance Act, 1922, and s. 31 (4) of the Finance Act, 1927, to the effect that the actual income of the company from all sources, for the period from the close of the last complete financial year of the company on Apr. 30, 1943, to the commencement on Dec. 9, 1943, of the voluntary winding-up of the company, should be deemed to be the income of its members, and consequently apportioned among such members for the purposes of their assessment to surtax, the only members of the company being in fact two brothers named respectively Albert and Jothan Mucklow. The direction under appeal was, as I have said, made under s. 21 (1) of the Finance Act, 1922, and s. 31 (4) of the Finance Act, 1927.

Section 21 of the Finance Act, 1922, as amended by the Finance Act, 1927, s. 31, and the Finance Act, 1936, s. 19 (4) includes the following provisions:

"With a view to preventing the avoidance of the payment of supertax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows: (1) Where it appears to the Special Commissioners that any company to which the section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to Apr. 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of supertax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for purposes of assessment to supertax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members and supertax shall be assessed and charged under the provisions of this section in respect of the sum so apportioned after deducting in the case of each member any amount which has been distributed to him by the company in respect of the said year or period in such manner that the amount distributed falls to be included in the statement of total income to be made by that member for the purposes of supertax: Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business.

"For the purpose of this sub-section any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company and not as having been applied or being applicable to the current requirements of the company's business or to such other requirements as may be necessary or advisable for the maintenance and development of that business, that is to say: (a) Any sum expended or applied, or intended to be expended or applied, out of the income of the company, otherwise than in pursuance of an obligation entered into by the company before Aug. 4, 1914—(i) in or towards payment for the business, undertaking or property which the company was formed to acquire or which was the first business, undertaking or property of a substantial character in fact acquired by the company; or (ii) in redemption or repayment of any share or loan capital or debt (including any premium on such share or loan capital or debt) issued or incurred in or towards payment for any such business, undertaking or property, or issued or incurred for the purpose of raising money applied or to be applied in or towards payment therefor; or (iii) in meeting any obligations of the company in respect of the acquisition of any such business, undertaking or property; or (iv) in redemption or repayment of any share or loan capital or debt (including any premium on such share or loan capital or debt) issued or incurred otherwise than for adequate consideration. (b) Any sum expended or applied, or intended to be expended or applied, in pursuance or in consequence of any fictitious or artificial transaction."

Section 31 of the Finance Act, 1927, includes the following provisions regarding companies in liquidation:

"(1) Where an order has been made or a resolution passed for the winding-up of a company to which the said s. 21 applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for

winding-up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company, and, as respects that period and the next preceding year or other preceding period or periods ending within that next preceding year for which accounts have been made up, the said section shall apply as if the words ' within a reasonable time ' in sub-s. (1) of the said section were omitted therefrom.

A (5) Any notice required under the provisions of the said s. 21 to be served upon a company may, where the company is in liquidation, be served upon the liquidator of the company, and the liquidator shall be responsible for doing all matters or things required to be done by or on behalf of the company, and the liquidator shall be responsible for the due payment of any supertax payable by or recoverable from the company under the provisions of the said section."

B The matter had previously come before the learned judge on Nov. 26, 1952, when, not being satisfied with the finding of the Special Commissioners in the Stated Case on the question whether income had been unreasonably withheld from distribution, he remitted it to them for a further finding on that question, with directions as to the principles by which they should be guided in reaching their conclusion. The judgment under appeal thus proceeded on the Case as C originally stated, together with the further finding for which the learned judge had called and which again upheld the direction. Counsel for the appellant company submits that the Special Commissioners misdirected themselves on the first occasion and were misdirected by the learned judge on the second occasion and that the direction should be discharged.

D The appeal to the Special Commissioners related to a direction in respect of the financial year ended on Apr. 30, 1943, as well as the direction in respect of the broken period from May 1, 1943, to the commencement of the voluntary winding-up of the company on Dec. 9, 1943, which is the subject of the present appeal. The Special Commissioners discharged the former direction, and there has been no appeal by the Crown from that part of their decision. The former E direction is, therefore, no longer material, save in so far as the Special Commissioners' finding to the effect that there was no unreasonable withholding of profits from distribution as regards the year ended on Apr. 30, 1943, can be said to afford an argument in support of the view that a similar conclusion should have been reached as regards the final period.

F The history of the company is fully narrated in the Case Stated from which I extract the following:

G " 3. The company was incorporated as a private company on Apr. 12, 1939, to acquire the partnership business of builders and contractors previously carried on by A. & J. Mucklow. The authorised capital of the company was £100,000. The issued capital was £60,002 which was taken up equally by the brothers Albert and Jothan Mucklow, who were the sole directors. No increase was ever made in the amount of the issued capital . . .

H 4. By an agreement dated Apr. 14, 1939, the company purchased the aforesaid partnership business for £93,924, satisfied as to £60,002 by the issue of shares as aforesaid, the balance of £33,922 remaining as a loan from the partners. The company repaid this loan by making successive sums available between July, 1939, and April, 1941, for meeting tax liabilities of the partners. Cash amounting to £51,194 net was excluded from the sale and was retained by the partners. 5. The company continued to trade from Apr. 14, 1939, until Dec. 9, 1943, when Jothan Mucklow was appointed liquidator in a voluntary winding-up. The business was sold by the liquidator on Dec. 23, 1943, to a new company A. & J. Mucklow & Co., Ltd., formed for the purpose. 6. At no time did the appellant company pay any dividend."

The Case goes on to comment on the company's trading activities and accounts

from its incorporation down to Dec. 9, 1943. It appears that, when the outbreak of war made it impossible to continue the development of building estates which had at first been the company's main activity, the company turned to the hiring out of machinery such as tractors and bulldozers with highly profitable results. The period to Apr. 30, 1940, showed a loss of £12,394 explained as due to the writing down of land on which development had to be suspended owing to war conditions. Thereafter, profits were consistently made, amounting to £57,002 for the year to Apr. 30, 1941, £55,496 for the year to Apr. 30, 1942, and £44,987 for the year to Apr. 30, 1943.

The Case continues:

"12. It appears from the above trading results that the balance on profit and loss account had accumulated by Apr. 30, 1943, to £145,092. There was a further profit in the period up to the date of liquidation, Dec. 8, 1943, of £14,534, bringing the total accumulation up to £159,626. These figures were subject to taxation liabilities. 13. . . . A bank overdraft was incurred by the company during its initial trading period and appears at £12,667 at Apr. 30, 1940, £80,232 at Apr. 30, 1941, and £32,650 at Apr. 30, 1942, this last amount having been cleared by Apr. 30, 1943, by which date there was a credit cash balance of £14,366. This credit cash balance had increased to £41,117 by Dec. 8, 1943. 14. A copy of an 'analysis of balance sheets' as at Apr. 30, 1943, and Dec. 8, 1943, is annexed . . . This analysis shows the assets, etc., 'not immediately realisable', totalling £136,066 and £127,824 at the respective dates, those 'realisable', totalling £30,266 and £18,035 and those 'liquid', totalling £40,107 and £75,117. A footnote states that 'taxation liabilities at Dec. 8, 1943, paid subsequently but not provided for above have amounted to £49,748.' "

After referring to the minutes of a number of meetings of the directors and of the company, the Case continues:

"16. At the aforesaid directors' meeting of Oct. 18, 1943, it appears that 'after very careful consideration' the directors recommended that the total of £145,092 to the credit of profit and loss account should be carried forward; it was so resolved at the ordinary general meeting of Nov. 8, 1943. At the aforesaid directors' meeting of Dec. 4, 1943, it appears that 'the chairman explained that it was proposed to wind up the company'; a special resolution to that effect, appointing Jothan Mucklow liquidator, was passed at the extraordinary general meeting of Dec. 9, 1943. 17. A new company, A. & J. Mucklow & Co., Ltd., hereinafter called 'the new company' was incorporated on Dec. 23, 1943 . . . 18. The authorised capital of the new company was £250,000 and the issued capital £130,000. As in the case of the appellant company this was taken up equally by the brothers Mucklow, who were the sole directors. The amount of the issued capital has not been increased. 19. On the same day as that of the incorporation of the new company, Dec. 23, 1943, the liquidator of the appellant company sold its business to the new company, the consideration for the sale being £131,681 . . . 20. The capital assets of the appellant company at the date of liquidation amounted to some £220,000 reduced by taxation to about £170,000. Of this latter sum about £35,000 net was excluded from the sale and paid by the liquidator to and retained in the hands of the brothers Mucklow, who put it on deposit to guarantee an overdraft of the new company."

Evidence was given by both the brothers Mucklow. I extract the following from that of Jothan Mucklow as set out in para. 23 of the Case:

" . . . The question of paying a dividend on the last day of the old company's existence, Dec. 9, 1943, never occurred to him because there were no accounts, and it never occurred to him to consider a fresh lot of

accounts. Everything he did was done by rush tactics, the whole purpose of which was that the company's expenditure policy should not change. He did not think there was any better reason for paying a dividend on Dec. 9, 1943, than at the annual meeting on Nov. 8, 1943, or that there could have been unless they had been making tremendous profits since the last accounts. The new company was still the same business, as far as he was concerned. When the new company was formed, he and his brother as shareholders of the old company retained £55,000 cash, but they had to repay to the liquidator £20,000 to meet the taxation liability of the old company which left them with about £35,000 but he did not regard that as effectively lessening the capital of the new company. The money was not retained for their personal use, but was put on deposit for the new company's use. They had not drawn any of it, and it was still there. It had not been necessary to increase the issued capital of £130,000, but it would have been necessary, if they had been able to get going with the building."

The decision of the Special Commissioners is thus stated in para. 27 of the Case:

"... We had been requested to express our opinion on the broad question of what was reasonable. Were it possible to view this question apart from the proviso to s. 21 (1) of the Finance Act, 1922, and s. 31 (4) of the Finance Act, 1927, with the relevant authorities, we should have formed the opinion that it was not unreasonable for the appellant company to pay no dividend in respect of the broken period up to the date of liquidation. But the matter was not so at large, and we had to determine it by reference, firstly, to s. 31 (4) of the Act of 1927, under which the income of the appellant company for the period in question must be deemed available for distribution, and, secondly, to the proviso to s. 21 (1) of the Act of 1922, under which the test of what was reasonable had to be interpreted by reference to the current and future requirements of the appellant company's business. The evidence as to such requirements of the business at October, 1943, before liquidation was contemplated, had much impressed us, and we had accepted it in discharging the first direction. But current and future requirements meant nothing in the case of a company which was being wound-up, and the company's appeal must fail. Moreover, the case was, in our opinion, clearly covered by *H. Collier & Sons, Ltd. v. Inland Revenue Comrs.* (1), by the authority of which we were bound. We accordingly confirmed the direction."

In his judgment of Nov. 26, 1952, on the Case as originally stated *HARMAN, J.*, considered at some length the question whether (as the Crown submitted and the Special Commissioners had thought) the case in this court of *H. Collier & Sons, Ltd. v. Inland Revenue Comrs.* (1), was binding authority for the proposition that the words

"shall . . . be deemed to be income of that period available for distribution to the members of the company"

in s. 31 (4) of the Act of 1927 have the effect of making the income of a company for the period ending with the commencement of its winding-up automatically liable to a direction under s. 21 (1) of the Act of 1922 on the ground that "deemed to be income . . . available for distribution" means "deemed to be income which there is no reason not to distribute", or, in other words, income which, if not distributed (as it never in fact could be in such a case), is withheld from distribution without reason, and, therefore, unreasonably withheld. The learned judge held that, though a majority of this court (*LORD HANWORTH, M.R.*, and *SLESSER, L.J.*) placed this construction on s. 31 (4), the case should not be regarded as a binding authority on this point, mainly, I think, on the ground

that the view expressed on it by the majority, which was the opposite of the view taken by FINLAY, J., below, was not necessary to the decision, inasmuch as the Special Commissioners had found on the facts that it was unreasonable not to have distributed the income in question, or, in other words, that a reasonable part of that income had not been distributed, and the case could, therefore, be disposed of simply by holding, as did ROMER, L.J., that there was evidence on which the Special Commissioners could so find. The learned judge, therefore, regarded himself as free to decide in accordance with his own views the question whether the language of s. 31 (4) imported automatically a notional failure to distribute a reasonable part of the company's income for the final period and consequent liability to direction, and for reasons which seem to me wholly convincing, unless *H. Collier & Sons, Ltd. v. Inland Revenue Comrs.* (1), forbids their consideration, he came to the conclusion that it did not.

On the question of onus of proof, the learned judge referred to the case of *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.* (2), and in particular to this important passage from the speech of LORD ATKIN ([1942] 1 All E.R. 625):

"It seems clear that the discussion must proceed ab initio on the footing that the action of the directors must be judged by considering what their conduct would reasonably be if no question of surtax influenced their decision. Withholding of distribution for the purpose of 'avoidance of the payment of surtax' by shareholders would, if found, obviously negative the reasonableness of any part so withheld. The other general point to be observed is that, as it seems to me, what has to be found is that the company acted unreasonably in withholding some part of its income from distribution. It is not enough to show that a part could reasonably be distributed, if at the same time it could be said, as it well might, that it was equally reasonable to withhold distribution. The section is highly penal, and I feel no doubt that the onus is originally and remains on the Revenue to show that the company acted unreasonably in withholding part of its income from distribution. What is reasonable has consistently been held to depend upon the actual conditions known at the time for decision. In the application of this section it is what *these* directors recommend and *these* shareholders decide in *those* conditions of *that* company. There is no abstract conception of reasonableness, and the conclusion is not to be reached on a priori reasoning."

In expressing his conclusion that the case should be remitted to the Special Commissioners for a further finding the learned judge said this ([1952] 2 All E.R. 1099):

"I conclude, therefore, that the commissioners misdirected themselves in holding that s. 31 (4) of the Finance Act, 1927, and the *Collier* case (1) bound them to hold that the direction was mandatory and followed automatically in the circumstances. It may well be that it will usually follow, because it is hard to see what circumstances can make it reasonable to refrain when the company is on the point of expiring, having regard to the injunction to treat the profit as available for distribution and considering that the factors mentioned in the proviso to s. 21 can have little weight. None the less, in my judgment, it is the duty of the commissioners to consider the matter as FINLAY, J., indicates in the *Collier* case (1). Have they done this? I am unable to say. I cannot find from their statement about reasonableness in para. 27 of the Case what factors they have considered in expressing this hypothetical view. They describe it as a 'broad question', and it looks as though they have considered reasonableness as divorced from the circumstances . . . There are two limiting considerations imported—(i) that the income must be considered 'available' and so forth, and, (ii) that the proviso to s. 21 indicates two of the factors to be taken into account. Moreover, I think that the needs of the new company for financial

A support must be irrelevant. With these guides, the commissioners must seat themselves in the board room and consider the whole situation facing the directors at the relevant time, remembering LORD ATKIN's warning about onus. Unless they conclude that the directors have acted unreasonably, they must discharge the direction. I cannot feel sure that they have gone through this process, and I must say I feel great sympathy with them, for it is a hard one. It would be much simpler if the Crown were right and the result automatic, but I feel constrained to hold that it is not. Therefore, I must remit the case for a new finding, hoping, though without much confidence, that what I have tried to indicate may help them to find a way through this dark legislative jungle."

B In the report of their further finding, submitted in accordance with the directions of the learned judge, the Special Commissioners, after some preliminary observations in the course of which they remarked that they bore in mind that in every case the onus was on the Crown to establish that in the circumstances it was unreasonable of the company concerned not to make a distribution or a larger distribution as the case might be, that the requirements mentioned in the proviso to s. 21 (1) could have little or no force in the case of a company going
C into liquidation, but that the proviso, while directing a special attention to those matters did not exclude other circumstances which might bear on the question of reasonableness, continued as follows:

D "The appellant company went into liquidation on Dec. 9, 1943. It did not make any distribution out of the income deemed to be available for the purpose. In view of the financial situation of the company, to which
E reference is made in para. 6 below, we have no difficulty in finding that it could reasonably have made a substantial distribution by way of dividend. But we have to ask whether, in all the circumstances existing at Dec. 9, 1943, it was also reasonable to make no distribution, or whether this was unreasonable. The brothers Mucklow, who were both the directors and the share-
F holders of the company, inevitably had in mind the purposes of the liquidation, which were to facilitate the expansion of the business through the formation of a new company. But, so far as the company's income was retained with that end in view, we cannot find that the brothers, when they refrained as directors from recommending a distribution, were actuated by
G any reason distinct or severable from the desire to support the financial needs of the new company. Such support was the form which their concern for the business took. With the guidance given us by the judgment we cannot regard such a desire or purpose as any relevant or valid consideration in the company's favour. On the other hand, the brothers as directors had to consider any commitments of the appellant company existing at Dec. 9, 1943, for which provision was required to be made. There was in fact one
H substantial commitment in regard to outstanding tax liabilities, which were of unascertainable amount. We recognise that this was a definite and valid consideration, but we ask ourselves whether, allowing it full weight, we can regard it as sufficient by itself to make it reasonable for the company to withhold the whole of the income deemed to be available to it for distribution. On reviewing all the figures and evidence before us, particularly having regard to the strong position of the company on profit and loss account, and to the fact that liquid resources amounted at Dec. 8, 1943, to some £75,000 (on both of which matters the Crown relied) we feel bound to answer the question in the negative. After carefully considering the whole of the facts we are unable to find any circumstances or combination of circumstances making it reasonable for the company to refrain from making a distribution. We therefore conclude that the company acted unreasonably in so refraining, and we find that it did not distribute 'a reasonable part of its actual income' for the period in question".

After hearing further argument on the Special Commissioners' report of their further finding, HARMAN, J., in his judgment of Nov. 17, 1953, said that, so far as he could tell from their report, the Special Commissioners had faithfully followed the lines he had indicated (as I think they clearly had) and held (in effect) that the conclusion adverse to the appellant company expressed in para. 7 of their report was a finding of fact reached, without misdirection or the application of any wrong principle, on evidence sufficing to justify it, with which he ought not to interfere, and with which, indeed, he agreed. He, therefore, dismissed the company's appeal, and the present appeal has at long last resulted, coming as it does before this court more than ten years after the end of the period to which the dispute relates, a delay which, after making every allowance for war time difficulties in Revenue administration, seems to me to be wholly inordinate.

It is not possible to assess the merits of the arguments presented in support of this appeal without forming some view as to the statutory conception of reasonableness underlying the essential condition of liability under s. 21 (1), viz., that the company should not have "distributed to its members . . . a reasonable part of its actual income" for the period in question. These words have to be construed in the light of the proviso to the sub-section, which says that

"in determining whether any company has or has not distributed a reasonable part of its income"

regard is to be had

"not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

It should be noted, however, that, as recognised by the Special Commissioners and by HARMAN, J., the matters mentioned in the proviso are merely matters to which regard is to be had and that it by no means necessarily follows that they are the only matters to be taken into account. The question in each case must be: "Having regard to all the relevant circumstances, including the matters mentioned in the proviso, has this company distributed a reasonable part of its income for the period in question?", and, as appears from the passage quoted above from the speech of LORD ATKIN in the *Fatherland* case (2) ([1942] 1 All E.R. 625), the question which must be answered affirmatively in order to justify a direction under s. 21 (1) is not: "Could this company reasonably have made some distribution or some larger distribution?", but: "Was it unreasonable for this company not to make any distribution, or not to make some larger distribution?" On the other hand, I think it is clear that, for the purposes of the section, it is to be considered unreasonable not to distribute income when there is no reason, or no sufficient reason, relevant to the needs, present or future, certain or contingent, of the company's business which makes its retention necessary or expedient in the interests of the company's business.

In applying s. 21 (1) to liquidation cases, such as the present case, a feat of imagination has to be performed, for it has to be assumed that the company could, notwithstanding its winding-up, distribute as dividend (as distinct from return of assets) profits earned during the period from the end of its last complete financial year down to the commencement of the winding-up and (accepting for the moment HARMAN, J.'s rejection, notwithstanding the *Collier* case (1), of the theory of automatic direction) must further be assumed that it may be unreasonable not to distribute that income or some part of it as dividend, notwithstanding that the shareholders will in and by virtue of the winding-up in any case receive the whole of the surplus of assets over liabilities in the ordinary course of liquidation. It follows that such a company cannot meet a claim under s. 31 (4) by saying: "True, no part of the income for the final period was distributed, but there was nothing unreasonable in that, for in view of the winding-up it was coming to the shareholders anyhow in the form of surplus assets". The

necessary feat of imagination having been performed, the test by which the reasonableness or unreasonableness of the supposed withholding of the hypothetically possible distribution must be judged is the same as it would be in relation to any other period. It must, however, be borne in mind that the fact of the winding-up and consequent cesser of the company's business necessarily eliminates most of the grounds which might in relation to any other period suffice to prevent a withholding from distribution from being unreasonable.

A In his argument for the appellant company counsel was obviously concerned to support HARMAN, J.'s view that, notwithstanding the *Collier* case (1), the theory of automatic direction and liability in respect of any income of the final period should be rejected. This was logically his first point, though he properly reserved his observations on it for his reply, as the learned judge had decided it in his favour. On the assumption that the *Collier* case (1) and the automatic theory were out of the way, counsel contended that HARMAN, J., had misdirected the Special Commissioners, who consequently in their further finding had misdirected themselves, in treating the needs of the new company in relation to the maintenance and development of the business transferred to it by the old company as irrelevant. He submitted that the winding-up of the old company merely for purposes of reconstruction, and the consequent transfer of the business to the new company merely by way of reconstruction, should be ignored, with the result that the same considerations as led the Special Commissioners to discharge the direction in respect of the year to Apr. 30, 1943, should have led them to discharge the assessment under appeal. He further contended that the Special Commissioners and HARMAN, J., had failed to apply the principles regarding the onus of proof stated by LORD ATKIN in the *Fattorini* case (2) ([1942] 1 All E.R. 625) and that it followed from a proper application of those principles that the Crown had failed to discharge the burden of proving that the company had unreasonably withheld this income from distribution.

E As to the first of these contentions, I agree with HARMAN, J., that the needs of the new company are not for this purpose a relevant consideration. I think we are bound to hold them irrelevant in view of the observations regarding the effect of such a transfer of ROMER, L.J., and in the House of Lords of LORD HAILSHAM, L.C. (with whom the other Lords concurred) in the case of *Montague Burton, Ltd. v. Inland Revenue Comrs.* (5). ROMER, L.J., said (152 L.T. 17):

F "The company had no business whose requirements had to be considered; the business had been sold to a new company. There were no business requirements that the directors could take into consideration, or that the commissioners would have to take into consideration."

LORD HAILSHAM, L.C., said (154 L.T. 359):

G "There is also in the present case a point which is very well put, if I may say so, in the judgment delivered by ROMER, L.J., in the Court of Appeal. At the end of the year ended Mar. 31, 1929, the position was that the company had sold its whole business to the new company; it required no sums for the maintenance or development of the business which it had so transferred

H If I am wrong in this, I think the argument of counsel for the company fails on the facts. I appreciate that, if the needs of the new company could be regarded as relevant, it might be said that it was not unreasonable to make no distribution because the whole of the old company's resources had to be transferred to the new company to enable it to maintain and develop its business. But in this case the whole of the old company's resources were not so transferred. No less than £35,000 excepted from the sale was distributed to the brothers Mucklow in the winding-up. It is true that they placed this sum on deposit to guarantee the new company's overdraft. But they could equally well have done that if the £35,000 or some part thereof had come to them as dividend, the

fact that it would then have been diminished by surtax being, of course, wholly irrelevant for the present purpose. I fail to see, therefore, how on the facts of this case the needs of the new company, even if proper to be included in the matters to which regard should be had, could provide any ground for holding that it was not unreasonable to withhold from distribution the income of the final period which under s. 31 (4) has to be treated as capable of being distributed as dividend.

As to the contention of counsel for the company regarding the onus of proof, it is, I think, important to bear in mind what has to be proved and the nature of the proof of which it is capable. The thing to be proved is an unreasonable withholding from distribution. But given a withholding, the reasonableness or unreasonableness of it is not susceptible of direct proof short of, so to speak, a plea of guilty by the company. It is an inference of fact to be made from the primary facts, comprising the nature of the company's business, its financial position, the needs of its business, present or future, certain or contingent, the amount of the income in question, the extent, if any, to which it has been distributed, and any reasons deducible from the foregoing facts or otherwise shown for not distributing it or, as the case may be, not distributing more of it. If on consideration of the whole of the facts as proved or admitted in the course of the hearing the Special Commissioners find that there was income which could have been, but was not, distributed, and that on the facts as proved or admitted there was no reason, or no sufficient reason, for not distributing it, then they can and ought to conclude that the company has acted unreasonably in withholding it from distribution. The onus is on the Crown in the sense that the direction must be discharged unless the facts proved or admitted are such as to justify that conclusion. I do not think that LORD ATKIN's observations in *Fattorini's case* (2) ([1942] 1 All E.R. 625) should be taken as meaning anything more than this.

As to the case of *H. Collier & Sons, Ltd. v. Inland Revenue Comrs.* (1), I confess to feeling considerable difficulty. In that case a company sold its business to a new company for shares, and went into liquidation on Dec. 20, 1928. Its financial year ran from Sept. 1 to Aug. 31. The sale was effected under a sale agreement dated Nov. 16, 1928, which provided that the profits as from Sept. 1, 1928, should be included in the sale. A direction was made on the company under s. 21 (1) and s. 31 (4) for the period from Sept. 1 to Dec. 20, 1928. The case came before FINLAY, J., and the theory of automatic direction and liability which I assume to have been contended for on behalf of the Crown, although there is no report of the argument, was considered and rejected by him. The main contest was on the question whether, if the direction was otherwise warranted, the income from Sept. 1, 1928, to Nov. 15, 1928, could properly be included in the direction in view of the fact that it had been retrospectively sold to the new company. The Crown admitted that the claim in respect of income for the period subsequent to the date of the sale agreement could not be supported, since this had never been income of the company. FINLAY, J., held that the sale did not affect the position with regard to the profits for the period from Sept. 1, 1928, to Nov. 15, 1928, and dismissed the company's appeal on the ground that the facts warranted the finding that there had been an unreasonable withholding of income from distribution. The company appealed to this court, and, in the course of the argument of counsel in support of the appeal, SLESSER, L.J., raised against him the point as to the automatic effect of s. 31 (4), on which FINLAY, J., had decided in the company's favour. The company was thus in effect called on to justify a decision in its favour which, according to the usual practice, should have been accepted until attacked by the Crown. In these circumstances counsel did argue the point, though it may well be less fully and effectively than he would have been able to do in reply if the more usual course had been taken. In the result, the Crown was not called on to argue, and, as appears from what I have said earlier in this judgment, LORD HANWORTH, M.R., and SLESSER, L.J.,

both gave judgments against the company in which they clearly, as I think, adopted the "automatic" construction of s. 31 (4), while ROMER, L.J., confined himself to dismissing the appeal on the facts, though in language which certainly suggests that he did not agree with the construction placed by the other members of the court on s. 31 (4), as to which, however, he expressed no opinion. It has been pointed out that SLESSER, L.J., seems to have been under the impression that the surtax liability attracted by a direction under s. 21 (1) was confined to the income which might reasonably have been distributed, instead of extending, as it, undoubtedly, does, to the whole of the income of which a reasonable part has not been distributed. It is said that the misapprehension may have affected his view, by giving rise to a false antithesis between income which could have been distributed (or in other words "available for distribution"), on the one hand, and income required by the company for purposes such as those mentioned in the proviso to s. 21 (1), and which, therefore, could not reasonably have been distributed (or in other words income not "available for distribution"), on the other hand, which led him in effect to conclude that income deemed to be available for distribution is deemed to be income which would reasonably have been distributed, whether it is in fact such or not. I feel the force of this criticism, but it does not alter the fact that SLESSER, L.J., did quite clearly express his concurrence with LORD HANWORTH, M.R. There is, however, the further point, noted by HARMAN, J., that, having regard to the conclusion reached by the Board of Referees on the facts, the views of the majority of the court as to the automatic effect of s. 31 (4) were not necessary to the decision.

For the reasons I have stated, I cannot regard the circumstances in which the majority judgments in the *Collier* case (1) came to be delivered as wholly satisfactory, and having regard to those circumstances, to the probability that the court was consequently denied the assistance of anything comparable to the very full argument addressed to us in the present case, and to the fact that it was unnecessary for the purpose of deciding the case then before the court to express any opinion on this aspect of the construction of s. 31 (4), I think those are substantial grounds for the view that we would be justified in holding that it should not be considered as a binding authority for the proposition that s. 31 (4) is automatic in its effect.

If so justified, I would have little hesitation in adopting the conclusion reached by HARMAN, J. The phrase "available for distribution" means in itself no more than "capable of being distributed", and I would require a very strong context to convince me that in a taxing Act, and to the detriment of the taxpayer, it should be construed as equivalent to "which ought in reason to be distributed". I admit that some colour is lent to this view by the addition made by s. 31 (1) of the Act of 1927 to the proviso to s. 21 (1) of the Act of 1922, as the addition provides that the various sums therein mentioned

"... shall be regarded as income available for distribution . . . and not as having been applied or being applicable to the current requirements of the company's business or to such other requirements as may be necessary or advisable for the maintenance and development of that business . . ."

But even here, having regard to the primary meaning of "available for distribution", I think it is possible to hold that recognition of other grounds for considering the withholding of the income in question not to be unreasonable is not excluded. In s. 31 (4) itself the words "deemed to be . . . available for distribution" are clearly appropriate in their primary meaning of "capable of being distributed". Counsel for the company referred us to the regulations contained in sched. 1 to the Finance Act, 1922, and to the amendments of those regulations contained in s. 31 (7) of the Act of 1927, and observed with force that there was nothing in those amendments to make the regulations in the least appropriate to the automatic liability alleged to have been introduced by sub-s. (4) of the very same section. Again, as counsel for the company pointed out,

s. 18 of the Finance Act, 1928, which amends the procedure in s. 21 of the Act of 1922, contains nothing appropriate to automatic liability. He also referred us to s. 14 of the Finance Act, 1937, where "available for distribution" clearly has its primary meaning of "capable of being distributed". By contrast he referred us to s. 14 of the Finance Act, 1939, for the very different language used by the legislature for the purpose of providing for automatic liability as regards investment companies.

These reasons suffice to satisfy me that, apart from the *Collier* case (1), it would be right to hold that s. 31 (4) of the Act of 1927 does not impose automatic liability, but leaves open the question whether there was any unreasonable withholding of income from distribution on the hypothesis that the income concerned was "available for distribution", i.e., "capable of being distributed" as income, notwithstanding the winding-up. So far as the present case is concerned, I am content to assume, without deciding, that the *Collier* case (1) is not binding and that I am free to follow my own opinion to the effect indicated above. I say this because my assumption that I am free to do so cannot, in my judgment, alter the result, for I think that, quite apart from the *Collier* decision (1), the Special Commissioners' conclusion here was well warranted by the facts. I see no reason whatever for disturbing their conclusion, with which I entirely agree, and I hold, accordingly, that this appeal fails and should be dismissed.

HODSON, L.J. : For the reasons which have been given in the judgments already delivered, I am of opinion that the Special Commissioners were not misdirected nor did they misdirect themselves in arriving at the conclusion of fact in favour of the Crown that they were unable to find any circumstances or combination of circumstances making it reasonable for the company to refrain from making a distribution. Their conclusion, therefore, that it acted unreasonably in so refraining and that it did not distribute a reasonable part of its actual income for the period in question, namely, the broken period from May 1, 1943, the end of the company's financial year, to Dec. 9, 1943, the date of the voluntary winding-up of the company, cannot be disturbed. This court is thus in the same position as the court found itself in in *Collier's* case (1), in that it is unnecessary to decide the point now taken on behalf of the Crown, but not so clearly taken in *Collier's* case (1), that the direction in respect of the broken period should have been automatic having regard to the terms of s. 31 (4) of the Finance Act, 1927.

I have come to the conclusion that two of the three members of the court, namely, LORD HANWORTH, M.R., and SLESSER, L.J., did base their decision on the automatic effect of the last section, and regarded as unnecessary any finding of fact whether or not the company had distributed a reasonable part of its income. SLESSER, L.J., admittedly, misapprehended the penal effect of s. 21 (1) of the Finance Act, 1922, which has been recognised as having such effect by the House of Lords in *Fattorini's* case (2). This misapprehension would be expected to have affected his conclusion as to the automatic effect of the later section, and, if this is so, his opinion on the construction of the section, in so far as it was based on a ground held by the House of Lords in *Fattorini's* case (2) to be wrong, would enable this court to express its own view in accordance with the principles laid down in *Young v. Bristol Aeroplane Co., Ltd.* (3). The point now having been fully argued on both sides, I am of opinion, for the reasons already given, that the effect of s. 31 (4) of the Finance Act, 1927, having regard to its context, is not automatic, but that it is open to a company in liquidation, if it can, to resist a direction on the facts and to insist on the Crown proving its case in accordance with the directions given in *Fattorini's* case (2). To put the matter shortly, I think that the words "available for distribution" bear their ordinary meaning and are not equivalent to "which ought to be distributed".

Appeal dismissed.

Solicitors: *Scott & Son* (for the company); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. MILLER.

[WINCHESTER ASSIZES (Lynskey, J.), December 9, 10, 1953.]

*Criminal Law—Rape—By husband on wife—No separation agreement or order in force—Divorce petition presented by wife.**Criminal Law—Assault occasioning actual bodily harm—Enforcement of husband's marital rights—Mental injury—Offences against the Person Act, 1861 (c. 100), s. 47.*

A

In January, 1952, the wife left the husband, but did not apply for a separation order or for an order of judicial separation, and there was no separation agreement between the parties. In January, 1953, she presented a petition for divorce on the ground of adultery. On May 21, 1953, before the petition was heard, the husband had intercourse with her against her will. He was alleged to have used force against her, and, according to the evidence, she was in a hysterical and nervous condition afterwards. The husband was charged on indictment with rape and with assault occasioning actual bodily harm. On a submission by the defence that there was no case to answer,

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C

HELD: (i) the fact that the wife had left the husband and had presented a petition for divorce did not amount to a revocation of the consent to marital intercourse impliedly given by her at the time of the marriage, and, as the implied consent had not been revoked either by an act of the parties or by any order or decree of a court, the husband could not be guilty of rape.

R. v. Clarence (1888) (22 Q.B.D. 23), considered.

Principle in *R. v. Clarke* ([1949] 2 All E.R. 448), applied.

D

(ii) "assault occasioning actual bodily harm" included an assault which resulted in an injury to the state of a person's mind for the time being: although the husband had a right to marital intercourse, he was not entitled to use force or violence for the purpose of exercising that right; and, if he did, he was guilty of an assault.

E

AS TO RAPE BY HUSBAND ON WIFE, see HALSBURY, Hailsham Edn., Vol. 9, p. 476, para. 815.

Cases referred to:

(1) *R. v. Clarke*, [1949] 2 All E.R. 448; 2nd Digest Supp.

(2) *R. v. Clarence*, (1888), 22 Q.B.D. 23; 58 L.J.M.C. 10; 59 L.T. 780; 53 J.P. 149; 15 Digest 818, 8931.

(3) *R. v. Jackson*, [1891] 1 Q.B. 671; 60 L.J.Q.B. 346; 64 L.T. 679; sub nom.

F

Re Jackson, 55 J.P. 246; 15 Digest 827, 9057.

TRIAL on indictment.

G

The defendant, Peter Miller, was charged at Winchester Assizes, before LYNSEY, J., and a jury, on an indictment containing two counts charging him (i) with having had carnal knowledge of Gwendoline May Miller on May 21, 1953, without her consent, and (ii) with having assaulted her and thereby occasioned her actual bodily harm. Before the arraignment counsel for the defence moved to quash the indictment on the ground that, as the complainant was the defendant's wife, he could not be guilty of a rape on her, and that the charge of assault occasioning bodily harm could not be supported as the defendant had done no more than was necessary to enforce his marital rights. LYNSEY, J., held that, as the indictment was regular on the face of it, he could not accede to the motion. The trial proceeded, and the defendant pleaded "Not Guilty". At the close of the case for the prosecution counsel for the defence submitted that there was no case to answer on either count.

H

Skelhorn for the prosecution.

Fay for the defendant.

LYNSEY, J.: As to the first charge, it is now clear that the complainant, Gwendoline May Miller, was the wife of the defendant, and the point is taken

by the defence that, in the circumstances, he cannot be guilty of the offence of rape against her. Rape is unlawful carnal knowledge of a woman without her consent by force, fear or fraud, and it is an essential ingredient of that particular offence that it must be without the woman's consent. It is argued that, in the case of a married woman, by the contract of matrimony she gives her consent to acts of intercourse with her husband and that that consent cannot subsequently be revoked. The law on this matter was first dealt with many years ago in *HALE'S PLEAS OF THE CROWN*, where it is said (vol. 1, p. 629):

A

"... a husband cannot be guilty of a rape ... upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

At that time it was, no doubt, considered that that consent, once given, could never thereafter be retracted. One can well imagine that, in the days when that book was written by SIR MATTHEW HALE, that was the accepted view of the law because at that time a valid marriage could not be dissolved except by death. The only way in which a marriage could be voided in those days was by a private Act of Parliament. It was not an act of the judiciary, but of the legislature. As far as the law was concerned there was no power to void a marriage. Since then there have been numerous departures from that view of marriage, but the position as outlined by HALE, so far as I can see, has never, in terms, been overruled. It has been criticised by some judges, and approved by others, but the curious fact is that, in the many years since *HALE'S PLEAS OF THE CROWN*, there is no recorded case of a man being prosecuted for the rape of his wife until *R. v. Clarke* (1), before BYRNE, J., in 1949.

B

C

The matter was considered by way of obiter dicta by a number of judges in *R. v. Clarence* (2). In that case the defendant was charged, under the Offences against the Person Act, 1861, s. 20 and s. 47, with unlawfully and maliciously inflicting grievous bodily harm on his wife, and with an assault on her occasioning actual bodily harm. It appeared that at the time when the offence was committed the husband was suffering from gonorrhoea, which he knew might cause her to be infected by it, and the allegation was that she had been so infected. A special court was formed to consider the matter as one of the Crown Cases Reserved, there being no fewer than thirteen judges composing the court, and, apparently, their views differed considerably. Nine judges took one view and four had a different view. The majority decision was that the defendant could not be convicted of the offences charged because there was no assault and no inflicting by the husband of any unlawful act occasioning bodily harm. But, in the course of that case, the position of a married man with regard to rape on his wife was considered, and, again, the judges took different views. WILLS, J., who gave the first judgment, said (22 Q.B.D. 33):

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"If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority."

G

A. L. SMITH, J., took the view (*ibid.*, 37) that:

"At marriage the wife consents to the husband exercising the marital right. The consent then given is not confined to a husband when sound in body, for I suppose no one would assert that a husband was guilty of an offence because he exercised such right when afflicted with some complaint of which he was then ignorant. Until the consent given at marriage be revoked, how can it be said that the husband in exercising his marital right has assaulted his wife?"

H

The interesting part of that observation is that, apparently, A. L. SMITH, J., took the view, contrary to that expressed in *HALE*, that a wife could revoke her

consent to the right of the husband to intercourse. He did not suggest in what circumstances she could revoke it, but it was left generally at large. STEPHEN, J., one of the greatest authorities on criminal law, said (*ibid.*, 46):

A "I wish to observe . . . that I was quoted as having said in my *DIGEST OF THE CRIMINAL LAW* that I thought a husband might under certain circumstances be indicted for rape on his wife. I did say so in the first edition of that work, but on referring to the last edition (p. 124, note), it will be found that that statement was withdrawn."

Thus, so far, there were three different views on the matter.

HAWKINS, J., took the strong view that a husband could not be convicted of a rape on his wife. He said (*ibid.*, 51):

B "Rape consists in a man having sexual intercourse with a woman without her consent, and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the mere act of sexual communion is lawful . . ."

C In other words, what HAWKINS, J., was saying was that a wife could not withdraw her consent to the mere act of sexual intercourse, but he then went on to say (*ibid.*):

D " . . . but there is a wide difference between a simple act of communion which is lawful, and an act of communion combined with infectious contagion endangering health and causing harm, which is unlawful. It may be said that assuming a man to be diseased, still as he cannot have communion with his wife without contact, the communication of the disease is the result of a lawful act, and, therefore, cannot be criminal. My reply to this argument is that if a person having a privilege of which he may avail himself or not at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege and which is unlawful and dangerous to another, he must either forego his privilege or take the consequences of his unlawful conduct."

E That view of the law was a dissenting judgment, and it is a judgment which would appeal to a great many people as drawing a distinction between what a woman is assenting to and what she is not assenting to—that is, she is assenting to the act of sexual intercourse, but not to another act which is dangerous to her health, and there may be circumstances in which a woman would be entitled to refuse that which is dangerous to her health. In the Divorce Court that would be an act of cruelty.

F FIELD, J., said (*ibid.*, 57):

G "Thus far the case rests upon what seem to me to be known and generally adopted principles. But it is argued that here there is no offence, because the wife of the prisoner consented to the act, and I entertain no doubt that, if that was so, there was neither assault nor unlawful infliction of harm. Then, did the wife of the prisoner consent? The ground for holding that she did so, put forward in argument, was the consent to marital intercourse which is imposed upon every wife by the marriage contract, and a passage from HALE'S *PLEAS OF THE CROWN*, vol. 1, p. 629, was cited, in which it is said that a husband cannot be guilty of rape upon his wife, 'for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract'. The authority of HALE, C.J., on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime."

Finally, POLLOCK, B., said (*ibid.*, 63):

"The husband's connection with his wife is not only lawful, but it is in accordance with the ordinary condition of married life. It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent."

He then cited the passage from HALE, vol. 1, p. 629. LORD COLERIDGE, C.J., A did not deal with the matter.

There are no other authorities that I can find prior to 1949 when this matter was considered in *R. v. Clarke* (1), and the view which I take of the dicta of the judges in *R. v. Clarence* (2) is that the statement of the law in HALE was still accepted by them because their observations are only obiter dicta, but some seemed to lean to the view that the consent given by the wife at marriage could B in some circumstances be revoked. That view also appealed to BYRNE, J., in *R. v. Clarke* (1). In that case the defendant was charged with the rape of his wife at a time when a separation order made by justices, on the ground of persistent cruelty, was in force. The order contained the usual clause that the wife was no longer obliged to cohabit with her husband. In ruling on that case the learned judge said ([1949] 2 All E.R. 448): C

"As a general proposition it can be stated that a husband cannot be guilty of a rape on his wife. No doubt, the reason for that is that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them. The marital right of the husband in such circumstances exists by virtue of the consent given by the wife at the time of the marriage and not by virtue of a consent given at the time of each act of intercourse as in the case of unmarried persons. Thus, the intercourse is not by virtue of any special consent, but is based on an obligation imposed D on the wife by reason of the marriage."

After citing the passage from HALE, vol. 1, p. 629, BYRNE, J., said (*ibid.*, 449): E

"In the present case, the justices made an order on Mar. 2, 1949, on the ground of the husband's persistent cruelty containing a provision that the wife be no longer bound to cohabit with the husband. That order has the effect in all respects of a decree of judicial separation, and one result of it is that both the person and the property of the wife are protected by it. It could be discharged if the wife committed adultery or if she voluntarily resumed cohabitation with her husband, and by 'cohabitation', as I understood it, is meant intercourse when the parties have begun to live together again, or intercourse although they are not living under the same roof. In this case at the material time the wife had not resumed cohabitation. The position, therefore, was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked. Thus, in my opinion, the husband was not entitled to have intercourse with her without her consent." F

The learned judge differentiated the case which he was trying from the position under the general proposition as laid down in HALE'S PLEAS OF THE CROWN, in that, in the case which he was trying, there had been a justices' separation order which is the equivalent of a decree of judicial separation and protects the person and the property of the wife. In other words, once that order is made, the husband has no right to interfere with the wife, her person or her property. I respectfully agree with BYRNE, J., and consider that the order amounted to a revocation of the consent given by the wife in the marriage contract. G H

A The question which I have to consider in the present case is whether, on the facts, it can be suggested that there is anything which will amount to a revocation of the wife's consent. There has been no separation order, no judicial separation, and no agreement to separate. If there had been an agreement to separate, particularly if it had contained a non-molestation clause, I should have come to the conclusion that that, also, revoked the wife's consent. But here the facts are that the wife committed an act of adultery as a result of which a child was born in December, 1951; the defendant condoned that act of adultery and had her back to live with him; and then, in January, 1952, she left him. She says that she left him because he said he would be harsh to the child, which was living with them. I have not sufficient evidence to come to a conclusion whether she is right or wrong, but there has been no decree of any court, and it is quite clear that there was never any agreement between the parties to live apart. B The defendant seems to have been trying all the time to get her back. She offered to go back on one occasion, she says, and he would not take her, but there is a dispute about that. Then, in January, 1953, she issued a petition for divorce in which she alleged that the defendant had been guilty of adultery. The petition came on for hearing in May, 1953, when the husband was away. C As he sent a letter saying that he wanted to be heard, the learned commissioner adjourned the case generally and it is still awaiting trial.

Can I say that, because the wife has left her husband and has brought a petition for divorce, that amounts to a termination of the marriage, or that one should infer a revocation of the wife's implied consent? I have considered the matter very carefully, and I cannot see that the fact that a petition for divorce has been presented has any effect in law on the existing marriage. It is not until a decree nisi, or, possibly, a decree absolute, has been pronounced that the marriage and its obligations can be said to have been terminated. It is not as if there had been some interim order of a court. The petition might be rejected, and in that event the marriage would still be subsisting and consent to marital intercourse, as given in the marriage contract, would still be unrevoked. Therefore, I must apply the law as it stands, there being no evidence which enables me to say that the wife's implied consent to marital intercourse has been revoked by an act of the parties or by an act of the courts. The result is that, as the law implies consent to what took place so far as intercourse is concerned (but only so far as intercourse is concerned), the defendant cannot be guilty of the crime of rape, and I shall direct the jury that there is no evidence on which they can convict him of rape. D E F

With regard to the second count, which is a charge of assault occasioning actual bodily harm, the proposition is put forward by counsel for the defence that the defendant, having the right to marital intercourse, is entitled, for the purpose of exercising that right, to use as much force as is reasonably necessary to enable him to do so. I have heard no case cited to support that proposition, but *R. v. Jackson* (3) which was mentioned, is, in my view, rather against it. G In that case a husband had obtained an order for the restitution of conjugal rights against his wife, and she was ordered to return to him. She did not return, whereupon the husband, with the assistance of an articled clerk, took possession of the person of the wife and took her off to his house, and thereafter he detained her there. She was allowed the run of the house, but was not allowed to leave the premises. The husband said that he had a right to her society, and that his general rights included the right to marital intercourse, and he claimed that he had a right to do what he did. The wife, or someone on her behalf, took out process for habeas corpus, and the Court of Appeal held that, although the husband had a right to his wife's society, and although he had a decree of the court for the restitution of conjugal rights, he was not entitled to use force for the purpose of enforcing his rights. H

It seems to me, on the reasoning of that case, that, although the husband

has a right to marital intercourse and the wife cannot refuse her consent, and although, if he does have intercourse against her actual will, it is not rape, nevertheless he is not entitled to use force or violence for the purpose of exercising that right. If he does so, he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular case warrant. If he should wound her, he might be charged with wounding or causing actual bodily harm, or he may be liable to be convicted of common assault. The result is that in the present case I am satisfied that the second count is a valid one and must be left to the jury for their decision. The point was taken that there is no evidence of bodily harm. The bodily harm alleged is said to be the result of the defendant's actions, and they were, if the jury accept the evidence, that he threw the wife down three times. There is evidence that afterwards she was in a hysterical and nervous condition, but it is submitted by counsel for the defendant that that is not "actual bodily harm". According to ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, 32nd ed., p. 959:

"Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor . . ."

There was a time when shock was not regarded as bodily hurt, but the day has gone by when that could be said. It seems to me now that, if a person is caused hurt or injury resulting, not in any physical injury, but in an injury to the state of his mind for the time being, that is within the definition of "actual bodily harm". On that point I would leave the case to the jury.

Verdict: "Not Guilty" on the first count; "Guilty" on the second count.

Solicitors: Bernard Chill & Partners, Southampton (for the prosecution); Geoffrey Wells & Woodford, Southampton (for the defendant).

[Reported by CONRAD OLDHAM, ESQ., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

PROBATE NOTICE.

Probate Grant Confirmation—Re-sealing—Provision of copies for deposit.

At present the copy of a Scottish confirmation or Northern Irish or Colonial grant which is required to be deposited at the Principal Probate Registry on re-sealing must be provided by the applicant.

As an experiment, the registry is now proposing to accept, at the option of the applicant, a confirmation or grant lodged for re-sealing without an accompanying copy, and to prepare and retain a photographic copy officially at a charge of 1s. 6d. per sheet.

It is not expected that this procedure will delay the re-sealing.

D. A. NEWTON,
Secretary,

Principal Probate Registry,
Somerset House,
Strand, London, W.C.2.

June 17, 1954.

NOTE.

CHEETHAM v. CHEETHAM.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Hodson, L.J.J.),
May 27, 1954.]

A *Divorce—Practice—Pleading—Answer—Leave to amend—Need of affidavit in support—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 15 (3).*

APPEAL by the wife against a decision of His Honour JUDGE FENWICK, Q.C., sitting as special commissioner in divorce at Preston, on Feb. 22, 1954, that the husband had not been guilty of desertion.

B The husband filed a petition dated Feb. 18, 1953, for dissolution of the marriage on the ground of the wife's desertion. By her answer, dated Apr. 29, 1953, the wife denied desertion and cross-prayed for a decree of dissolution on the grounds of the husband's desertion and adultery with a woman named. On Dec. 18, 1953, the registrar ordered that proceedings on the husband's petition be stayed and that the cause proceed on the prayer in the wife's answer. On Dec. 22, 1953, the wife's solicitor applied for an order striking out the allegation of adultery in her answer. No affidavit in support of the application was filed, but it was stated that there was not sufficient evidence to prove the allegation, which was ordered to be struck out. The commissioner refused to grant a decree in favour of the wife, holding that she had not a reasonable ground for her belief that the husband had committed adultery.

Vos for the wife.

D The husband did not appear.

THE COURT OF APPEAL held that, had the commissioner known all the circumstances, he would have granted a decree and the appeal would be allowed.

In giving their judgments,

E SIR RAYMOND EVERSLED, M.R., said: Charges made in matrimonial proceedings cannot be struck out, as in other proceedings, merely because the party in question desires the withdrawal. In matrimonial cases the public interest is involved, and there is a possibility that the reason for seeking to have a charge struck out is improper or collusive. Therefore, generally speaking, an affidavit is required to show that the application is not the result
F of any collusive conduct.

G HODSON, L.J., said: Sufficient attention was not paid to the Matrimonial Causes Rules, 1950, r. 15 (3), which requires that an application for leave to amend a petition after service shall be supported by an affidavit verifying the new facts alleged. By analogy, in the present case, that rule applies to the answer which, in fact, was the petition on which the court had been asked to pronounce. An affidavit is required in support of an application to amend—for the obvious reason that there may be a tendency for a charge of adultery to be "bought off". It is true that the requirement of an affidavit is not absolute because the court may otherwise direct, as, for example, in cases where a paragraph is struck out in default of compliance with an order for particulars, but if r. 15 (3) had received the consideration it ought to have received, the commissioner would not,
H I think, have been left in the dark.

Appeal allowed. Decree nisi granted.

Solicitors: *Hargreaves & Crowthers*, agents for *Alan Marshall*, Barrow-in-Furness (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

STRANSKY v. STRANSKY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), March 2, May 26, June 4, 1954.]

Divorce—Residence by wife—"Ordinarily resident"—Matrimonial Causes Act, 1950 (c. 25), s. 18 (1) (b).

The parties were married in London on July 21, 1944, the wife being a British subject and the husband a Czechoslovak in exile from his country. In 1945 the husband returned to Czechoslovakia and was joined there by the wife, a child of the marriage being born at Prague in August, 1946. In March, 1948, the husband was compelled to leave Czechoslovakia for political reasons, and on Apr. 2, 1948, the wife and the child joined him in London. In October, 1948, the wife acquired and furnished a flat in which she and the husband and child took up residence. In 1950 the husband obtained employment in connection with which he was sent to Munich. In January, 1951, the wife visited him at Munich, returning to England in February, 1951. In April, 1951, the wife and child joined the husband in Munich and lived in furnished accommodation under the control of the United States Army. The wife left her furniture and possessions at her flat in London and took to Munich only a limited quantity of clothing. The flat was tended by a domestic servant employed by the wife, and remained at all times ready for occupation by the wife. In September, 1951, the parties came to England, but in October, 1951, they returned to Munich where the wife became seriously ill. In June, 1952, she returned to England and stayed in the flat, but in July, 1952, she rejoined the husband at Munich. In September, 1952, the husband, in the course of his employment, returned to London, and he then went to New York. The wife was unable to accompany him owing to ill-health and she stayed in Munich until October, 1952, when she returned to the flat in London. In March, 1953, the husband came back to London and stayed with the wife at the flat and together the parties visited Paris and Rome. In April, 1953, the wife returned to her flat, and the husband again went to New York whence he wrote to the wife a letter in which he confessed he had committed adultery. There was no further cohabitation between the parties, and on July 28, 1953, the wife filed a petition for divorce on the ground of the husband's adultery, alleging that she and the husband were domiciled in England, that she was resident in London, and that she had been ordinarily resident there for three years immediately preceding the presentation of the petition. Between July 28, 1950, and July 28, 1953, the wife had spent altogether fifteen months in Munich.

HELD: (i) on the facts, in July, 1953, the husband had formed no clear intention of settling in England, and, therefore, although admittedly he had not resided in Czechoslovakia since 1948, he had not acquired a domicile of choice in England.

(ii) to determine where the wife was ordinarily resident between July 28, 1950, and July 28, 1953, one of the tests was to find where her real home was between those dates: during her absences abroad she never let her flat in London, but throughout kept it ready for occupation and returned there when circumstances permitted; her sojourns in Munich were accidental in the sense that they were dictated by the exigencies of the husband's work, and there was no evidence of any intention on her part to make Munich her home for an indefinite period; she had, therefore, been ordinarily resident in England for the requisite period of three years, and the court had jurisdiction to hear the petition, and a decree nisi would be granted.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 18 (1) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 405.

Cases referred to:

- (1) *Winans v. A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 11 Digest, Replacement, 329, 41.
- A (2) *Foulsham v. Pickles*, [1925] A.C. 458; 94 L.J.K.B. 418; 133 L.T. 5; sub nom. *Pickles v. Foulsham*, 9 Tax Cas. 261; 28 Digest 25, 131.
- (3) *Levene v. Inland Revenue Comrs.*, [1928] A.C. 217; 97 L.J.K.B. 377; 139 L.T. 1; 13 Tax Cas. 486; Digest Supp.
- (4) *Inland Revenue Comrs. v. Lysaght*, [1928] A.C. 234; 97 L.J.K.B. 385; 139 L.T. 6; sub nom. *Lysaght v. Inland Revenue Comrs.*, 13 Tax Cas. 511; Digest Supp.
- B (5) *Hopkins v. Hopkins*, [1950] 2 All E.R. 1035; [1951] P. 116; 11 Digest, Replacement, 469, 1024.
- (6) *Macrae v. Macrae*, [1949] 2 All E.R. 34; [1949] P. 397; [1949] L.J.R. 1671; 113 J.P. 342; 27 Digest, Replacement, 693, 6629.
- (7) *Udny v. Udny*, (1869), L.R. 1 Sc. & Div. 441; 11 Digest, Replacement, 326, 22.
- C (8) *Forbes v. Forbes*, (1854), Kay, 341; 23 L.J.Ch. 724; 69 E.R. 145; 11 Digest, Replacement, 327, 24.
- (9) *A.-G. v. Yule & Mercantile Bank of India*, (1931), 145 L.T. 9; 11 Digest, Replacement, 350, 181.
- (10) *D'Etcheegoyen v. D'Etchegoyen*, (1888), 13 P.D. 132; 57 L.J.P. 104; 11 Digest, Replacement, 349, 180.
- D (11) *Manning v. Manning*, (1871), L.R. 2 P. & D. 223; 40 L.J.P. & M. 18; 24 L.T. 196; 11 Digest, Replacement, 475, 1051.
- (12) *Berkley v. Thompson*, (1884), 10 App. Cas. 45; 54 L.J.M.C. 57; 52 L.T. 1; 49 J.P. 276; 3 Digest 393, 312.
- (13) *Lowry v. Lowry*, [1952] 2 All E.R. 61; [1952] P. 252; 116 J.P. 343; 3rd Digest Supp.
- E (14) *Inland Revenue v. Cadwalader*, (1904), 7 F. (Ct. of Sess.) 146; 42 Sc. L.R. 117; 12 S.L.T. 449; 5 Tax Cas. 101; 28 Digest 24, *g*.

PETITION by the wife.

By her petition dated July 28, 1953, the wife alleged that the husband had committed adultery with the woman named on a number of occasions between October, 1951, and the date of the petition, and prayed for a dissolution of the marriage. In the petition she alleged, *inter alia*:

"4. That the [wife] now resides at . . . Clabon Mews, London, S.W.1, and has been ordinarily resident at that address for a period of three years immediately preceding the presentation of this petition . . . 6. That the [wife] and the [husband] are domiciled in England."

G On Mar. 2, 1954, the petition came undefended before KARMINSKI, J., who adjourned the case for the assistance of the Queen's Proctor under the Matrimonial Causes Act, 1950, s. 10 (1).

N. Lawson for the wife.

Colin Duncan for the Queen's Proctor.

Cur. adv. vult.

H June 4. KARMINSKI, J., read the following judgment. For the purposes of deciding the question of jurisdiction it is necessary to examine the history of the parties and of their married life together. The parties were married in London on July 21, 1944. At the time of the marriage the wife was a British subject, the husband a Czechoslovak at that time in exile from his country which was then under German occupation. At the conclusion of the war in the summer of 1945 the husband returned to Czechoslovakia and was joined in Prague by the wife in July, 1945. The parties lived together in Prague until

Mar. 2, 1948, and a child of the marriage was born to them in Prague in August, 1946. In March, 1948, the husband was again compelled to leave Czechoslovakia for political reasons. On Apr. 2, 1948, the wife and the child of the marriage, who had also left Prague, rejoined the husband in London. There they lived together in temporary accommodation until they moved together into a flat at Clabon Mews, London, S.W.1, where the wife still resides. At that time the husband was unemployed, but towards the end of 1949 he obtained temporary work as a journalist on the staff of an English weekly newspaper. Towards the end of 1950 the husband entered the employment of the National Committee for Free Europe and was sent to Munich for the purposes of broadcasting from that city. He was joined there by the wife in January, 1951. The child of the marriage was left in London, since at that time the husband was working in Munich on a monthly basis. In February, 1951, the wife came back to London, leaving the husband in Munich, but rejoined him there with the child in April, 1951.

At that time the wife did not expect to remain in Munich for long and took with her only a limited quantity of clothing. Her flat at Clabon Mews which was furnished with her own furniture and possessions, remained open and at all times ready for her occupation. It was kept clean and aired by the domestic "help" usually employed by the wife. In April, 1951, the parties were living in furnished billets near Munich controlled by the United States Army. In July, 1951, they moved to new billets nearer to the centre of Munich, and these billets were again allotted to them by the United States Army. In September, 1951, the wife and the husband returned to England, leaving the child in Munich. In October, 1951, they returned to Munich, where soon after their return the wife was taken seriously ill. They remained together in Munich until June, 1952, when the wife came back to London alone and lived for a short time in the flat in Clabon Mews. At that time the husband knew that his work in Munich was ending and that he would shortly be transferred elsewhere. In July, 1952, the wife returned to Munich and rejoined the husband. In September, 1952, the husband left Munich by reason of a change in his employment, but the wife was unable to accompany him to England because of her illness. She was, however, able to return home to Clabon Mews in October, 1952, but by that time the husband had left for New York where he was temporarily employed by the same organisation. The wife did not join the husband in New York, but in March, 1953, he returned to London and the parties lived together for a few days at Clabon Mews, and subsequently went together to Paris and Rome. At that time the relationship between the parties was greatly strained, and in April, 1953, the husband wrote a letter to the wife in which he made it clear that he was in love with the woman named in this petition and had committed adultery with her. Thereafter, there was no further cohabitation between the parties. The wife has continued to reside since April, 1953, in her flat at Clabon Mews.

The question of domicile in the present case does not, in my view, present any difficulty. It was stated by counsel for the wife that the domicile of origin was Czechoslovak. It is, however, possible that the husband's domicile at birth was Austrian, since one of the documents before me in evidence states that he was born at Brno when that town was in Austria. But the emergence of the State of Czechoslovakia in 1918, doubtless, changed his domicile to one in Czechoslovakia. I observe from the marriage certificate that the husband was born in or about the year 1914, so that in 1918 he was an infant and would acquire the new domicile of his father. I do not, however, consider that the question whether or not his domicile of origin was Czechoslovak is of importance, since the question I have to decide is whether or not he has acquired an English domicile of choice.

There is no doubt that the husband has spent at least several years in this country, though both his periods of sojourn here have been occasioned by circumstances outside his own choice. His parents are settled here, and I do

not doubt that he has a considerable affection for this country, and, indeed, some ties with it. From such documents as I have seen he writes well and fluently in English. He has made it clear that he desires his son to acquire British nationality, and he is the possessor of a travel document issued to him in this country as a person who is described in the document as the concern of the International Refugee Organisation. The document itself states that it is issued to persons resident in this country and not elsewhere. On the other hand, it is difficult to find any fact which would enable me to infer that the husband has formed a settled intention to abandon his domicile in Czechoslovakia and acquire a domicile of choice in England. The wife's evidence on the subject of the husband's declared intentions was on this as on other matters perfectly frank. She told me that, at any rate, during the years immediately following his return to England in 1948 he hoped to return to his own country, stating that he would like to stay in the United Kingdom until he could get back to Czechoslovakia. In 1949 the wife re-acquired her British nationality and I think this for a time made the husband regard more favourably the idea of settling permanently in this country. The husband also discussed his future intentions with his medical adviser and personal friend, Dr. L., who gave evidence before me. Dr. L. had no full discussion with the husband as to the latter's intention with regard to settling in any particular country. Dr. L. was asked whether the husband ever expressed any intentions on this matter, to which Dr. L. answered:

"Occasionally he discussed the possibilities of war and returning to Czechoslovakia, but he also seemed to hope for permanent work here, I think."

The wife's solicitor also gave evidence of a conversation with the husband in which the latter made it clear that he was pessimistic about his chances of returning to Czechoslovakia. The solicitor formed the impression from the husband, not that all hope was dead, but that it certainly was not a very lively hope.

If the husband's domicile of origin was Czechoslovak it is necessary to prove that he had formed at the time of the petition a fixed and settled purpose to abandon his Czechoslovak domicile and settle in England. This test I take from the speech of LORD MACNAGHTEN in *Winans v. A.-G.* (1). If the court cannot come to a conclusion on the evidence whether or not the husband intended a change of domicile, then the domicile of origin must remain. It may, however, be the fact in the present case that, though the husband's domicile of origin was Austrian, that domicile changed with that of his father in or about 1918 to a domicile in Czechoslovakia. Except so far as the question of burden of proof is concerned, I think the distinction may be academic. It is clear that the husband lived and was domiciled in Czechoslovakia until he was forced into exile on two occasions. Before the court could be satisfied on the facts of the present case that he acquired a domicile of choice here it would be necessary to prove, not only the undoubted fact that he has not resided in Czechoslovakia since 1948, but that he has formed a clear intention of settling in England. On the evidence before me I have come to the conclusion that in July, 1953, the husband had formed no such clear intention and had not, therefore, acquired a domicile of choice in England.

I now consider whether or not the wife has established that she was ordinarily resident in England for the three years immediately preceding the commencement of these proceedings, that is, prior to July 28, 1953. Section 18 (1) (b) of the Matrimonial Causes Act, 1950, confers jurisdiction on the court on a wife's petition for divorce, notwithstanding that the husband is not domiciled in England,

"... if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings ..."

In the present case there can be no doubt that the wife was, in fact, resident in England on July 28, 1953. The question I have to decide is whether or not she was "ordinarily resident" for the three years preceding that date, notwithstanding the admitted fact that for fifteen months out of that period she was living in Munich.

The meaning of the words "ordinarily resident" has been frequently discussed in tax cases, and, although the problem in this case arises on the construction of s. 18 (1) (b) of the Matrimonial Causes Act, 1950, great help can be derived from consideration of some of the cases under the Income Tax Acts. In *Pickles v. Foulsham* (2) ROWLAT, J., emphasised (9 Tax Cas. 274) that the word "residence" must only be used as signifying an attribute of the person and that confusion might follow by thinking of residence in the sense of a house or place of residence. In *Levene v. Inland Revenue Comrs.* (3) VISCOUNT CAVE, L.C., said ([1928] A.C. 222):

"... the word 'reside' is a familiar English word and is defined in the OXFORD ENGLISH DICTIONARY as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'."

LORD CAVE, dealing with the meaning of the words "ordinarily resides", said (*ibid.*, 225):

"The expression 'ordinary residence' is found in the Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word 'residence' as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here."

In *Inland Revenue Comrs. v. Lysaght* (4) VISCOUNT SUMNER, discussing the meaning of the word "resident", said ([1928] A.C. 244):

"Grammatically the word 'resident' indicates a quality of the person charged and is not descriptive of his property, real or personal. To ask where he has his residence is often a convenient form of inquiry but only as leading to the question 'then where is he resident himself?'"

Pointing out that many nomads are homeless folk, though they may reside continually within the limits of the United Kingdom, LORD SUMNER said (*ibid.*):

"Property obviously is no conclusive test."

Discussing the meaning of the word "ordinarily", LORD SUMNER pointed out (*ibid.*, 243) that the statute he was there considering, namely, the Income Tax Act, 1918, did not use any qualifications such as "usually" or "most of the time", or "exclusively", and he added this:

"I think the converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'."

The industry of counsel was able to discover only one case decided under the wording of s. 18 (1) (b) of the Matrimonial Causes Act, 1950 (then that of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) (a)), namely, *Hopkins v. Hopkins* (5). In that case, the wife petitioned for divorce on the ground of cruelty. The parties were married in 1943. In February, 1949, she returned to England, and when she presented her petition on Oct. 11, 1949, she was clearly resident in England. It appeared that for five out of the relevant thirty-six months she was, in fact, resident in Canada. It also appeared that during the five months during which she was living with the husband in Canada

neither of them had any home of their own in England. On those facts PILCHER, J., decided that the wife was not "ordinarily resident" in England within the meaning of s. 1 (1) (a) of the Law Reform (Miscellaneous Provisions) Act, 1949, which has been re-enacted in s. 18 (1) (b) of the Matrimonial Causes Act, 1950. In the course of his considered judgment PILCHER, J., referred to the tax cases and to the principles there established, and after a full consideration of those cases found that on the facts of that case the wife, while physically present in Canada, was ordinarily resident there. He further came to the conclusion, again on the facts of that case, that the adverb "ordinarily" added nothing to the adjective "resident". Since the wife in *Hopkins v. Hopkins* (5) had during the critical five months' period given up her English residence entirely and had acquired a residence in Canada, I am in respectful agreement with both his reasoning and his conclusion in that case.

But it is to be observed that s. 18 (1) (b) of the Matrimonial Causes Act, 1950, uses the term "resident" as a requirement at the time of the institution of the suit, and the term "ordinarily resident" as a requirement during the preceding three years. I do not think that the use of the two terms is either meaningless or accidental. Clearly, mere temporary absences from England, such as for holidays abroad, would not make a gap in the period of ordinary residence. Nor, in my view, would a longer gap of some months, such as one caused by a journey overseas by a wife accompanying her husband on a business trip, necessarily break the period of ordinary residence. In *Macrae v. Macrae* (6), a case under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, the Court of Appeal had to consider the question of a change of residence by a husband from England to Scotland. SOMERVELL, L.J., said ([1949] 2 All E.R. 36):

"Ordinary residence . . . can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place—in this case he left his wife; in another case he might have disposed of his house—and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place."

It will be observed that SOMERVELL, L.J., emphasised the importance of a place and of a house, though I do not think that he was making these factors the only tests in every case. As counsel for the Queen's Proctor suggested in argument, one of the tests in the present case is to find the answer to this question: Where between July 28, 1950, and July 28, 1953, was the wife's real home? The flat at Clabon Mews she acquired in October, 1948. Thereafter, she never let it, in spite of the prolonged absences abroad. Indeed, throughout those absences she kept it ready for occupation, and returned there whenever circumstances permitted. She is, indeed, still living there. Her long sojourns in Munich were accidental in the sense that they were dictated by the exigencies of the husband's work. I can find no intention on the wife's part to make Munich her home for an indefinite period. So far from disposing of her flat at Clabon Mews she went to trouble, and, probably, to some expense, to keep it as a permanent home. The wife has satisfied me that she was ordinarily resident in England for a period of three years immediately preceding the commencement of these proceedings. This court has, therefore, jurisdiction to dissolve her marriage. The wife has proved the contents of her petition and I pronounce a decree nisi accordingly.

Decree nisi.

Solicitors: *Edwin Cox & Calder Woods* (for the wife); *Treasury Solicitor*.

[*Reported by A. T. HOGLAHAN, Esq., Barrister-at-Law.*]

BATH AND ANOTHER v. BRITISH TRANSPORT COMMISSION.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), May 31, June 1, 2, 1954.]

Factory—Floor—Opening—Dry dock—Factories Act, 1937 (c. 67), s. 25 (3).

Factory—Safe means of access—Dry dock—Re-concreting wall—Workman working on ledge containing open culvert—Bridge over culvert—Factories Act, 1937 (c. 67), s. 26 (1).

Master and Servant—Liability of master—Negligence—Dry dock—Re-concreting of wall—Employee working on ledge two feet six inches wide with back to well—Failure to provide fence.

A workman, employed by the defendants, was engaged in re-concreting the walls of a dry dock, which involved the erection of a timber framework against the dock walls, a process known as "shuttering". In order to carry out this work, it was necessary for the workman to stand with his back to the well of the dock, at the edge of a ledge or "altar" some two feet six inches wide, along the centre of which ran an open culvert. Some yards away from the point at which the workman was engaged, the culvert was traversed by a small concrete bridge. When returning to his position on the altar the workman stepped across the culvert, stumbled and fell over the edge of the altar and fell into the dock below, receiving fatal injuries. In an action by the widow and the administrators of the deceased under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, the plaintiffs alleged that the defendants were guilty of negligence at common law, and were in breach of their statutory duty under the Factories Act, 1937, s. 25 (3) and s. 26 (1).

Held: (i) a dry-dock was not an opening in the floor of a factory within s. 25 (3), and there was, therefore, no breach of that sub-section; nor were the defendants in breach of s. 26 (1) because they had provided the concrete bridge which afforded safe means of access over the culvert.

(ii) the defendants were guilty of negligence at common law in failing to provide a protecting fence or guard-rail along the outside edge of the altar, and the plaintiffs were, therefore, entitled to recover damages.

FOR THE FACTORIES ACT, 1937, s. 25 (3) and s. 26 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1018.

APPEAL by the defendants from an order of GORMAN, J., at Winchester Assizes, dated Mar. 10, 1954.

The deceased, an employee of the defendants, the British Transport Commission, was, together with other workmen, engaged in re-concreting the side walls of a dry dock. This work involved a process known as "shuttering" which consisted in constructing a timber support against the edge of the dock wall running down the face of the wall to a ledge or altar some three feet below the surface of the ground, and pouring liquid concrete into the framework of timber. At the material time the deceased was engaged in work on the top ledge or altar some two feet six inches in width, along the centre of which ran an open culvert. This culvert was traversed by a small concrete bridge at some distance from the point at which the deceased was working. In order to perform his work on the timber support, it was necessary for the deceased to stand at the edge of the altar with his back to the well of the dock. Immediately prior to the accident, the deceased was returning to his position of work, and in so doing he crossed the culvert, stumbled on the edge of the altar, and fell into the bottom of the dock. He died as a result of his injuries.

In an action under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, the plaintiffs, his widow and

administrators, alleged negligence at common law on the part of the defendants in failing to provide fencing or a guard-rail, and breaches of s. 25 (3), s. 26 (1) and s. 26 (2) of the Factories Act, 1937. GORMAN, J., held that the defendants were liable for negligence at common law and were in breach of s. 25 (3) and s. 26 (1) of the Act, and gave judgment for the plaintiffs.

Marven Everett, Q.C., and *M. L. R. Romer* for the defendants.

A *Beney, Q.C.*, and *Humfrey Edmunds* for the plaintiffs.

SOMERVELL, L.J., stated the facts and continued: The learned judge decided that all the claims in the statement of claim succeeded, that there was a breach of the Factories Act, 1937, s. 25 (3) and s. 26 (1), and also negligence at common law. With respect, I have come to the conclusion that no breach of s. 25 (3) was established. The general nature of a dry-dock is familiar. It is a large excavation with built-up sides of concrete into which a ship can float. The water is then pumped out and work can be done on the ship. It seems to me quite impossible to regard the excavation which constitutes the dry-dock as an opening in a floor within s. 25 (3). I do not know that I can say much more about that point. Where words are, as the words of s. 25 (3) are, perfectly familiar, all one can do is to say whether or not one regards them as apt to cover or describe the circumstances in question in any particular case. I cannot myself regard this dry-dock into which the deceased fell as an opening in a floor.

On the second point, concerning safe means of access within s. 26 (1), there is, I think, some difficulty in knowing certainly what the learned judge had in mind when dealing with that issue. Had it been suggested that this open culvert rendered the means of access unsafe, it could be pointed out with some force by the defendants that there was, a few yards further along from the place where the deceased was working, a concrete bridge which a man could cross without having to step over the culvert. On the other hand, if the learned judge had in mind this question of fencing another question arises which I will deal with later. As to s. 26 (2) which deals with secure footholds and handholds, I do not think it is established that this place came within that sub-section. I think there may have been both secure footholds and handholds, and, even if there were not, it may be that point would fail on causation.

I have come to the conclusion, however, that the learned judge was right in holding that there was here a failure by the defendants to take due care at common law. I think that that failure raises the question of the application of s. 26 (1) and also the question of causation. This first ledge or altar on which the men were working and from which there was a steep descent to the other ledges, the first drop being about six feet down, was only two feet six inches in width. That width was lessened to some extent by the "shuttering" which the men were erecting. The shuttering is shown on the plan before us, and although the exact proportion of the width of the ledge which it occupies is not shown, I dare say it would be about four inches. It was, therefore, a narrow ledge above a steep drop and the men would be working with their backs to the drop. The building regulations do not apply here, but the position was very like that in which men are working on scaffolding high up on a building. Although the work had been going on for some three years without mishap, I think it was a position where, had someone directed his mind to the possible danger of these men working on this very narrow platform with their backs to the drop, some protection should have been afforded behind them. That was the view which the learned judge took, and, although it may be on the border-line, I am not satisfied that it was not right. That raises the question of causation. The deceased was not actually working at the time, but was returning to the place of work. However, I think that it is clear on the evidence that he was descending on to the ledge at the place where the shuttering was erected and where there should, in my view, have been a protecting fence. It is possible, of course, that he might have fallen over the fence, but the probabilities are, and one has to act on probabilities,

that, if there had been such a fence there, it would have saved his life, and this was not disputed. I think, therefore, that, if there should be some protection at a place where a man works and he falls over because there was no such protection, it is no answer to say: "At the time when you fell you were getting to the place and were not actually working at it". On the other hand, I do not think the fact that an argument on causation does not succeed means that one should apply s. 26 (1) and say that because the man was injured in approaching his place of work there was no safe means of access and, therefore, a breach of that subsection. It is a narrow point and it may not be of great importance, but I do not think the fact that the injury occurred in the way I have described entitled the plaintiff to maintain that there was a failure to provide safe means of access. I think the only failure established was the failure at common law which applies to this particular type of shuttering work. I am not suggesting any general principle applicable to ordinary work in dry-docks. For these reasons I think the appeal should be dismissed.

BIRKETT, L.J.: I agree. On the question of statutory duty I do not desire to add anything to what my Lord has already said as I agree with his conclusion on that matter, but I would like to say a word about the liability at common law. The learned judge found the defendants were liable at common law, and it is plain from the citations from the authorities which the learned judge kept well in mind and from his clear exposition of the facts that it is impossible to say that on this part of the case he did not direct himself properly. It is not clear from the evidence exactly how this accident occurred, but it is clear enough to show that the place at which the deceased was working on this altar was some two feet six inches wide on the side of the dock. It is equally plain that he was working facing the shuttering and, no doubt, as the work proceeded, he concentrated on that work. It is a remarkable thing that, sitting in the quietude of this court, one might say that was a position of the gravest possible danger, but the workmen employed seemed to think nothing of it. It was said with some force that for three years at least this kind of work had been going on. The men had from time to time moved round the side of the dock erecting the shuttering, and nobody had ever suggested that a precaution of any kind should be taken. In fact, there was no word of evidence to the effect that the manifest danger was such that something should have been done. It is plain from the evidence that, if a simple protection had been erected in the way of a rail such as was in fact erected after the accident, the deceased would have been quite safe. In this case with a man working on a ledge of that width with a possibility of a fall of this nature, I should have thought there was an obvious risk. The strange thing is that nothing was done, and, indeed, as I understand it, after this accident the protective fencing was erected because of the activity of the workmen's union. In those circumstances I think the learned judge had to address his mind to the question what, bearing all the circumstances in mind, was the kind of risk to which this workman was subjected. It is plain that he had that matter in mind. In the case of a man on that ledge working in that position with his face towards the work on which he was concentrating and his back to the dangerous drop, there was, undoubtedly, a risk.

The next question, therefore, is: What would a reasonable employer do in contemplation of that situation? What precautions ought he to take to lessen that risk and to make the position of the workman more secure? The answer, of course, based on the facts of the three years' previous experience, was that no precautions need be taken. I think the learned judge was entitled to say, having regard to all the circumstances, that a reasonable employer would have taken some precaution to avoid that risk which was, in the circumstances, manifest. A slip or momentary forgetfulness might cause a man to fall with the most dreadful consequences. Here was a man who was descending to this ledge to do his work, and, as I understand from the evidence, he had actually

alighted on that place, but was not able to maintain his balance. I think, therefore, the learned judge having properly directed himself and having directed his mind to the exact facts and heard the evidence, came to the right conclusion, on those facts and applying the law, that the defendants had been guilty of negligence at common law. I, therefore, would dismiss the appeal.

ROMER, L.J.: I agree. I think there are no sufficient grounds for disturbing the learned judge's findings on the question of negligence at common law, and I have nothing to add to what my brethren have said on that aspect.

As to the Factories Act, 1937, s. 25 (3), I cannot for my part share the learned judge's view that the dry-dock itself which was in question here was an opening in a floor within that provision. The section is manifestly directed to fencing openings in the floors of factories. By reason of s. 151 of the Act, which is a definition section, dry-docks and their precincts are factories and are, therefore, *prima facie* brought within s. 25. Accordingly, if there were a cavity in the "precincts", whatever that word may properly mean in relation to a dry-dock, it would be within s. 25, and so also, I suppose, if an opening were to be made for some purpose or other in the bottom of the dock. But if one reads the relevant definition in s. 151 into s. 25, one would find as a result that it requires that

"all openings in floors of dry-docks including the precincts thereof shall be securely fenced".

As a mere matter of language it seems to me to be an untenable contention that dry-docks themselves are within the meaning of the word "openings". That interpretation would result in applying to the main object itself a requirement which is referable only to one of its constituent parts. I think for myself, therefore, that it is plain that a dry-dock itself is not an opening in a floor and subject to the requirement of fencing imposed by s. 25 (3).

As to s. 26, which deals with safe means of access, I do not think that sub-s. (2) really has any bearing on this case or the circumstances of the accident. As to sub-s. (1), I agree with my Lord, and I am not sure precisely what the learned judge had in mind when he found that the defendants were in breach of that statutory obligation. I think on the whole that he was impressed by the presence of the culvert close to the edge of the dock and by the evidence that this unfortunate man walked or jumped over it, and having done so stumbled and fell over the side. On the assumption that safe means of access from that direction had to be provided, I think he was holding that the presence of the culvert was a breach of the obligation imposed by s. 26 (1). But if that be so, it seems to be a sufficient answer to the suggested breach that, as is shown in the photograph before us, a perfectly safe means of access was in fact provided for anybody approaching the dock from that direction by the strip of concrete which forms a bridge over the end of the culvert. On that view, it seems to me that it is not possible to hold that the defendants were in breach of s. 26 (1), and I cannot agree with the learned judge that they were. As I say, however, having regard to the judge's finding of common law negligence which we ought, in my opinion, to uphold on the facts, this appeal must fail.

Appeal dismissed.

Solicitors: *M. H. B. Gilmour* (for the defendants); *Arnold Carter & Co.* (for the plaintiffs).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

SIMPSON *v.* SIMPSON.

[COURT OF APPEAL (Denning and Hodson, L.JJ.), June 1, 1954.]

Divorce—Petition—Petition within three years of marriage—Leave to present—Consideration of affidavit of respondent—Matrimonial Causes Act, 1950 (c. 25), s. 2 (1), proviso—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 2 (2).

The parties were married on Dec. 11, 1952. On Apr. 7, 1954, the wife gave notice of application for leave, under the proviso to the Matrimonial Causes Act, 1950, s. 2 (1), to present a petition for dissolution of the marriage notwithstanding that three years had not passed since the date of the marriage, and she filed an affidavit in support in accordance with the Matrimonial Causes Rules, 1950, r. 2 (2). The proposed petition charged the husband with cruelty and alleged acts of physical violence and threats. The husband filed an affidavit in reply and exhibited thereto two letters written to him by the wife on Mar. 18, 1953, and Nov. 3, 1953, in affectionate terms, thereby casting doubt on the truth of the wife's allegations.

Held: (i) in exercising its discretion to grant leave to present a petition under the proviso to s. 2 (1) of the Act of 1950, the court should take into consideration, not only the affidavit of the petitioner in support of his or her application, but also that of the respondent, and also the possibility of a reconciliation between the parties.

Observations of GODDARD, L.J., in *Winter v. Winter* ([1944] P. 75) and of TUCKER, L.J., in *Charlesby v. Charlesby* (1947) (176 L.T. 534), applied.

(ii) applications under the proviso were not meant to be preliminary trials, but were meant to be dealt with simply and inexpensively, and so in the present case the wife would not be allowed to file a further affidavit.

(iii) in the circumstances, leave would be refused.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 2 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 393.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 2 (2), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 197.

Cases referred to:

(1) *Winter v. Winter*, [1944] P. 72; 113 L.J.P. 49; 171 L.T. 111; 27 Digest, Replacement, 373, 3077.

(2) *Charlesby v. Charlesby*, (1947), 176 L.T. 532; 27 Digest, Replacement, 373, 3078.

APPEAL by the husband against an order of SACHS, J., dated May 7, 1954.

The parties were married on Dec. 11, 1952. On Jan. 20, 1954, the wife left the matrimonial home. On Apr. 7, 1954, the wife gave notice of application to the judge in chambers for leave to present a petition for dissolution of the marriage notwithstanding that three years had not passed since the date of the marriage. In support of the application the wife filed an affidavit, dated Apr. 6, 1954, exhibiting the proposed petition in which she charged the husband with cruelty. The matters alleged by the wife amounted to exceptional hardship to her and exceptional depravity by the husband. The husband filed an affidavit in answer stating facts and exhibiting letters of the wife, dated Mar. 18, 1953, and Nov. 3, 1953, which threw doubt on the truth of the charges contained in the proposed petition. SACHS, J., refused to take the affidavit of the husband into account on the ground that he had only to consider the case of the petitioner, and he granted leave to present the petition. The husband appealed.

B. Lewis for the husband.

Hannay for the wife.

DENNING, L.J.: It is common ground that, if the proposed petition were taken at its face value without further inquiry, there would be a case of

A “exceptional hardship” suffered by the wife, or of “exceptional depravity” on the part of the husband. The question is whether the proposed petition is to be taken at its face value or whether the court is entitled to look at the affidavit sworn by the husband in answer to it, to which he exhibits two letters written by the wife which contain statements apparently inconsistent with the allegations of cruelty. For example, on Mar. 18, 1953, at a time when, according to her petition, she had been already treated with violence on three occasions, she wrote a letter to him saying: “You are always kind and very good to me”, and: “To me you are all my life needs and all I want”, and: “I still love you just like I used to write”. In November, 1953, at a time when, according to her petition, most of the acts of cruelty had already taken place, she wrote an affectionate letter to him, sending him all her love, followed with kisses.

B The Matrimonial Causes Act, 1950, s. 2 (1), provides that a judge may allow a petition to be presented within three years of the date of the marriage on the ground that the “case” is one of exceptional hardship or of exceptional depravity. SACHS, J., read that as meaning that “the case as made in the petition” must be one of exceptional hardship or exceptional depravity. He said that it was not for him “to enter into the possibility of the allegations being untrue” or “to go into the likelihood of the case being established”. He thought that he could only look at the proposed petition of the wife and her affidavit in support of it, and that he could not have regard to the husband’s affidavit in answer. In my C opinion, that is not a correct interpretation of the sub-section. If one looks at the observations ([1944] P. 75) of GODDARD, L.J., in *Winter v. Winter* (1) and of TUCKER, L.J., in *Charlesby v. Charlesby* (2), there can be no doubt, I think, that on one of these applications a judge is not confined to the proposed petition D and the affidavit in support, but that he can look at the affidavit in answer also. If the affidavit in answer is destructive of the petitioner’s case, the judge will dismiss the application. Even if it is not altogether destructive of the petitioner’s case, but only throws doubt on it, the judge is entitled to have regard to that doubt in coming to his decision whether or not to grant leave.

E It seems to me, therefore, that the judge was wrong in his ruling in point of law. He should have exercised his discretion on the affidavits as a whole. That he did not do. In these circumstances, the judge not having exercised his discretion and all the material being before us, it is for this court to exercise its discretion, and in so doing we must have regard to the letters which the wife wrote and must also consider the question of reconciliation. In all applications of this kind the possibility of reconciliation is a most important aspect of the case. F The letters, some extracts of which I have read, show that at one time the wife was very much in love with her husband. The husband says that her complaints are largely hysterical and may respond to treatment. He says that, if she were treated, it would be possible for them to resume a normal married existence. In those circumstances, it seems to me that there is a possibility of reconciliation, and that it is not one of those cases where we should give leave to present a G petition within three years.

H It was suggested that we might send the case back so that the wife might supplement her affidavit by further material. That is not a course which we should encourage. These applications are not meant to be preliminary trials. They are meant to be dealt with simply and inexpensively. There should be an affidavit on each side, but there should not be affidavits piled on affidavits. We ought not to send the matter back for the filing of further affidavits, but we ought to decide it on the material before us. I think this appeal ought to be allowed, and the application to lodge the petition within three years should be refused.

HODSON, L.J.: We are asked to review the exercise of the discretion of the learned judge on an application by the wife for leave to lodge a petition

for divorce within three years of the marriage. Section 2 (1) of the Matrimonial Causes Act, 1950, provides:

"No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage."

But there is a proviso which enables the court in its discretion to give leave for a petition to be presented before that time

"... on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent ..."

In the same proviso there is a further reference to "the nature of the case". The learned judge, in my view, has put too narrow a construction on the proviso in emphasising the use of the word "case" and "the nature of the case" as being only the case set forth by the wife in her petition and affidavit.

It is, of course, true, as was made clear by this court in *Winter v. Winter* (1), that in deciding what constitutes "exceptional hardship" or "exceptional depravity" a judge is entitled to act on the *prima facie* evidence in the affidavits filed on the application, and if, in the proper exercise of his discretion, he grants leave to present the petition, his decision will not be reviewed by the Court of Appeal. That proposition, however, does not involve that the learned judge, who is to exercise his discretion, is limited to the affidavit or affidavits put forward on behalf of the proposed petitioner. I am bound to say—in fact I think it is conceded by the parties in the present case—that the learned judge was persuaded that he was so limited.

There is no transcript of his judgment, but a note was taken on each side. On the one hand, it was thought that SALES, J., said that he could not consider the possibility of the wife's case not being established. On the other hand, it was thought that he said he could not enter into the likelihood of the wife's case not being established. In saying that, I think the learned judge felt the position was difficult, and, indeed, no doubt, having that in mind, gave leave to appeal. But his attention was not drawn to *Winter v. Winter* (1) in which GODDARD, L.J., said ([1944] P. 75):

"In my opinion, the words [of the proviso to s. 1 (1) of the Matrimonial Causes Act, 1937, which was in the same terms as the proviso to s. 2 (1) of the Act of 1950] mean that the judge has to come to a conclusion that the allegations made in the affidavits filed on the application are such that, if proved, they would amount to exceptional hardship or depravity, though of course he may take into consideration the affidavits, if any, filed in opposition to assist himself in forming a conclusion as to the likelihood of the case proving to be of that character".

I think SCOTT and DE PARCQ, L.J.J., said nothing inconsistent with that. In case it should be thought that GODDARD, L.J., was confining himself to the consideration of whether or not the affidavits of the opposition threw light on the exceptional hardship and depravity, as opposed to the proof of the case, I think some assistance is to be gained from TUCKER, L.J.'s judgment in *Charlesby v. Charlesby* (2) because he there referred (176 L.T. 534) to GODDARD, L.J.'s judgment in *Winter v. Winter* (1) and said, paraphrasing GODDARD, L.J.:

"... no doubt it is the duty of the judge to deal with the affidavits of the petitioner as *prima facie* correct but at the same time as part of the material of the case, and in judging whether he should exercise his discretion or not, he would have regard to the affidavit sworn by the respondent."

I think "the affidavit sworn by the respondent" is part of the material at which the court must look if any affidavit is filed in opposition. That is clearly laid down by proper appreciation of the judgments to which I have referred. If it were otherwise, it would seem to be futile, except, possibly, on the question of

the prospect of reconciliation, for a respondent to file any affidavit at all. These applications are matters which are determined judicially after hearing both sides. The Matrimonial Causes Rules, 1950, r. 2, provides the machinery, including (r. 2 (2)) machinery for filing an affidavit or affidavits, to be used in support of the summons, not excluding those sworn by the respondent, which would be utterly useless unless the court were entitled to pay attention to them.

A Having said that the learned judge had misdirected himself in the way I have mentioned, that does not dispose of this appeal, because the learned judge did go on to consider what the position would be if he were wrong in his approach. He said that the letters (which have been referred to) did raise in his mind certain doubts as to the truth of the wife's case, although he added:

"These doubts could be resolved, of course, because the letters might be capable of explanation."

B It is conceded by counsel for the wife that there must be cases in which the affidavit of the respondent can be looked at and the full rigour of the rule laid down by the learned judge cannot be maintained. But, he argued, such cases were not those in which merely doubt was cast on the petitioner's case but were those in which the petitioner's case was destroyed. The learned
C judge here was not exercising his discretion in the light of the husband's affidavit which, in his view, did throw doubt on the wife's case. One of the letters of the wife, dated Mar. 18, 1953, written after, according to her allegation, a series of most violent assaults had been committed or threatened against her, begins: "My dearest darling husband", and goes on to use expressions of great affection and to describe how she missed him whenever he was away, ending
D up with more expressions of great affection, such as: "I love you my darling Johnnie always, Baby Vil", followed by symbols for kisses. In the letter in November, 1953, two months before the parting, she wrote a short affectionate note to her husband which, as the learned judge indicated, throws great doubt on the truth of the charges which she had made against him in the petition. Taking all these matters into consideration, and the doubts which the learned
E judge entertained and which are entertained by this court, the material here being the same as the material before him, it seems to me that this is a case in which we ought to express our own view on the matter and dismiss the wife's application.

Counsel for the wife has argued that it would be right to give her an opportunity of supplementing the evidence which she previously gave. I have considered that matter, and I have come to the conclusion that that would not be right.
F It is not desirable for the parties to be encouraged to put before the court a mass of material, because the court would find itself then in even greater difficulty than it necessarily now is in reaching a *prima facie* conclusion on contradictory affidavits. Nor, I think, is it contemplated that the contradictions in the affidavits are to be resolved at this particular stage. The wife has had the opportunity of putting forward her case, and the husband's affidavit has been
G filed in answer. The material thus before the court, I think, ought to be treated as the material on which this court can properly act. For these reasons, as well as those given by DENNING, L.J., I think this appeal should be allowed, and the wife's application dismissed.

Appeal allowed.

Solicitors: *Sudney Davidson & Co.* (for the husband); *Charles Caplin & Co.* (for the wife).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

SELF v. SELF.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), May 26, 1954.]

Legal Aid Costs Taxation—Counsel's fee—Additional fee for case outside London or large assize centres—Right of assisted litigant to select counsel from appropriate panel—Fair and reasonable remuneration—Legal Aid and Advice Act, 1949 (c. 51), s. 6 (4), sched. III, para. 4 (1).

On Nov. 17, 1953, counsel whose chambers were in London appeared before a special commissioner in divorce sitting at Brighton to represent in an undefended divorce suit the petitioner who was in receipt of legal aid under the Legal Aid and Advice Act, 1949. On taxation the registrar reduced the fee on counsel's brief from seven to five guineas, on the ground that there were counsel with chambers in Brighton willing to accept briefs on undefended petitions and that it would be wrong to allow the higher fee because counsel came from London. On a summons to review the registrar's decision,

HELD: (i) there was no evidence that any sum less than five guineas would be allowed on taxation as the fee on counsel's brief on an undefended petition in London or in such large assize centres as Liverpool, Leeds or Birmingham; it was a recognised and proper practice to make an addition to the fee when a petition was heard elsewhere, and by ignoring this recognised practice the registrar acted on a wrong principle; the effect of the registrar's decision would be to deny to assisted litigants their right under the Legal Aid and Advice Act, 1949, s. 6 (4), to select counsel from the "appropriate panel" and to restrict their choice to one of a small number of counsel.

(ii) alternatively, the result of the taxation was to fix the fee of a counsel selected from the "appropriate panel" at a figure which did not represent a fair and reasonable remuneration for work done in the normal course of practice, and was a wrong exercise by the registrar of his judicial discretion.

(iii) the decision of the registrar would, therefore, be reviewed and the sum of seven guineas allowed as the fee on counsel's brief.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 6 (4), sched. III, para. 4 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 18, pp. 541, 566.

Case referred to:

(1) *Dick v. Piller*, [1943] 1 All E.R. 627; [1943] K.B. 497; 112 L.J.K.B. 410; 169 L.T. 26; 2nd Digest Supp.

SUMMONS adjourned into court.

The facts appear in the headnote.

Simon, Q.C., and *R. T. Barnard* for the petitioner.

SACHS, J.: This is a summons to review a decision of the Brighton registrar on objections lodged when he, on a taxation under the Legal Aid and Advice Act, 1949, sched. III, para. 4 (1), reduced from seven to five guineas the brief fee of counsel who came from London on a petition heard at Brighton by a special commissioner exercising High Court jurisdiction in divorce. When the summons first came before me it was apparent that the issue might affect many other cases, and, accordingly, it was adjourned into court. Steps were taken to enable those concerned with the protection of the legal aid fund to be represented, but nobody has appeared to deal with the matter in that behalf. Indeed, there is nothing at present in the rules which technically enables them to appear. On the other hand, I have had the advantage of an argument from counsel on behalf of the petitioner in which with his usual fairness he has put before me the aspects of the case which might have been argued on behalf of the legal aid fund. I have also had the benefit since the matter originally came

before me of assistance from experienced taxing officers of this court. For the purpose of this judgment I am assuming that the registrar at Brighton was right when he said that the case involved no unusual complications and might be regarded as one of a normal type.

As regards counsel's brief fees on undefended petitions heard in London, no one has been able to inform me of any case in which on a taxation under sched. III. para. 4 (1), a lesser sum has been allowed than five guineas. Further, no one has been able, despite several inquiries made, to refer me to any similar case in a big assize centre outside London, such as Liverpool, Leeds or Birmingham, where a lesser fee than five guineas has been allowed. It is plain that normally the calls on a member of the Bar who undertakes to conduct in Brighton such a petition are greater as regards both expense and time than if he had been called on under the Act of 1949 to conduct such a petition in London.

Not only is it obvious that in those circumstances an appropriate amount ought to be added to his fee in respect of these calls, but my inquiries have shown that it is, in fact, a general and proper practice to make such an addition whenever a petition is heard outside London or one of the big centres.

It is clear that, if a registrar acts in ignorance of, or if he ignores, a recognised practice, he acts on a wrong principle. His discretion as to quantum being clearly a judicial discretion, I respectfully follow what was stated by CROOM-JOHNSON, J., in *Dick v. Piller* (1), where he said ([1943] 1 All E.R. 635):

"... an exercise of judicial discretion on a wrong principle is appealable.

To exercise it on wrong considerations or on wrong grounds, or to ignore some of the right considerations, is, in my judgment, to decide on wrong principles."

So, prima facie, the registrar in this case taxed on a wrong principle. The only suggestion made by the registrar to support the view that he should allow no more than five guineas is that there were counsel with chambers in Brighton willing to accept briefs on undefended petitions and that it would be wrong, therefore, to allow a higher fee because counsel came from London. From the material put before me today it appears that there are at most three counsel practising at Brighton. Whether or not these three counsel technically constitute a local Bar for purposes such as the County Court Rules, 1936, App. B, Scales 2 and 3, item 28, is, to my mind, irrelevant. Petitions for divorce are heard, not in the county court, but in courts which constitute a part of the High Court.

The Act of 1949, by s. 6 (4), specifically reserves the right of litigants reasonably to select their own counsel. The words used are:

"Where a person is entitled to receive legal aid, the solicitor to act for him and, if the case requires counsel, his counsel shall be selected from the appropriate panel, and he shall be entitled to make the selection himself."

The task of deciding what are the appropriate panels was in practice left to the scheme-making committee (constituted, under s. 8 (6) of the Act, of practising solicitors and practising barristers and a member of the Lord Chancellor's Department). Those panels have, in fact, been devised on the footing that there is one panel for matrimonial causes in a given area, and the area normally chosen is that of a circuit. Accordingly, no registrar has a right in effect to dictate to litigants that their choice of counsel in a High Court matter shall be restricted to three or any other such relatively small number. Such a restriction would, as counsel has pointed out, strike in one respect at the basis of the legal aid scheme which is intended to put the assisted litigant on the same footing—including choice of counsel—as an unassisted litigant who has reasonable means with which to pursue his remedies or his defences. In these circumstances it is clear that the registrar has gone wrong in principle.

I may add that there is an alternative way of putting the matter and one on which I would have been prepared to decide it. The result of the taxation of the registrar has been to fix the fee of an appropriately selected counsel at a figure which does not, having regard to the matters I have already referred to, represent a fair and reasonable remuneration for work done in the normal course of practice. It is not a proper exercise of judicial discretion so to assess their fees as to deprive those who do such work under the Act of 1949 of the eighty-five per cent. of that fair and reasonable remuneration which the Act provided under sched. III, para. 1 (D). In this regard it is not irrelevant to note that counsel, by putting their name on a panel, are obliged to take such work as may be offered to them in the localities which the panel serves.

Being satisfied, therefore, that the registrar has gone wrong in principle, I propose to review the item in question, and I allow it at the figure which, on inquiry, appears to be the normal and reasonable fee, that is to say, seven guineas. I am glad to know that in allowing that sum I am merely reinstating the figure of seven guineas as the brief fee for undefended petitions heard at Brighton, which was the fee normally allowed by the present registrar's predecessor. No application has been made for costs in the present summons, and I take this opportunity of thanking all those concerned for having undertaken a matter of importance to the legal system on a footing on which they can obtain no remuneration for so doing. There does not at present appear to exist a method by which appeals of this importance can readily be brought before the court in circumstances which enable those presenting them to be paid out of the legal aid fund. That fact and the absence of a system under which the legal aid fund itself can be satisfactorily represented are matters which may be worthy of attention.

Order accordingly.

Solicitors: *Harcock & Scott*, agents for *Banker & Co.*, Hove (for the petitioner).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

PROBATE NOTICE.

Probate—Grant—Re-sealing—Colonial Probates Acts, 1892 and 1927.

The Non-Contentious Probate Rules, 1954, which come into force on Oct. 1, 1954, provide (inter alia) that applications for re-sealing under the Colonial Probates Acts, 1892 and 1927, need not normally be advertised.

The registrars of the Principal Probate Registry are prepared to consider favourably applications to dispense with advertisement during the period before the new rules come into force.

D. A. NEWTON,
Secretary.

June 21, 1954.

BAKER v. JONES AND OTHERS.

[QUEEN'S BENCH DIVISION (Lynskey, J.), May 17, 18, 19, June 4, 1954.]

Contract—Illegality—Public policy—Jurisdiction of court—Exclusion—Unincorporated body—Interpretation of rules—Rule that central council to be final arbiter.

A *Unincorporated Body—Powers—Application of funds—Payment of personal legal costs incurred by members—Interpretation of rules—Review of decision—Jurisdiction of court.*

Maintenance of Action—Common interest—Nature of interest—Unincorporated body—Funds used to pay personal legal costs of members—Legal interest in result of action.

B In 1952 two actions for tort were brought against certain officers of the central council of the British Amateur Weightlifters' Association (the B.A.W.L.A.) in their individual capacities. Later, the central council authorised a payment on account of the legal costs of these actions out of the association's funds, and resolutions were passed by the central council confirming such payments and authorising such further payments as the central council might consider necessary. The association was an unincorporated body and its primary object, as set out in r. 2 of its constitution, was "To promote weightlifting as a sport and weight training as a means of physical improvement". By r. 34 the government of the association was vested in a central council, whose powers were set out in r. 40, which powers included, by C r. 40 (vii) "To be the sole interpreters of the rules of the B.A.W.L.A. and to act on behalf of the B.A.W.L.A. regarding any matters not dealt with by the rules", and by r. 40 (viii) "The decision of the central council in all cases, and under all circumstances, shall be final". A member of the D association claimed against the officers of the association and present and past members of the central council *inter alia* a declaration that the payments made towards legal costs were unlawful.

E HELD: (i) the relationship between the members was contractual, the contract being contained in, or implied from, the rules; while a tribunal or council could by such a contract be made the final arbiter on questions of fact, the parties could not prevent its decisions on questions of law (such as the interpretation of the rules of the B.A.W.L.A.) being examined by the courts, and, accordingly, the first part of r. 40 (vii) and r. 40 (viii) were F contrary to public policy and void.

F Dictum of DENNING, L.J., in *Lee v. Showmen's Guild of Great Britain* ([1952] 1 All E.R. 1181), applied.

(ii) rule 40 (vii), authorising the central council to act on behalf of the association regarding any matters not dealt with by the rules, had to be read in conjunction with r. 2, defining the association's object; the association, as an unincorporated body, could not be liable for the tortious acts of G members of the central council, and, therefore, there was no power under the rules to authorise the use of the association's funds to pay the personal costs of some of its members in defending proceedings brought against them in their personal capacity since that was not within the object of the association as set out in r. 2; accordingly, the payments made out of the association H funds were unlawful, the resolutions of the central council were *ultra vires* and void, and the defendants in whose favour the funds had been paid must repay such sums to the association.

HELD, further, even if the rules did authorise such use of the funds, although the defendants had a common interest with the defendants in the actions for tort, they had not the necessary legal interest in the sense that the judgments therein would affect their rights and they were intermeddling in litigation with which they had no concern; such intermeddling was unlawful.

as being the tort or crime of maintenance and could be restrained by injunction.

Alabaster v. Harness ([1895] 1 Q.B. 339); *Alfin v. Hewlett* (1902) (18 T.L.R. 664), and *Oram v. Hutt* ([1914] 1 Ch. 98), applied.

AS TO MAINTENANCE OF ACTION, see HALSBURY, Simonds Edn., Vol. 1, pp. 39-43, paras. 79-85; and FOR CASES, see DIGEST, Vol. 1, pp. 66-69, Nos. 546-571.

Cases referred to:

- (1) *Scott v. Avery*, (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 10 E.R. 1121; 16 Digest 115, 149.
- (2) *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; [1952] 2 Q.B. 329; 3rd Digest Supp.
- (3) *Oram v. Hutt*, [1914] 1 Ch. 98; 83 L.J.Ch. 161; 110 L.T. 187; 78 J.P. 51; 43 Digest 108, 1139.
- (4) *Alfin v. Hewlett*, (1902), 18 T.L.R. 664; 43 Digest 103, 1082.
- (5) *Alabaster v. Harness*, [1895] 1 Q.B. 339; 64 L.J.Q.B. 76; 71 L.T. 740; 1 Digest 83, 681.
- (6) *Neville v. London Express Newspaper, Ltd.*, [1919] A.C. 368; 88 L.J.K.B. 282; 120 L.T. 299; 17 Digest 155, 560.
- (7) *Wiggins v. Lavy*, (1928), 44 T.L.R. 721; 42 Digest 361, 4120.

ACTION for declaration, injunction and repayment of money.

The plaintiff was a life member of the British Amateur Weightlifters' Association. The first defendant, Jones, was the president of the association; the second defendant, Lavender, the chairman of the central council; the third defendant, Taylor, the honorary general secretary; and the fourth defendant, Stone, the honorary treasurer of the association. The remaining thirty-four defendants were officers, or present or past members, of the central council of the association.

Roy Wilson, Q.C., and *Platts-Mills* for the plaintiff.

John Hobson for the defendants, Jones, Lavender, Taylor and Stone.

Rees-Davies for the remaining defendants.

Cur. adv. vult.

June 4. **LYNSKEY, J.**, read the following judgment. In this case the plaintiff, Harry Baker, is a life member and has for many years been a member of the British Amateur Weightlifters' Association. This association is an unincorporated body and is generally referred to as "B.A.W.L.A." The defendants are officers, or present or past members, of what is described in the rules of the association as "the central council". The association itself is not a party to this action as no representation order has been, or, possibly, could be, made. The primary question I have to decide is whether the funds of the association may be applied in payment of the costs of six of the officers and members of the council in two personal actions—the one against three of them for conspiracy and defamation, and the other against three others of them for defamation of another member of the association. The members of the association have agreed to be bound by certain rules regulating their relationships to each other and to others, which are described as "Constitution—General Rules of the Association". An agreed copy of these rules, which were in force at all relevant times, was put in before me.

In these rules it is provided by r. 1:

"This association is known as the 'British Amateur Weightlifters' Association' and is referred to hereafter as the 'B.A.W.L.A.'"

Rule 2:

"The object of the B.A.W.L.A. is as follows:—To promote weightlifting as a sport and weight training as a means of physical improvement. In furtherance of this object, the B.A.W.L.A. to hold displays, British, county,

and other championship meetings whenever possible and practicable; grant diplomas for world, British, county and other 'special records' as may from time to time be determined; to encourage the practice of weight training through the provision of qualified instructors".

Rule 3:

A

"The association shall consist of:—(a) Such divisional and county associations and clubs as shall be accepted for affiliation and the enrolled members thereof; (b) such unattached members and life members as shall be accepted for enrolment; (c) such honorary life members and patrons as may be elected; and (d) such other associations and bodies as shall be accepted for affiliation".

By r. 34:

B

"The government of the B.A.W.L.A. shall be vested in a central council which shall consist of the officers of the association and sixteen other members, seven of whom shall form a quorum which shall include at least five elected members".

By r. 40, the powers of the council are set out in eight sub-rules and it is only necessary for the purpose of this judgment to refer to three of these sub-rules:

C

"(vi) To make such regulations for putting into effect the rules of the B.A.W.L.A. as they may deem desirable from time to time. (vii) To be the sole interpreters of the rules of the B.A.W.L.A. and to act on behalf of the B.A.W.L.A. regarding any matters not dealt with by the rules. (viii) The decision of the central council in all cases, and under all circumstances, shall be final."

D

By r. 43:

"The balance sheet shall be audited by two members of the B.A.W.L.A., the auditors to be elected at the annual general meeting. All cheques of the B.A.W.L.A. to be signed by the secretary and the hon. treasurer."

E

By r. 44:

"No rule of the B.A.W.L.A. shall be amended, added to, or cancelled except at an extraordinary general meeting called for that purpose in accordance with r. 22 and r. 23, or at an annual general meeting, in which case written notice, bearing the signatures of at least three members, shall be submitted to the secretary by Jan. 1 in the year of the meeting".

F

B.A.W.L.A. is apparently recognised as the authority controlling the sport or exercise of weightlifting in this country and is recognised as such by the Olympic Games Association.

G

For many years Percy Frederick Cranmer had been a leading member of B.A.W.L.A. He was honorary secretary from 1923 to 1926, honorary treasurer from 1926 to 1950 and also president and the B.A.W.L.A. delegate to the British Olympic Association. William Albert Pullum is a professional coach of professional and amateur weightlifters and was the coach to the British weightlifting teams at the Olympic Games in 1924 and 1948 and had been closely associated with B.A.W.L.A. and its members during that period and up to 1951.

H

During, or prior to, 1951, differences of opinion seem to have arisen between Mr. Cranmer and those who shared his views and the defendants, John Charles Lavender, the chairman of the central council, and Frederick Taylor, the secretary of B.A.W.L.A., and those who shared their views. Mr. Cranmer and his party were anxious that the association of B.A.W.L.A. and Mr. Pullum should continue, and, in particular, that he should be appointed the coach for the British Olympic weightlifting team at Helsinki in 1952. Messrs. Lavender and Taylor and their party took the opposite views and preferred the claims of a Mr. Al Murray. On Oct. 13, 1951, Mr. Al Murray was appointed by the central council as its

official coach for the Olympic Games of 1952. Mr. Pullum took the view that he had been treated unfairly by some of the members of the council and saw Mr. Cranmer, the president, about it and placed certain information before him. Mr. Pullum also saw his solicitors who wrote to Mr. Cranmer a letter dated Dec. 12, 1951. At a meeting of the central council of the association on Dec. 15, 1951, Mr. Cranmer submitted a written memorandum which was read, and in which he expressed the view that Mr. Pullum had been badly treated and might take legal action against B.A.W.L.A. and that he proposed to seek advice himself. According to the minutes, a discussion took place on this memorandum and the solicitors' letter to Mr. Cranmer, and it was moved by Mr. Stone and seconded by Mr. Barrs:

"(a) The report of Mr. Cranmer be received with thanks, (b) the chairman be authorised to seek legal advice as to any necessary action to protect the interests of the association and its honorary officers in connection with the matter in question".

The plaintiff called no oral evidence in this case and relied on the admitted documents and admissions of fact, and I have no information apart from what is set out in these documents and the evidence given by the defendant, Stone, the treasurer, and the only witness called for the defence. So far as these records and evidence go, the authorisation to the chairman to seek legal advice does not seem to have been acted on at the time. The chairman was the defendant, Lavender.

Mr. Cranmer, and those who shared his views, seem to have decided that they could no longer be associated with the activities of the majority of the members of the central council. Mr. Cranmer resigned his position as president and member of the council on Jan. 1, 1952, but retained his membership of the association. Seven other members of the council, who are defendants in this action, resigned from the council between Dec. 28, 1951, and Mar. 31, 1952, but remained members of the association and were replaced by others of the defendants named in these proceedings as members of the central council.

On Mar. 19, 1952, Mr. Pullum issued proceedings against the defendants, Frederick Taylor, H. W. Hartnall and Reginald Watkins, claiming an injunction and damages for libel, slander and malicious conspiracy to injure him in his position and business. On Apr. 9, 1952, Mr. Cranmer commenced proceedings against the defendants, J. C. Lavender, E. J. Stone and John Barrs, for damages for libel and slander and an injunction. The publication of which he complained was an article in the March issue of a magazine called "Vigour", headed "Mountains and Mohehills, by J. C. Lavender, chairman B.A.W.L.A., central council". The defendant, Barrs, was the editor of "Vigour", and the defendant, Stone, re-published the article in the central council newsheet No. 5 of B.A.W.L.A. The evidence establishes that there was no resolution of the central council authorising Mr. Lavender to publish this article and no resolution expressly authorising Mr. Stone to publish the article in the newsheet, although he was authorised to issue a newsheet to the various societies and others who were members of, or affiliated to, B.A.W.L.A.

Apparently, Mr. Pullum applied for an interlocutory injunction in his action, but this application was unsuccessful, and on Apr. 28, 1952, Messrs. Waterhouse & Co., solicitors acting for the defendants in both actions, wrote asking the defendant, Taylor, in Pullum's action, for £100 on account of the defendants' costs, and asking the defendant, Lavender, in the Cranmer action, for a similar amount. On May 1, 1952, the defendant, E. J. Stone, the treasurer of B.A.W.L.A., wrote to the defendant, F. Taylor, the secretary of B.A.W.L.A., enclosing a cheque dated Apr. 30, 1952, signed by him on B.A.W.L.A.'s account for £100 in favour of Waterhouse & Co., for signature by Taylor as secretary, and to be forwarded by him to Waterhouse & Co. Stone says in his letter that the cheque is sent

" as authorised by Mr. Lavender pursuant to the decision of the central council at their meeting on Dec. 15, 1951 ".

The cheque was duly countersigned by the defendant, Taylor, as secretary, and forwarded to Messrs. Waterhouse & Co. on May 3, 1952, and paid out of the association's account. In the meantime, on May 1, 1952, the defendant, Lavender, sent his own cheque for £50 on account of his own costs as defendant in the Cranmer action, and on the same day the defendant, Stone, sent his own cheque for £50 on account of his costs. The defendant, Barrs, was insured against claims for libel with the Royal Insurance Co., who undertook his defence through Messrs. Hair & Co.

On May 17, 1952, there was a council meeting. A financial statement was submitted by the treasurer, the defendant, Stone, and in that statement was an entry " Legal deposit £100 ". At the same meeting a resolution was passed:

" It was agreed with two abstentions that the association should pay the legal charges in the action '*Cranmer v. Lavender and Others*' " .

On May 28, 1952, two cheques for £50 were signed by the defendants, Stone and Taylor, as honorary treasurer and honorary general secretary respectively of the association, and drawn on the association's account, the one in favour of the defendant, Lavender, and the other in favour of the defendant, Stone, and were paid out of the association's account to each of them. These cheques were expressed to be paid to Messrs. Lavender and Stone as a refund for the deposit for legal costs paid by each of them to Waterhouse & Co. in the Cranmer action.

On June 14, 1952, there was a further meeting of the central council, and a financial statement was again submitted showing " Legal deposit £200 ". On Mar. 21, 1953, the annual general meeting was held at Manchester, to which was submitted a report of the central council. Although finance is dealt with in the report, there is no mention of the two actions, or any payment in respect thereof, or any liability for the defendants' costs thereof. There was a financial statement submitted which contained the entry " Deposit on account legal costs ". The entry, without explanation, would be meaningless to the ordinary member. Mr. Stone was not present at this annual meeting, and, although he suggests he did give an explanation, or may have given an explanation, to the central council, he has not satisfied me that, in fact, he did so.

On June 10, 1953, the writ was issued in these present proceedings, naming as defendants only the defendants, Jones, Lavender, Taylor and Stone. In consequence of an affidavit filed on behalf of those defendants, leave was obtained on Sept. 11, 1953, to amend the proceedings by adding the names of the other present defendants, and this was done on Sept. 16, 1953.

On Sept. 12, 1953, there was a meeting of the central council and, on counsel's advice, a series of resolutions was passed to try to make the position safe for the defendants and to defeat the plaintiff's claim. The resolutions read:

" Lawsuits. The chairman said that counsel [to the central council of B.A.W.L.A.] had given further consideration to the pending actions and advised that specific resolutions should be considered and recorded by the central council. Item 204. *Pullum v. Taylor and Others*. It was resolved that in the view of the central council it was and is in the interests of the promotion of weightlifting as a sport and reasonably incidental thereto that Messrs. Taylor, Hartnall and Watkins, members and officials of the council should be supported as to their own costs as defendants in the action 1952 P. No. 834 the issues and pleadings of which have been explained to and considered by the central council. Carried without dissent. Mr. Taylor as interested party abstained. Item 205. *Cranmer v. Lavender and Others*. It was resolved that in the view of the central council it was and is in the interests of the promotion of weightlifting as a sport and reasonably incidental thereto that Messrs. Lavender and Stone, members and officials of

the council, should be supported as to their own costs as defendants in the action 1952 C. No. 1730 the issues and pleadings of which have been explained to and considered by the central council. Carried without dissent, Messrs. Taylor, Stone, Lavender and Barrs abstained. Item 206. Authority for actions. It was resolved that neither of such matters are dealt with by any of the general rules of the British Amateur Weightlifters' Association. Carried with four abstentions. Item 207. Indorsement of payments. It was resolved that the payments of £100 made in respect of the defendants' costs in action 1952 P. No. 834 and of £100 in respect of the defendants' costs in action 1952 C. No. 1730 are approved and confirmed by the central council so far as they have power to approve and confirm the same. Carried with four abstentions. Item 208. Authority for further action. It was resolved that the central council desires to make further similar payments as and when it may desire or consider it necessary so to do in the future and intends itself and authorises all its officials to take such steps as may be necessary to justify the payments made and to establish the right and power of the central council to make such further similar payments hereafter. Carried with four abstentions."

The first question I have to consider is whether the members of the central council of the association are entitled to use or authorise the use of the association's funds in paying the legal costs of some of its members in defending proceedings for tort brought against them in their individual capacities? The plaintiff says that the members of the central council are not so authorised because the rules do not authorise it. The defendants, on the other hand, contend that, not only do the rules authorise them so to use the association's funds for this purpose, but also contend that their decisions cannot be challenged in the courts. The defendants rely particularly on r. 34 and r. 40 (vii) and (viii). Rule 34 vests the government of B.A.W.L.A. in the central council. Rule 40 sets out what those powers are. By r. 40 (vii), those powers include:

"To be the sole interpreters of the rules of the B.A.W.L.A. and to act on behalf of the B.A.W.L.A. regarding any matters not dealt with by the rules".

Rule 40 (viii) provides that:

"The decision of the central council in all cases, and under all circumstances, shall be final".

The defendants say that the rules contain no provisions as to how the funds of the association are to be applied, and that the central council are the sole interpreters of the rules, that they have interpreted the rules as authorising them to use the association's funds in payment of their members' legal costs, and that their decision must be accepted as final. The defendants' contention, no doubt, would be right if their rules are valid and binding on the plaintiff, but I have to consider whether the rule which makes the central council the sole interpreters of the rules and their decision final in all cases is valid and binding on the plaintiff.

B.A.W.L.A. is an unincorporated association. It has no legal entity. The relationship between its members is contractual. That contract is contained in, or to be implied from, the rules. The courts must consider such a contract as they would consider any other contract. Although parties to a contract may, in general, make any contract they like, there are certain limitations imposed by public policy, and one of those limitations may be that parties cannot, by contract, oust the ordinary courts from their jurisdiction: *Scott v. Avery* (1). The parties can, of course, make a tribunal or council the final arbiter on questions of fact. They can leave questions of law to the decision of a tribunal, but they cannot make it the final arbiter on questions of law. They cannot prevent its

decisions being examined by the courts. As DENNING, L.J., says in *Lee v. Showmen's Guild of Great Britain* (2) ([1952] 1 All E.R. 1181):

" If parties should seek, by agreement, to take the law out of the hands of the courts and into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void ".

A With this statement of the law I respectfully agree. The interpretation of the rules is a question of law which the courts will examine. In my view, therefore, the provisions in the B.A.W.L.A. rules, making the central council the sole interpreter of the rules and their decision in all cases final, is contrary to public policy and void.

B It then becomes necessary for me to consider whether the central council's interpretation of the rules is correct in law. The rules contain no express power authorising the use of the association's funds in paying the costs of its individual members. Rule 40 (vii), in its second limb, does authorise the central council to act on behalf of B.A.W.L.A. regarding any matters not dealt with by the rules. Although this rule, by its terms, gives the central council very wide powers, it seems to me that it must be read in conjunction with r. 2 of the association's rules which defines the association's objects. The central council
C cannot use the association's funds for purposes not within the objects.

The defendants contend that it was, and is, in the interests of the promotion of weightlifting as a sport, and reasonably incidental thereto, that the costs of the defendants in the Pullum action and the Cranmer action should be paid and, therefore, they are within the objects of the association. The argument is that
D the defendants in these two actions are sued because of what they are alleged to have done or said while officers or central councillors of the association and their costs should be paid as it is in the interests of the sport that officials and members of the association should speak their opinions freely without fear of having to pay their own costs if they are sued. In my view, this argument is
E unsound and one cannot construe r. 2 as making it one of the objects of the association, or a purpose reasonably incidental thereto, that its funds should be applied in paying the personal costs of some of its members in defending proceedings brought against them in their personal capacity. The association, being an unincorporated body, could not be liable for the tortious acts either of its officials or council members. The members of the association, individually, would not be liable for such tortious acts, except in so far as they had individually
F authorised such acts. There was, in my opinion, no power under the rules for the central council to authorise, or the defendants, Taylor and Stone, to use, the funds of the association in making payment on account of the costs of the defendants, Taylor, Hartnall and Watkins, in the Pullum action, or the defendants, Lavender and Stone, in the Cranmer action, or to pledge the association's funds for further costs to be incurred by these defendants and the defendant, Barrs.

This is sufficient to dispose of this action, but the plaintiff takes a further point
G that, even if the rules did authorise these payments, such payments are unlawful as amounting in law to the crime or civil wrong of maintenance. This question has been argued fully before me and it may be desirable that I should express my view on it.

Maintenance in earlier days was a far-reaching and important branch both of
H civil and criminal law. The common law does not approve of the intervention of any man in the litigation of another with which he has no lawful concern, whether that litigation is well founded or not. In these days, however, of insurance policies giving an indemnity against both damages and costs to wrongdoers, trade unions whose rules provide for paying the legal costs of their members, and the Legal Aid Acts, maintenance is not now regarded with the same repugnance as it was by the old common law. The offence and tort of maintenance, however, still exists, and the common law rules, although much modified and,

as some say, almost atrophied, still must be applied. If an unincorporated body chooses to finance an action in tort in which one of its officials or even one of its servants are concerned, in which it has not a common interest, that may amount to the crime or tort of maintenance and the court will restrain the members or committee of the unincorporated body from using its funds for that purpose and may compel them, if the funds have been used or received for that purpose, to replace the funds: *Oram v. Hutt* (3) and *Alfin v. Hewlett* (4).

It was suggested that the defendants had a common interest with the defendants to the Pullum and Crammer actions in the result of those actions. They clearly had an interest in the pleas raised in those actions, but that is not sufficient. The law, as I understand it, requires there should be a legal interest, i.e., the judgment in the action itself must affect the rights of the persons encouraging or financing the litigation: *Alabaster v. Harness* (5), *Alfin v. Hewlett* (4), and *Oram v. Hutt* (3). In this case I am satisfied that there was no such legal interest.

It was further contended, on behalf of the defendants, that it would not have been open to Mr. Pullum or Mr. Crammer to bring an action for maintenance against the defendants as, until these actions are decided, the plaintiffs in these actions could not prove that they have suffered any damage by the defendants' intermeddling. If both Mr. Pullum and Mr. Crammer failed in their proceedings they would be unable to prove that the defendants' intermeddling had caused them any damage, and proof of such damage is a necessary ingredient in an action for maintenance: *Neville v. London Express Newspaper, Ltd.* (6) and *Wiggins v. Lavy* (7). This, no doubt, is correct so far as proceedings by Mr. Pullum and Mr. Crammer for damages are concerned, but so far as the defendants are concerned they are intermeddling in litigation in which they have no concern. This is unlawful and will be restrained by injunction at least on the application of a member of an unincorporated society whose funds are being used for this unlawful purpose: *Oram v. Hutt* (3) and *Alfin v. Hewlett* (4). In the result, in my view, even if the rules had permitted the application of the association's funds for the purpose for which it is alleged they have been used, or were intended to be used, the use for such a purpose is unlawful as being the tort or crime of maintenance.

[His Lordship further held that, as there was no misapplication of the funds of the association before Apr. 30, 1952, the defendants who had resigned from the council before Mar. 31, 1952, were not liable for such misapplication.]

Judgment for plaintiff.

Solicitors: *Howard Davis, Nelson & Co.* (for the plaintiff); *Waterhouse & Co.* (for the defendants, Jones, Lavender, Taylor and Stone); *G. Howard & Co.* (for the remaining defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

SOUTHPORT CORPORATION v. ESSO PETROLEUM CO., LTD. AND ANOTHER.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), May 11, 12, 13, 14,
June 3, 1954.]

Negligence—Res ipsa loquitur—Onus on defendants to disprove negligence—

A *Pleading—Damage arising from stranding of vessel—Pleading of negligence in navigation—Stranding due to fractured stern frame—Not pleaded by defendants—Plaintiffs' right to rely on negligence in relation to fracture.*

Nuisance—Ship—Discharge of oil to lighten vessel stranded in estuary—Damage to adjoining foreshore—Necessity—Need to prove negligence.

B *Nuisance—Public nuisance—Discharge of oil to lighten vessel stranded in estuary—Damage to adjoining foreshore—Failure by defendants to prove inevitable accident.*

Trespass—Ship—Discharge of oil to lighten vessel stranded in estuary—Damage to adjoining foreshore—Necessity—Need to prove negligence.

C When approaching an estuary in weather which was not unusual, a tanker developed a steering fault and stranded on a revetment wall. To save the vessel and the crew from grave danger, the master (justifiably as it was held) jettisoned four hundred tons of oil, which became deposited on the plaintiffs' foreshore, causing damage. In an action for trespass, nuisance and negligence brought against the shipowners and the master, the plaintiffs pleaded as negligence negligent navigation and no more, and the defendants denied negligence, pleaded that the stranding was due to the steering being out of control through the propeller's striking "some object", and denied the creation of trespass or nuisance. It was found as a fact that the cause of the steering getting out of control was a fracture of the stern frame of the vessel, fouling the propeller, but there was no evidence as to the cause of the fracture.

E HELD: (i) (MORRIS, L.J., dissentiente) the defendants were liable for negligence, since (a) the stranding of the vessel was an accident such as did not happen in the ordinary course of things with a well-found vessel, and the onus, therefore, was on the defendants to give an explanation of its occurrence, including the cause of the fracture of the stern frame, which they had failed to do: dictum of ERLE, C.J., in *Scott v. London Dock Co.* (1865) (3 H. & C. 601) and (per DENNING, L.J.) *The Merchant Prince* ([1892] P. 179), applied; and (b) the plaintiffs were not precluded from setting up the negligence of the defendants in sending a vessel to sea with a fractured stern frame by their failure to plead it, since the defendants had not pleaded that the stranding was attributable thereto.

G Per MORRIS, L.J.: the defendants were not liable for negligence, since the plaintiffs could not assert that a defective or ill-found vessel had put to sea in the absence of such an allegation in their pleadings: *The Merchant Prince* ([1892] P. 179), distinguished.

H (ii) the defendants were not liable in trespass or for nuisance, since liability, if it existed, was destroyed by necessity unless there was negligence (per SINGLETON, L.J.), or would arise only if there was negligence (per MORRIS, L.J.) or, in the case of trespass, did not exist because the discharge of oil was not directly on to the plaintiffs' foreshore (per DENNING, L.J.).

Per DENNING, L.J.: the discharge of oil was not a private nuisance since it did not involve the defendants' use of any land: dictum of LORD WRIGHT in *Sedleigh-Denfield v. O'Callaghan* ([1940] 3 All E.R. 364), applied; but it was a public nuisance for which the defendants were liable to the plaintiffs since the oil was discharged in such circumstances that it was

likely to be carried on to the shore to the prejudice and discomfort of Her Majesty's subjects: *R. v. Muttons* (1864) (Le. & Ca. 491) and *Scott v. Shepherd* (1773) (2 Wm. Bl. 892), applied; and the defendants had failed to show that the discharge of oil was an inevitable accident, i.e., a necessity which arose utterly without their fault: *Weaver v. Ward* (1616) (Hob. 134), *Dickenson v. Watson* (1682) (T. Jo. 205), *Wringe v. Cohen* ([1939] 4 All E.R. 241) and *Sadler v. South Staffordshire & Birmingham District Steam Tramways Co.* (1889) (23 Q.B.D. 17), applied.

Decision of DEVLIN, J. ([1953] 2 All E.R. 1204), reversed.

AS TO BURDEN OF PROOF WHERE RES IPSA LOQUITUR APPLIES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 671-675, paras. 956-958; and FOR CASES, see DIGEST, Replacement Vol. 36, pp. 143-146, Nos. 753-778.

AS TO PRIVATE NUISANCES AND PUBLIC NUISANCES, and AS TO DEFENCES IN ACTIONS FOR NUISANCE, see HALSBURY, Hailsham Edn., Vol. 24, pp. 24, 25, paras. 42, 43, and p. 95, para. 169; and FOR CASES, see DIGEST, Replacement Vol. 36, p. 256, Nos. 68-71, and pp. 322-324, Nos. 672-682.

AS TO TRESPASS TO LAND, see HALSBURY, Hailsham Edn., Vol. 33, pp. 6-9, paras. 9-15; and FOR CASES, see DIGEST, Vol. 43, pp. 377-379, Nos. 51-61.

AS TO MATERIAL FACTS TO BE PLEADED IN A STATEMENT OF CLAIM, see HALSBURY, Hailsham Edn., Vol. 25, pp. 239, 260, 262, paras. 396, 429 and 435; and FOR CASES, see DIGEST, Pleading, pp. 14-17, Nos. 102-133.

AS TO DISCHARGE OF OIL IN NAVIGABLE WATERS, see HALSBURY, Hailsham Edn., Vol. 33, pp. 603-605, paras. 1060-1065.

Cases referred to:

- (1) *The Merchant Prince*, [1892] P. 9, 179; 67 L.T. 251; 36 Digest, Replacement, 163, 866.
- (2) *Scott v. London Dock Co.*, (1865), 3 H. & C. 596; 34 L.J.Ex. 220; 13 L.T. 148; 159 E.R. 665; 36 Digest, Replacement, 145, 772.
- (3) *The Llanover*, (1946), 79 Lloyd's Rep. 159.
- (4) *Prior of Southwark's Case*, (1498), Y.B. 13 Hen. 7, p. 26, fol. 4; Fifoot's History and Sources of the Common Law, p. 87.
- (5) *Regnolds v. Clark*, (1725), Fortes. Rep. 212 (92 E.R. 822); 2 Ld. Raym. 1399 (92 E.R. 410); 8 Mod. Rep. 272 (88 E.R. 193); 1 Stra. 634 (93 E.R. 747); 36 Digest, Replacement, 256, 73.
- (6) *Read v. Lyons (J.) & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 2nd Digest Supp.
- (7) *Fletcher v. Rylands*, (1866), L.R. 1 Exch. 265; 35 L.J. Ex. 154; 14 L.T. 523; 30 J.P. 436; *affd.* H.L. sub nom. *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest, Replacement, 282, 334.
- (8) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; sub nom. *Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 2nd Digest Supp.
- (9) *R. v. Muttons*, (1864), Le. & Ca. 491; 34 L.J.M.C. 22; 11 L.T. 387; 28 J.P. 804; 169 E.R. 1485; 34 Digest 750, 1234.
- (10) *Scott v. Shepherd*, (1773), 2 Wm. Bl. 892 (96 E.R. 525); 3 Wils. 403 (95 E.R. 1124); 36 Digest, Replacement, 23, 100.
- (11) *Anon.*, (1535), Y.B. 27 Hen. 8, p. 27, fol. 10; Fifoot's History and Sources of the Common Law, p. 98.
- (12) *Weaver v. Ward*, (1616), Hob. 134; 80 E.R. 284; 43 Digest 373, 4.
- (13) *Dickenson v. Watson*, (1682), T. Jo. 205; 84 E.R. 1218; 43 Digest 431, 559.
- (14) *Tarry v. Ashton*, (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; 34 Digest 163, 1274.
- (15) *Wringe v. Cohen*, [1939] 4 All E.R. 241; [1940] 1 K.B. 229; 109 L.J.K.B. 227; 161 L.T. 366; 31 Digest, Replacement, 383, 5108.

(16) *Sadler v. South Staffordshire & Birmingham District Steam Tramways Co.*, (1889), 23 Q.B.D. 17; 58 L.J.Q.B. 421; 53 J.P. 694; 43 Digest 353, 105.

(17) *The Annot Lyle*, (1886), 11 P.D. 114; 55 L.T. 576; 41 Digest 777, 6369.

(18) *The Dageid*, (1947), 80 Lloyd's Rep. 517.

(19) *Mitchell v. Allestry*, (1676), 3 Keb. 650 (84 E.R. 932); 2 Lev. 172 (83 E.R. 504); sub nom. *Mitchil v. Alestree*, 1 Vent. 295 (86 E.R. 190); 34 Digest 127, 977.

A

(20) *Illidge v. Goodwin*, (1831), 5 C. & P. 190; 172 E.R. 934; 36 Digest, Replacement, 43, 224.

(21) *Hendry v. McDougall*, 1923 S.C. 378; 36 Digest, Replacement, 109, 820.

(22) *Gayler & Pope, Ltd. v. Davies (B.) & Son, Ltd.*, [1924] 2 K.B. 75; 93 L.J.K.B. 702; 131 L.T. 507; 36 Digest, Replacement, 109, 540.

B

(23) *River Wear Comrs. v. Adamson*, (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 36 Digest, Replacement, 166, 890.

(24) *Jones v. Llanwrst Urban Council*, [1911] 1 Ch. 393; 80 L.J.Ch. 145; 103 L.T. 751; 75 J.P. 68; 36 Digest, Replacement, 288, 359.

(25) *The Marpesia*, (1872), L.R. 4 P.C. 212; 8 Moo. P.C.C.N.S. 468 (17 E.R. 387); 26 L.T. 333; 36 Digest, Replacement, 162, 863.

C

(26) *The Schwan, The Albano*, [1892] P. 419; 69 L.T. 34; 36 Digest, Replacement, 163, 865.

(27) *The Indus*, (1886), 12 P.D. 46; 56 L.J.P. 88; 56 L.T. 376; 41 Digest 777, 6370.

APPEAL by the plaintiffs against an order of DEVLIN, J., dated Oct. 21, 1953, and reported [1953] 2 All E.R. 1204.

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The plaintiffs owned a foreshore to which damage had been done by a deposit of oil discharged from a tanker, the *Inverpool*, which was owned by the first defendants and of which the second defendant was the master, in order to lighten the vessel after it had stranded on a revetment wall in the Ribble estuary. They brought an action for damages for trespass and nuisance and negligence. They alleged that the second defendant was guilty of negligent navigation inter alia in entering the channel when the steering was erratic and the helm could not be got over, in that the tanker was caused to strike the revetment wall, and in causing the oil to be discharged overboard. The defendants denied the negligence and alleged that striking the revetment wall had been caused by the steering gear being out of control because the propeller had twice struck "some object". DEVLIN, J., found on the facts (i) that the decision of the master to enter the

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channel in spite of a defect which had appeared in the steering was right in view of the impossibility of anchoring in the weather prevailing at the time and of the danger of turning round; (ii) that in the situation of grave peril in which the master found himself after the stranding and of the danger of loss of life his decision to jettison some of his cargo of fuel oil could not be criticised; (iii) that the stern frame of the vessel was fractured before it stranded (though there was no proof of the cause of fracture); and (iv) that the fractured stern frame was the cause of the vessel getting out of control and stranding. He held that, though the plaintiffs had a good cause of action in nuisance, whether public or private, they had to prove negligence in the defendants to succeed, the onus being on them, and not on the defendants, who had only to show that they had not been negligent and need not prove inevitable accident; and as the plaintiffs had not proved the negligence pleaded he dismissed the action. The plaintiffs appealed.

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Carpmael, Q.C., and *Baucher* for the plaintiffs.

Nelson, Q.C., and *G. B. H. Currie* for the defendants.

Cur. adv. vult.

June 3. The following judgments were read.

SINGLETON, L.J.: This case concerns a small tanker called the *Inverpool*

belonging to the defendants, which stranded in the Ribble estuary on Dec. 3, 1950. The master, in order to float her, discharged about four hundred tons of fuel oil. The oil became deposited on the foreshore which belongs to the plaintiffs, Southport Corporation, and entered the Marine Lake, a feature of the foreshore. The deposit extended for a distance of about $7\frac{1}{2}$ miles, and varied in thickness from one inch to three inches, and in width from three feet to twenty feet, at one point amounting to one hundred feet. It became necessary to close the Marine Lake for a time and also parts of the foreshore, and it has cost the plaintiffs a substantial sum to make good the damage. They claimed damages against the owners and master of the tanker. They alleged that the deposit of oil on their property constituted a nuisance, or was a trespass, and, further, that there was negligence. DEVLIN, J., gave judgment in favour of the defendants, and the plaintiffs appeal to this court.

I take the following statement of facts from the judgment of DEVLIN, J.:

"The Inverpool is a steam tanker of 680 tons gross, 169 feet in length and thirty-one in beam. The engine is aft. Her master, Mr. McMeakin, and her chief engineer, Mr. Mackintosh, are both experienced seamen, and she was manned by a crew of eleven hands all told. She left Liverpool at 7.30 on Dec. 3, 1950, with a cargo of 736 tons of heavy fuel oil. She has three tanks and her total capacity is eight hundred tons. She carried about 120 tons only in her No. 1 tank forward, and the other two tanks were full. Her draft forward was nine feet, ten inches and aft fourteen feet, ten inches. She arrived at the Nelson Buoy at 11.40 and waited there for the tide. High water at Preston was at 17.17. She left the Nelson Buoy at 14.30, the weather then being clear, wind N.N.W. force 7 or 8, and a moderately rough sea. At about 14.45, when she was between the Gut Buoy and the Wall End Buoy, she shipped two or three very heavy seas over the port quarter and engine room. Up to that time she had been behaving normally in every way, and almost immediately after that, the master says, the steering without any apparent cause became very erratic, and she began sheering four to five points to starboard and to port. The engineer describes her as lurching badly, sliding from side to side. The master said the weather made it impossible to put a man along the deck to find out what was wrong with the steering gear. He asked the engineer to increase the pressure to the steering. The master continued on his course with some anxiety. At 15.05, when the ship was about halfway between Wall End Buoy and Salter's Buoy, the engineer felt two violent blows on the propeller (metal hitting metal it sounded like) which he reported to the master. The ship was then, the master says, in mid-channel, and he did not think she had touched anything. The channel at this part is about six hundred feet wide. On the south side there is a revetment wall about seven or eight feet in width and of a height varying from three to six feet above datum. At this time there would be about fourteen or fifteen feet of water at Salter's Buoy, so that there was eight to twelve feet of water over the wall. When the Inverpool had passed Salter's Buoy—about half a mile, the master says, though the plaintiffs contend she had hardly passed it—she took a heavy sheer to starboard which could not be corrected and she ran aground on the revetment wall. It was then 15.15. She lay at right angles across the wall, about thirty feet of her length being over the other side of it while her stern was still afloat in the channel. The master did the obvious and natural thing and ordered the engines full astern so as to back her off into the channel. Immediately the engines went astern, it was found that the propeller was fouling some hard object. There was the same noise as before. There was such vibration that the engineer feared the main steam pipe might fracture with the danger of scalding the engine crew. After a few minutes he reported this to the master, who told him he could stop. The master then regarded the position of his ship as

extremely precarious. She was pounding on the wall and straining heavily. He thought she was in serious danger of breaking her back with probable loss of life as well as of the ship herself. Of course, she was on a rising tide, and there was a chance, great or small, that the water would lift her off. If the tide made to the predicted height (and in fact it was an inch over) there would be six or seven feet more water under the vessel within the next two hours. But the tide and the wind were pushing her on to the wall, and that would probably mean that she could not get off except by getting right over. The water would therefore have to rise enough to get her stern over, and her stern was drawing fourteen feet, ten inches. If the height of the wall where she was across it was, say, five feet, high tide would give her a theoretical clearance of about one foot. If the height was six or seven feet, as the master rightly or wrongly thought, the tide would not get her off. If it did not, her position bumping on a falling tide with her head and stern unsupported would be disastrous.

"I do not think that the master made any precise calculations. His instinct was to get off as quickly as he could and the obvious way to do that was to lighten her. He had no relish for waiting about doing nothing to see if the tide would rescue him. At 15.25, therefore, he began discharging No. 1 tank. There was some suggestion that he lightened her forward first with the idea of putting her further down by the stern and thus inducing her to slide back into the channel. In fact he had to discharge that tank first because it was slack, and I do not think he was concerned about which way she came off so long as he got her off. The discharge of No. 1 was completed at 16.05 without getting the ship off the wall. At 16.15 he began on No. 3 tank, and when that was completed he had discharged rather over four hundred tons and raised the ship about $3\frac{1}{2}$ feet. At 17.30 she bounced along the wall (to use the master's description) and went off it, coming to rest on a bank of sand. A survey report made later showed quite considerable hull damage which the ship must have sustained either on the wall or on the hard sand. The report showed also that the stern frame was very badly bent and fractured in two places, that one blade of the propeller was completely broken off and the other three blades broken at the tip."

I add this in order to make clear what the weather conditions were. The master of the Inverpool said that, when he left the Nelson Buoy, he was quite happy about going in. There were two other vessels near her, both of which made the journey up the channel to Preston. One was the Esso Suwannee, a motor tanker belonging to the defendants. Her master, who gave evidence for the defendants, said:

"They (the conditions) were not too good. The wind was blowing from the nor' west and there was a fairly big sea . . . I thought the passage was quite negotiable. There was a bit of wind and you had to keep her up to the wind when going past the buoys . . ."

He agreed "not an unusually bad weather afternoon, but more than normal." The other vessel was the Clyde Brae, whose master was called on behalf of the defendants. He said that, when he left the Nelson Buoy soon after the Inverpool left, it was blowing a moderate gale and it was a pretty rough sea. In cross-examination he said it was the kind of weather you would frequently experience whether entering Preston or elsewhere.

The plaintiffs alleged that the master of the Inverpool was guilty of negligent navigation in several respects, including: (a) in entering the channel when the steering was erratic and the helm could not be got over and was slow to move; (b) in that the tanker was caused to strike the revetment wall; (c) in that he caused about four hundred tons of oil to be discharged overboard. The learned judge rejected this part of the plaintiffs' case. He came to the conclusion that

it was a defect in the steering gear which caused the vessel to get out of control and which led to her coming on the wall. He added ([1953] 2 All E.R. 1211):

"The remaining point is much more difficult, because it has not proved possible to arrive at any clear conclusion as to what caused the defect in steering. It remains, the master said, a puzzle and a mystery to him. The plaintiffs say, therefore, that the defendants have failed to prove that they were not responsible for the loss. I approach the problem by considering, first, what relevant damage was found on the ship at her survey. The propeller blades were broken and so was the stern frame. If the stern frame was fractured or even cracked, it would be quite enough to account for the ship's behaviour. Is there sufficient evidence to support the inference that the stern frame was fractured before the vessel stranded? I think on the whole that there is. The damage could, of course, have been done as she was crossing the wall or afterwards on the sand. But if I accept, as I do, the engineer's evidence of the propeller fouling on two occasions when the stern was still afloat, first, between Wall End Buoy and Salter's Buoy, and, secondly, just after the stranding, it points to the damage being done earlier. On both occasions it sounded as if the propeller was striking metal. That suggests that in two different places in the channel it was the same sort of metal object that was being struck, and, therefore, that it was a metal object that was travelling with the ship. The defendants' theory that the propeller was fouling a part of the stern frame that was loose or out of alignment fits in with this, and the theory is certainly not weakened by the fact that the stern frame was afterwards found to be fractured. I accept this theory and find as a fact that the stern frame was fractured before 15.05 when the propeller first fouled. I find that the fractured stern frame was the cause of the vessel getting out of control.

"Is there evidence to show how the stern frame was fractured? The defendants' theory is that it was done by the two or three very heavy seas that she shipped at about 14.45. Assuming the stern frame to be sound, I cannot see how heavy seas could by themselves fracture it, and I am advised by the Elder Brother that they could not. They could, of course, if they drove the stern frame up against some hard object. The Elder Brother points out that between the Gut Buoy and the Wall End Buoy just about the bar, there are places where the ship would not have much water under her stern, and suggests as a possibility that the stern frame might have been broken against the bed of the channel. This hypothesis was not advanced at the trial and I feel now that it is too speculative for me to adopt in the absence of any supporting evidence from the master or engineer. The plaintiffs' theory is that the fracture was caused by the vessel striking the revetment wall owing to negligent steering at some point before that at which she grounded. I do not accept this. In the first place I am advised that it is unlikely that she could have struck the wall in such a way as to damage her stern; the plaintiffs' theory was put to the defendants' witness, Mr. Evans, and the Elder Brother considers that Mr. Evans's opinion on this point is correct. In the second place, I do not think it could have happened without the knowledge of the engineer, whose evidence I accept. Thirdly, it certainly could not have happened without the master's knowledge; and while I do not want to decide the matter simply by accepting his evidence, the circumstances do not point to his telling a lie and I do not feel that he was. The evidence of the master of the Clyde Brae, a following ship, for what it is worth, bears out his story. On the evidence I am unable to say how the stern frame fractured. I may add that I do not accept the theory that the vessel's loss of control was due to sea damage done to some part of the steering gear such as the rods and chains along the deck. As in the case of the stern frame, I am advised that it is unlikely that the sea alone could do any

serious damage. If it had, I should have expected it to be found in the survey; if there were any signs of it there, my attention was not drawn to them."

A I am not sure on the evidence that it is right to say that the stern frame was fractured before the propeller first fouled, though it may have been so. Equally it may have been that the stern post was loose and that the fracture or fractures occurred later. The master said that there was nothing wrong with the steering until the vessel shipped two or three very heavy seas between the Gut Buoy and the Wall End Buoy, and that, thereafter, the steering became very erratic. He said that the vessel did not hit the wall before grounding, but soon after passing Salter's Buoy she took a heavy sheer to starboard and so came on the wall. In cross-examination he was asked: "Q.—Do you know why your steering gear became difficult to use?", and he answered: "I am puzzled." B And:

"Q.—But you do not know what caused your vessel to be slow in steering, do you? A.—I do not. Q.—It remains a mystery to you? A.—It does. Q.—Can you suggest anything other than the revetment which could have caused the two heavy thuds reported by the chief engineer? A.—Possibly the stern post was loose and possibly swinging and the propeller struck it. Q.—And I suppose that is the kind of thing which would be known to the chief engineer, would it not? A.—About the stern post? Q.—Yes. A.—I do not know . . . Q.—Now you say that after pumping out the oil you got no success having had to stop working the propeller astern because of the engineer's report. What was that due to—striking, do you think? A.—Striking the loose stern frame. Q.—It all depends on this loose stern frame, does it? A.—Exactly. Q.—When did you first think of that one? A.—Which one? Q.—Striking the loose stern frame? A.—I am saying that now. I did not know that at the time. Q.—Do you know it now? A.—I know it now, yes. Q.—How do you know it? A.—Because I saw the frame afterwards. Q.—But the frame could have been broken in a number of ways, could it not? A.—It could, yes. Q.—By being on the wall, for example? A.—I think it had gone before that. . . Q.—When did you first form the opinion that it was the propeller striking the stern frame? A.—After we had gone down to look what the ship was like. Q.—And have you always said that? A.—Yes, the marks of the propeller were on the stern frame: the marks of the propeller going round were on the stern frame. Q.—Did you make a report after you got off? A.—Yes. Q.—Did you make any statement to that effect in that report? A.—I think you will find it is marked on it. I am not quite sure at the moment. The marks were there definitely. The bottom of the stern frame was scored; the marks of the propeller were on it. Q.—It does not appear in your report, does it, captain? A.—It is on one of my reports. G Everybody saw it."

In further cross-examination, he said he only made one report. The report sets out the damage found, but does not mention the marks on the stern frame. The marks are referred to in a report of a Mr. Poole (the superintendent engineer of the shipowners) dated Dec. 10, 1950. Mr. Poole was not called as a witness H by the defendants. The defendants did not disclose any survey report on the vessel.

Now, the defendants by their defence had denied negligence, and they had further denied the creation of trespass or nuisance. They had not pleaded that the difficulty in steering arose through a loose stern frame or a damaged stern frame. Their case on the hearing was that the damage was done by two or

three heavy seas shipped about 14.45. The finding of DEVLIN, J., on this is ([1953] 2 All E.R. 1211):

"Assuming the stern frame to be sound, I cannot see how heavy seas could by themselves fracture it, and I am advised by the Elder Brother that they could not."

The natural inference is that there was something wrong with the stern frame before the commencement of the voyage. What, then, is the position in law? The submission made to the trial judge by counsel for the plaintiffs was that, in the circumstances, the defendants must explain the accident, or must show that the defect in steering was not their fault (see the judgment (*ibid.*, 1207)), and he relied on *The Merchant Prince* (1). Counsel for the defendants submitted that no question of fitness of the ship entered into the case, as the only plea of negligence was directed against the master. I do not think that the decision in this case ought to turn on any question of pleading. If it had to do so, I should not regard the defendants' pleading as complete in view of the facts known to them. Moreover, I would not think that there had been full discovery of documents. And the plaintiffs could know little of the facts which were within the knowledge of the defendants. It was really only on cross-examination of the master that the plaintiffs discovered the facts as they now appear.

I look on the case in this way. The stranding of the vessel on the revetment wall was an unusual happening, something not likely to happen even in bad weather in this channel if proper care was taken. Other vessels made the journey successfully. Thus, an explanation is called for from the defendants. I think this was the opinion formed by the judge. He appears to have considered it was a case in which the doctrine of *res ipsa loquitur* applied, and he said (*ibid.*, 1212):

"If the defendant offers a plausible explanation consistent with his diligence, the plaintiff is back where he was before and must show the greater probability of negligence."

Unfortunately, he did not apply that principle to the facts of the case, for he ended his judgment by saying that the only negligence alleged was against the master in respect of negligent navigation. Thus, he may be said to have determined the case on a question of pleading. If the defendants had pleaded that the trouble arose through looseness of, or a fracture of, the stern frame, there might have been a reply, and without doubt further discovery would have been sought. On the judge's findings, the damage was caused by the fractured stern frame, which could not have been caused by heavy seas if the stern frame had been sound. This was a vessel which was said to have been new in 1925. It would appear that her stern post became loose, or the stern frame fractured, before she entered the channel. There is no evidence to show that that sort of thing happens in a well-found ship. It seems to me that we ought to assume that it is unlikely that such a thing will happen if proper care is taken. We know nothing as to the history of the *Inverpool*. No earlier survey reports have been produced. We do not know when repairs had last been done to her. (There is a somewhat nebulous remark as to her having been overhauled in the previous March or April.) Nor is there any information as to what the condition as to possible looseness of the stern post was found to be afterwards. Counsel for the plaintiffs said that he left it to the defendants to show that they had taken proper care, relying on his submission.

Is the explanation a plausible one consistent with diligence, to take the question posed by DEVLIN, J.? It is unnecessary, in my view, for the plaintiffs' case to be put in the way FRY, L.J., put the case of *The Merchant Prince* (1) ([1892] P. 189). I prefer the test laid down by ERLE, C.J., in *Scott v. London Dock Co.* (2) (3 H. & C. 601):

"There must be reasonable evidence of negligence. But where the thing

is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

That appears to me to be the position on the facts of this case. If the defendants have produced a reasonable explanation, equally consistent with negligence or no negligence, the burden of proving that the defendants were negligent, and that their negligence caused the damage, rests on the plaintiffs. Have the defendants produced such an explanation? Counsel on their behalf submitted that it cannot be said that there is evidence of negligence whenever a vessel goes ashore in a storm. From that proposition, stated in general terms, I do not dissent. But the weather was not unusual. There is nothing to indicate that there were unusual, or unexpected, difficulties in the channel, or under the conditions encountered on that day. Other vessels made the journey up the channel successfully. It appears that the trouble arose through some fault in the stern post, or in the stern frame, of the vessel. There was no evidence to show that that is something which may happen in a well-found ship if proper care has been exercised in regard to her. Indeed, no evidence was directed to this side of the case. The defendants were content to rely on the fact that the master noticed nothing wrong with the steering until after the heavy seas were shipped. There is no evidence of any inspection, routine or other, beforehand.

In the case of *The Llanover* (3) BUCKNILL, L.J., said (79 Lloyd's Rep. 163):

"On the undisputed evidence as to the circumstances leading up to the collision, it seems to me that a prima facie case of negligence is made out against the *Llanover* which she has failed to rebut. Her rebuttal rests on her evidence that her steering gear jammed, which made it impossible for her to keep out of the way. It is not sufficient for a ship to say: 'My steering gear has jammed and therefore I can do nothing.' I think that the burden is cast on her of showing that the jamming could not have been avoided by the exercise of reasonable care and skill on her part, or at least that she used all reasonable care and skill to prevent the jamming of the gear, and that it might reasonably have jammed for a cause which they could not have prevented by the exercise of reasonable care and skill."

I find this statement of BUCKNILL, L.J., most helpful. In the circumstances of the present case I cannot see that the defendants gave an adequate explanation of the happening in the absence of any evidence to show what the condition of the stern post, or of the stern frame, was at any time prior to the day of the stranding and without any evidence to show how the damage might have occurred, or as to what the condition of the parts was afterwards. They directed evidence to show that the steering might be affected by heavy seas, but they gave no evidence as to the likelihood of damage to the stern post or stern frame. It is not without interest to notice that no evidence was given in chief by the defendants' witnesses as to this damage being the cause of trouble occurring in the steering; it was in the cross-examination of the master that it appeared. It cannot have come as a surprise to the defendants. It appears to me that, on the facts, the plaintiffs did give evidence which pointed to negligence on the part of the defendants, and that the case was not answered. I have come to the conclusion that the plaintiffs' claim should succeed, and that the appeal should be allowed.

I do not propose to consider the claim made on the basis of nuisance or trespass. Assuming that either is right, the defence of necessity would, in my view, destroy it. But, again, the defendants could not avail themselves of that defence if the whole trouble was due to their negligence. And it is on the issue of negligence that the case falls to be decided. I would add that I cannot accept the

submission of counsel for the defendants that no duty is owed by those on, or responsible for, a ship to persons, whether owners or occupiers, on shore. There is a duty to act reasonably—in other words, a duty not unnecessarily to do an act which any reasonable person in charge of a ship would know to be likely to cause injury to those on shore. In my opinion, judgment should be entered for the plaintiffs with damages to be assessed. No distinction was drawn between the position as between the defendants, but, as the judge acquitted the master of any negligence in the navigation of the ship, it may be better that judgment should be entered against the owners, though if any question arises on that we will hear the learned counsel.

DENNING, L.J.: This is one of those cases, rare nowadays, where much depends on ascertaining the proper cause of action, particularly in regard to the burden of proof. The plaintiffs allege that the deposit of oil on their foreshore was either a trespass to land, or a nuisance, or that it was due to negligence. The judge seems to have thought that it did not matter much what was the proper cause of action. It all came back in the end to the universal tort of negligence. The action was, he said ([1953] 2 All E.R. 1210),

“to be treated in the same way as any running-down or collision case in which the plaintiff alleges negligence.”

I do not share this view, and will give my reasons.

(1) Trespass to land. In order to support an action for trespass to land, the act done by the defendant must be a physical act done by him directly on to the plaintiff's land. That was decided in the year 1498 in the *Prior of Southwark's Case* (4) which is conveniently set out in Mr. FROOD's book on the HISTORY AND SOURCES OF THE COMMON LAW, p. 87. The prior complained because the defendant, who was a glover, had made a lime pit for calf-skins so close to a stream as to pollute it. It was held that, if the glover had dug the lime pit in the prior's soil, the action ought to be in *trespass*, but, if it was made in the glover's soil, it should be in *case*. The same distinction was taken in 1726 in *Reynolds v. Clark* (5) where the defendant put a rainspout on his house from which water poured on to the walls of the plaintiff's house and rotted them. The plaintiff brought an action for *trespass*, but failed because he should have brought an action on the *case*. The reason was because the prejudice to the plaintiff was not immediate, but consequential. Quite recently, in 1946, in *Read v. J. Lyons & Co., Ltd.* (6), VISCOUNT SIMON affirmed the same distinction when he observed ([1946] 2 All E.R. 474) that:

“The circumstances in *Fletcher v. Rylands* (7) did not constitute a case of trespass because the damage was consequential, not direct.”

Applying this distinction, I am clearly of opinion that the plaintiffs cannot here sue in trespass. This discharge of oil was not done directly on to their foreshore, but outside in the estuary. It was carried by the tide on to their land, but that was only consequential, not direct. Trespass, therefore, does not lie.

(2) Private nuisance. In order to support an action on the case for a private nuisance, the defendant must have used his own land or some other land in such a way as injuriously to affect the enjoyment of the plaintiff's land. LORD WRIGHT in *Sedleigh-Denfield v. O'Callaghan* (8) said ([1940] 3 All E.R. 364):

“The ground of responsibility is the possession and control of the land from which the nuisance proceeds.”

Applying this principle, it is clear that the discharge of oil was not a private nuisance, because it did not involve the use by the defendants of any land, but only of a ship at sea.

(3) Public nuisance. The term "public nuisance" covers a multitude of sins, great and small. An instructive collection of precedents will be found in JOSEPH CHITTY'S CRIMINAL LAW (1826), vol. 3, pp. 607 et seq. Suffice it to say that the discharge of a noxious substance in such a way as to be likely to affect the comfort and safety of Her Majesty's subjects generally is a public nuisance. That was decided in *R. v. Mutters* (9) where the owner of a quarry in Torquay, while blasting out the rock, put an excessive amount of gunpowder into a hole, and the ensuing explosion was so great as to scatter rocks and stones into the houses and gardens of people in the neighbourhood and on to the road. He only did it on one isolated occasion, but he was convicted at the Devon sessions of a public nuisance, and a strong court consisting of POLLOCK, C.B., WILLES, J., CHANNELL, B., BYLES and SHEE, JJ., upheld the conviction. This recalls the celebrated case of *Scott v. Shepherd* (10), where the defendant threw a lighted squib into a crowded market house, and it was thrown from one stallholder to another until it put out the plaintiff's eye. The defendant there was, I think, guilty of a public nuisance, and the plaintiff could have sued him in *case*. BLACKSTONE, J., thought that *case*, and not trespass, would lie against Shepherd, and I agree with him. Those cases concerned, it is true, the discharge of explosives which affect the safety of Her Majesty's subjects, whereas the discharge of oil only affects their comfort, but that is only a distinction in the kind of the nuisance, not in the principle of it.

Applying the old cases to modern instances, it is, in my opinion, a public nuisance to discharge oil into the sea in such circumstances that it is likely to be carried on to the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects. It is an offence punishable by the common law. Furthermore, if any person should suffer greater damage or inconvenience from the oil than the generality of the public, he can have an action to recover damages on that account, provided, of course, that he can discover the offender who discharged the oil. This action would have been described in the old days as an action on the case: see *Anon.* (11) (1535) Y.B. 27 Hen. 8, p. 27, fol. 10; FIFOOT, p. 98; but it is now simply an action for a nuisance. I realise that by a statute passed in 1922 (the Oil in Navigable Waters Act, 1922) the discharge of oil in navigable waters has been made an offence punishable summarily; but that does not mean that it is not also a public nuisance by the common law. Applying these principles, it seems to me plain that the discharge of four hundred tons of oil into the estuary of the River Ribble was a public nuisance. It would, obviously, be thrown up on some part of the coast. Indeed, the master accepted the likelihood of the oil reaching the Southport foreshore. The defendants can, therefore, probably be called on to account for it.

(4) Burden of proof. One of the principal differences between an action for a public nuisance and an action for negligence is the burden of proof. In an action for a public nuisance, once the nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted on to the defendant to justify or excuse himself. If he fails to do so, he is held liable, whereas, in an action for negligence, the legal burden in most cases remains throughout on the plaintiff. In negligence the plaintiff may gain much help from provisional presumptions like the doctrine of *res ipsa loquitur*, but, nevertheless, at the end of the case the judge must ask himself whether the legal burden is discharged. If the matter is left evenly in the balance, the plaintiff fails. But in public nuisance, as in trespass, the legal burden shifts to the defendant, and it is not sufficient for him to leave the matter in doubt. He must plead and prove a sufficient justification or excuse.

(5) Justification or excuse. The defendants seek to justify themselves by saying that it was necessary for them to discharge the oil because their ship was in danger. She had been driven by rough seas on to the revetment wall, and it was necessary to discharge the oil in order to get her off. If she had not got off,

lives might have been lost. This is, no doubt, true at that stage in the story, but the question is: How came she to get on the wall? If it was her own fault, then her justification fails, because no one can avail himself of a necessity produced by his own default. Where does the legal burden rest in this respect? Must the plaintiffs prove that the ship was at fault in getting on to the wall, or must the ship prove that she herself was not at fault? In my opinion, the burden is on the ship. She does not justify herself in law by necessity alone, but only by unavoidable necessity, and the burden is on her to show it was unavoidable. Public nuisance is, in this respect, like unto a trespass, as to which it was said by the Court of King's Bench as long ago as 1616 in *Weaver v. Ward* (12) (Hob. 134) that no man shall be excused "except it may be judged utterly without his fault." The court added (*ibid.*) that, as a matter of pleading, it is for the defendant to

"set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

To the same effect is the case of *Dickenson v. Watson* (13) where the defendant, who was a tax collector on his rounds, discharged a gun and put out the plaintiff's eye. The court held that (T. Jo. 205)

"the defendant shall not be excused without unavoidable necessity, which is not shown here."

To take a modern instance, if a cricketer hits a ball out of the ground and it falls on to the head of someone walking along the road—or on to someone's greenhouse—he is liable in trespass. He could not hope to show that it was an unavoidable necessity for him to hit the ball so hard.

These were, it is true, cases in trespass. But the same principle applies to cases of public nuisance. That is shown by *Tarry v. Ashton* (14), where a lamp which projected over the Strand fell on to a passer-by (which LORD WRIGHT has said was a private action for a public nuisance: *Sedleigh-Denfield v. O'Callaghan* (8) ([1940] 3 All E.R. 366); and also by *Wringe v. Cohen* (15), where the gable of a house next the highway was blown down in a storm (which was treated by this court as a public nuisance). In both cases the defendant was held liable because his premises were in a defective state. He did not know of the defect, and he was not negligent in not knowing, but, nevertheless, he was liable because he did not prove any sufficient justification or excuse. He did not prove inevitable accident. Likewise in *Sudler v. South Staffordshire & Birmingham District Steam Tramways Co.* (16), a tram going along the highway ran off the track because the points were defective. The jury acquitted the tramway company of negligence, but they were held liable because they could not prove inevitable accident. Applying these cases, I am of opinion that the defendants can only escape liability if they can prove that the discharge of oil was an unavoidable necessity, i.e., a necessity which arose utterly without their fault, in other words, that they committed no negligence to give occasion to it.

(6) The failure of the steering. The question is, therefore, whether the ship has proved that it was not her fault that she got on the wall. She has given the circumstances in which she got there. Her steering gear had failed half an hour previously. She was lurching about in the channel out of control and finished up on the wall. But why did her steering gear fail? She has never attempted to explain it. The judge thinks it failed because the stern frame fractured. No one can doubt that the stern frame should not have fractured. Why did it fracture? The seas themselves were not rough enough to do it. There must have been some other cause, but what was it? Several suggestions have been made. It may be that she hit the bed of the channel. It may be that there was a latent defect in the metal. It may be that there was a latent defect which

could have been discovered by reasonable examination and inspection. But whatever the cause, the defendants have not shown that it happened without their fault. They have, therefore, not discharged the burden on them. They are liable for the nuisance which they caused. That is sufficient for the decision of this case, but I proceed to consider the case in negligence.

(7) The rule in *The Merchant Prince* (1). Although in negligence the legal burden in most cases remains throughout on the plaintiff, nevertheless there are some exceptional cases where the legal burden is shifted on to the defendant. It is shifted in those cases which fall within the rule in *The Merchant Prince* (1). In that case a steamship under way in broad daylight ran into a ship at anchor in the Mersey. No one can doubt that if it was done deliberately it was a trespass. Alternatively, if the steamship was out of control by her own fault in a crowded river, with the steering gear jammed, she was a public nuisance. In the further alternative, if she was out of control she must have been negligent. Those being the only possible alternatives, it appeared on her own showing that her steering gear was jammed and she was out of control. She was, therefore, called on to answer for her dangerous condition as if it had been a public nuisance. That is how SIR WALTER PHILLIMORE put it in argument when he said ([1892] P. 183):

“... the machine was dangerous, and the defendants are liable for using it in a crowded river like the Mersey.”

The Court of Appeal accepted his argument and put the legal burden fairly and squarely on the defendants. The cause of action was laid only in negligence, but the facts shifted the legal burden on to the defendants just as if it were a case of trespass or public nuisance. LORD ESHER, M.R., said (*ibid.*, 187):

“He can only get rid of that proof against him by showing inevitable accident, that is by showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid.”

That decision followed an earlier decision to the like effect by LORD HERSCHELL, L.C., in *The Annot Lyle* (17), and it has since been repeatedly applied both in the Court of Admiralty and in this court, notably in *The Dageid* (18). I do not think we should admit of any doubt on a rule which is at once so just and so convenient. It applies, not only to a ship at sea, but also to a lorry or a horse and cart which gets out of control and runs off the road into a house. If there is no other traffic about, the legal burden is on the defendant to prove inevitable accident: see *Mitchell v. Allestry* (19), *Illidge v. Goodwin* (20) (per TINDAL, C.J., 5 C. & P. 192), and *Hendry v. McDougall* (21) (1923 S.C. 385, 386). The fact of running into the house calls, not merely for an explanation consistent with diligence, as McCARDIE, J., thought in *Gayler & Pope, Ltd. v. B. Davies & Son, Ltd.* (22), but for proof of inevitable accident. I realise that in *Fletcher v. Rylands* (7), and *River Wear Comrs. v. Adamson* (23), LORD BLACKBURN seems to put the burden rather differently, but that was before *The Merchant Prince* (1) had settled the law on the point.

Applying *The Merchant Prince* (1), we find here that the ship ran on to the revetment wall. If the steering gear was in order, that was plain negligence. The ship seeks to escape from this charge of negligence by saying that her steering gear had failed and she was out of control. But that is no answer unless she proves—and the legal burden is on her to prove—that it was no fault of hers that the steering gear had failed. She has not discharged that burden, or even attempted to discharge it. She is, therefore, liable.

(8) *Res ipsa loquitur*. If, contrary to my view, the legal burden was on the plaintiffs throughout to prove that the ship was in fault, I must say that the facts, to my mind, speak for themselves. The steering gear of the ship went wrong. It ought not to have gone wrong if those having the management of the vessel used proper care. The defendants have not given any explanation

of how it could go wrong, consistent with due diligence. Surely, if they had had proper examinations and surveys of the ship, the stern frame would not have fractured. The inference of negligence should, I think, plainly be drawn. I agree with all that SINGLETON, L.J., has said on this part of the case.

(9) The pleadings. The defendants say that they came to the court to meet a charge of negligent navigation on the part of the master, not a charge of negligent inspection and overhaul by the owners. This point so impressed the judge that he decided in their favour on account of it. I do not agree with it. The plaintiffs made a *prima facie* case of negligent navigation by the master by showing that he went on to the wall. The defendants in their pleading sought to attribute that to the steering gear being out of control because the propeller had twice struck "some object". That would lead anyone to think that it struck a submerged object, such as a rock or a piece of wreckage. No one would think that they were referring to a fractured stern frame. If they had done so, the plaintiffs would, no doubt, have retorted with the charge that they should not send a ship out in such a condition that the frame might fracture. The defendants cannot complain of omissions in the plaintiffs' pleading when it was their own reticence which led to it. I may add that, even on this point of pleading, *The Merchant Prince* (1) is in the plaintiffs' favour, because I have referred to the record of the case and find that the plaintiffs there only pleaded negligent navigation. They pleaded (para. 3) that the *Merchant Prince* struck the *Catalonia* a heavy blow; (para. 4) that a good look-out was not kept; (para. 5) that the *Merchant Prince* neglected to keep clear of the *Catalonia*; (para. 6) that she was being navigated at too high a rate of speed; and (para. 7) she did not stop or reverse her engines. Nothing was alleged about a defect of the machinery or bad management of the machinery. Yet the plaintiffs succeeded because negligence in that respect was not disproved by the defendants.

(10) In conclusion I would say that the plaintiffs know nothing of what happened on board the ship except that it discharged oil which polluted their foreshore. It is only just and reasonable that the shipowners should pay the cost of cleansing the foreshore unless they can show that they were no way in fault; and that they have not done. I am of opinion that, whether the case is put in nuisance or negligence, the plaintiffs should succeed. I would allow the appeal and enter judgment against the defendants.

MORRIS, L.J.: The voyage of the *Inverpool* on Dec. 3, 1950, was at first uneventful. Leaving Liverpool at 7.30 in the morning, bound for Preston, she arrived at the Nelson Buoy at 11.40. It was necessary to wait for the rising tide. The weather was "a bit too rough for dropping the anchor", and so Captain McMeakin turned the vessel round, head to sea, put her on "slow", and kept marking time for nearly three hours off the buoy. The steering of the vessel had been, and continued to be, normal. It was, apparently, too rough for the pilot boat to come out. At 14.30 the vessel started to make her way towards the channel of the Ribble. The time of starting required to be determined by relation to the time of the high water at Preston. No suggestion is made that the timing was in any way wrong. The *Inverpool* proceeded at half-speed. The Gut Gas Buoy, which is about two miles from the Nelson Buoy, was passed, and then at about 14.45, while proceeding towards the Wall End Buoy, two or three very heavy seas were shipped. An immediate result, and one which surprised Captain McMeakin, was that the steering suddenly became very erratic; the vessel began to sheer both to starboard and to port; the sheering was to an extent of about four points. At about 15.05, when the vessel was about half-way between the Wall End Buoy and Salter's Buoy, came the incident, reported by the engineer to the captain, when there were two violent blows on the propeller which sounded like metal hitting metal. Ten minutes later the vessel ran aground on the revetment wall. The situation then was fraught with great danger. The lives of those on board were in peril; the ship was in

jeopardy. In the predicament then existing the decision of the captain to pump out oil was manifestly justified. In the result lives were saved. The vessel went over the wall and came to rest on a bank of sand. The fate of the vessel was in the balance for some days thereafter during which it seemed doubtful whether she would again ride her element, but eventually she was refloated and was towed to Preston on Dec. 8.

A Gratitude for deliverance apart from other instincts might have inspired a desire to reimburse the plaintiffs the amount of the expense to which they were put in clearing the oil which came unwanted and unwelcome to their shore and to their lake. The misfortunes which befell the owners of the ship arose in the course of their commercial pursuits. The plaintiffs had no concern in the carriage of the oil—save that it should be carried securely. But considerations other than the legal ones are not for the court and may not be fully known. After correspondence had taken place in the course of which the owners of the Liverpool B stated that she stranded during very heavy weather in circumstances outside the control of the master and crew, and repudiated the suggestion that there had been negligence in the navigation, management and control of the vessel, legal proceedings were begun against the owners of the ship and her captain.

C The shores and other property of the plaintiffs are in proximity both to the sea and to the channel of the Ribble. Those who own seashores or land near to the sea are inevitably subject to certain hazards. If a ship founders in a gale or is blown ashore and battered by the elements, the shore may be strewn with debris or with cargo; the consequences may be disagreeable. But this is a risk which is recognised both in fact and, I think, in law. If the Liverpool had been D caught in a hurricane and had been sunk, and if her whole cargo of oil had been carried to and precipitated on the plaintiffs' shore and if no fault were alleged against the ship, I cannot think that in law the plaintiffs would have a claim. They would not be able to assert negligence, and it would not avail to complain of nuisance or of trespass. They would be enduring one of the risks to which the owners of property so situate are subject. The law was stated by BLACKBURN, J., in *Fletcher v. Rylands* (7) (L.R. 1 Exch. 286):

E "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have F their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident: and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass, can be explained on the same principle, G viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself."

H It was doubtless with a recognition of this position that the plaintiffs sought to establish that there had been negligence in the navigation, management and control of the vessel. They alleged that the master had been negligent. In the statement of claim, they further pleaded that the defendants were liable for nuisance and trespass. But in the circumstances of this case I do not think that the claim of the plaintiffs is advanced by the inclusion of these words: liability can only attach, in my judgment, if there was negligence. If the ship, while sailing in placid seas near Southport, had for no good reason deliberately decided to pump out a quantity of oil on to the sea and had done so in circumstances in which, by the action of the tide or the wind, the oil would be carried on to the Southport shore, I consider that there would have been a

good cause of action in trespass or nuisance. There may be trespass if something is placed on land. But equally I think that there may be trespass if something is thrown on land or if the force of the wind or of moving water is employed to cause a thing to go on to land: see the judgment of PARKER, J., in *Jones v. Llancrist Urban Council* (24). In the illustration that I have supposed, the affliction of the owners of the land would not be of the kind or quality to the risk of which those owning property near to the sea would deem themselves or ought reasonably to be subject. Such a deliberate and unwarranted outpouring could not be regarded as being a natural incident of navigation. It is true that in the present case, when the Inverpool was stranded on the wall, the decision to pump out oil was a calculated one. The plaintiffs contended that the decision was unreasonable and need never have been taken. After hearing the evidence the learned judge rejected this contention. In my judgment, he rightly rejected it. In the situation in which the ship was placed it was necessary and proper to jettison. But the plaintiffs advanced further contentions by reference to an earlier phase in the story. On the assumption that, having got on to the wall, it was necessary to jettison, they urged that the vessel ought never to have got on to the wall, for, they said, she ought never to have entered the channel. The issue so raised required a consideration of much evidence. The learned judge came to the conclusion that the allegation that it was negligent to enter the channel (having regard to what had happened to the ship at and after 14.45) also failed. Every other allegation of negligence likewise failed. I see no reason to differ from the conclusions of fact reached by the learned judge in regard to all these allegations.

If the plaintiffs had in effect simply said: "You deliberately poured out oil near to our shore in such manner that the tide would carry the oil on to our shore, as it did, and you are, therefore, liable in nuisance or trespass unless you can excuse yourselves", it is possible that the defendants could have been required to assume the onus of proof and to show that they became under necessity to jettison oil without any negligence on their part. The defendants might then have had to decide at what stage to take up matters of proof, and how exhaustively to anticipate all points that might be raised. But the litigation never developed at all in that way or on those lines. The plaintiffs set out their case and then sought to prove it. They called a series of witnesses. The position was that, if at 15.15, as matters then stood, the pumping out of oil was unjustifiable, the plaintiffs would succeed in their action. They fought that issue and failed in regard to it. But if it was as a result of negligence that the ship became in the predicament in which she found herself at 15.15, then likewise the plaintiffs would succeed. Accordingly, the plaintiffs quite naturally and properly alleged that that was the position. They set out to show that there had been negligence. They carefully specified and stated the negligence that they alleged. I see no reason to think that the course adopted by the plaintiffs was other than entirely appropriate and correct, and no criticism has been made, or is made, of their pleadings. Indeed, I think that it is virtually common ground in the proceedings that, if there was negligence, then there would be liability in the defendants. Negligence would be the foundation of a direct claim and would render unavailing any contention that the discharge of oil was an inevitable incident of navigation or was unavoidably necessary. With full appreciation of this, the plaintiffs recited and tabulated the many and various respects in which they alleged that there had been negligence. In so doing they, so to speak, chose and fixed the agenda for the trial. Their suggestion was that there had been "negligent navigation, management and control of the said oil tanker" by the second-named defendant.

Careful investigation followed in regard to all the points raised. The learned judge did not think that there had been negligence. I cannot think that the plaintiffs can fairly say in these circumstances that the defendants must fail

because they have not shown that they were not negligent in some way not alleged. The case for the plaintiffs really is that the defendants did not disprove that the vessel was ill-found when she left Liverpool. But the plaintiffs did not allege that she was: they did not so allege either before the case began or during the case, save that at the trial they relied on the authority of *The Merchant Prince* (1), to which I will later refer, and claimed that the burden of proof shifted so as to require the defendants to explain what had happened and to prove inevitable accident. The defendants gave evidence that the ship had behaved normally from 7.30 a.m. until she was struck by heavy seas. Captain Davies, who was called for the plaintiffs, said that he thought that a captain would know when he left the Nelson Buoy whether his ship was steering all right. I would have thought that a reasonable inference was that the later events and the damage that was subsequently found in the vessel were caused in some way as a result of the heavy seas. No one can say exactly when, where and how particular features of damage were sustained. There was the question of the broken stern frame. The learned judge negatived the suggestion that the fracture was caused by the direct action of the waves. But the vessel had a draught of fourteen feet, ten inches, aft, and at places in the channel there was not much water under her stern. Having regard to this fact and to the weather conditions, the suggestion of the Elder Brother that the stern frame may have been broken against the bed of the channel is highly significant. The learned judge pointed out that the possibility that there was some defect in the stern frame which made it liable to fracture could not be excluded. But the view, or theory, that was put forward by the plaintiffs was that the fracture was caused by the vessel striking the revetment wall owing to negligent steering at some point before that at which she grounded. The learned judge did not accept that view. I consider that his conclusion that the propeller fouled after the stern frame was fractured and that the fractured stern frame was the cause of the vessel getting out of control is a reasonable one. But no one can be sure. The fact that the cause of the fracturing of the stern frame cannot be precisely stated does not lead me to the view that there was anything wrong with the stern frame before the commencement of the voyage. I form the view that the vessel became damaged, with the results that followed, because of the sea and weather conditions that beset her, though the times and causes of under-water occurrences may never be known. The theory seems to me to be a very reasonable one that the fracture to the stern frame was just before 15.05 when the propeller first fouled. If the stern frame fractured at about that time, the vessel being positioned as she then was, and being subject to the severe conditions which prevailed, I do not think that there should be any inference or assumption that the occurrence came about through any lack of care either at the time or previously.

The first witness called by the plaintiffs was the harbour master of the Preston Docks. He gave evidence that he saw the vessel on Monday, Dec. 4, when she was high and dry on the sand. He noticed that the stern post of the rudder was fractured and that the rudder was twisted, and that there was damage to the propeller. If the plaintiffs had wanted to contend that any of these circumstances suggested that the ship was ill found or was in defective condition when she began her voyage, they could have done so and they could have asked for any documents or survey reports that they desired to see. The defendants could then have addressed themselves to such matters. The case that the plaintiffs presented was that the defendants were vicariously liable for the negligent navigation of the captain. It would have been another and quite different case if the plaintiffs had said that the defendants were themselves to blame in that they had sent their captain to sea in a faulty ship. A further possibility might have been for them to submit that it was for the defendants to begin and to show that each and every conceivable avenue of criticism was a cul-de-sac. As it was,

the plaintiffs called two witnesses with considerable experience of the navigation of large liners. Captain Davies thought that, as there was something wrong with the steering, it was a very hazardous operation to attempt to enter a narrow channel in the weather conditions prevailing. He thought that the two thuds heard at 15.05 must have been caused by the stern or the propeller striking the revetment wall. He had seen the survey reports of the damage, and agreed that, if the stern frame came adrift, the propeller could easily foul the stern frame. Both he and Captain Hartley, who was also called for the plaintiffs, gave evidence in support of the various allegations of negligence which were put forward. On a consideration of their evidence, and of all the evidence called by the defendants, the learned judge rejected all the allegations of negligence. There were many of them. They included an allegation that the master had failed to make and keep himself acquainted by chart or otherwise with the presence and situation of the revetment wall. The plaintiffs did not assert that it was a defective or ill-found vessel that had sailed from Liverpool. Captain McMeakin had been master of the *Inverpool* for twenty-six years. Mr. Mackintosh had served as an engineer in her ever since she was built in 1925. They were both well qualified to know of her performances and to know the feel of her, and to know whether there was anything wrong with her. They would both have been well competent to answer any questions as to whether there were any defects in the condition of their vessel.

The case of *The Merchant Prince* (1) was different from the present case. In broad daylight the *Merchant Prince* ran into a ship at anchor in the River Mersey. An action of damage by collision was brought. By the defence the collision was admitted, but it was pleaded that the cause was that the steering gear did not act and that it failed to act ([1892] P. 179):

"in consequence of some latent defect, or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of the defendants, and that the collision and damage were caused by inevitable accident."

In *The Marpesia* (25) inevitable accident was said to be (L.R. 4 P.C. 220):

"... that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill."

On the pleadings in *The Merchant Prince* (1) it was held at the trial that it was for the defendants to begin and to prove what they had pleaded. It seems clear that, where one ship is riding at anchor and another ship in motion collides with her, the ship in motion is *prima facie* liable, and can only escape from liability by showing inevitable accident: see per FRY, L.J., in *The Schwan*, *The Albano* (26) ([1892] P. 431). In *The Indus* (27) the law was stated by LORD ESHER, M.R., as follows (12 P.D. 47):

"It is the duty of a vessel in motion to keep clear of one at anchor, if the latter can be seen, and if she does not keep clear then she must show good cause for not doing so. In what way, then, could the defendants justify themselves? They could say that everything was done which could be done by careful seamen, but that some overwhelming storm occurred which prevented the ship from being navigated as she ought to have been. They could say that an entirely unforeseen accident, which could not have been prevented by proper management, occurred to the machinery with the same result. There are yet other things which may be classed under the head of law known as inevitable accident, which is a well-known expression, and though it may not be philosophically correct, answers its purpose. But the defendants must clearly prove the occurrence of such an inevitable accident."

A In *The Merchant Prince* (1) SIR CHARLES BUTT, P., held that the defendants had proved inevitable accident, but this decision was reversed in the Court of Appeal. A new chain had been put in the steering, and new chains were known to be liable to stretch. There had been a stretching of the links of the chain on the night before the collision, and the chain had been tightened up. The defendants could have foreseen that, if next morning the chain stretched while the ship was going down the Mersey, the consequences would be awkward. They could easily have provided—by reasonable foresight—against this contingency. But it was for the defendants either to show what was the cause of the accident and to show that the result of that cause was inevitable, or to show all the possible causes and to show with regard to each one that the result could not have been avoided.

B It seems to be both good sense and good law that, if a ship runs into another ship which is at anchor, or if one ship in a convoy runs into another ship, it is not enough for the colliding ship merely to say that its steering became defective. It is necessary to go on and explain how and why the steering became defective and to negative negligence. It might be the case (as in *The Dageid* (18)), that careless handling of the steering gear brought about defects. I do not question the authority or the current validity of the decision in *The Merchant Prince* (1).
C But in the circumstances of the present case, which differ materially from those in *The Merchant Prince* (1), the proceedings were at the instance, and by the choice of, the plaintiffs launched and continued in quite a different way from those in *The Merchant Prince* (1).

D Though it is with diffidence that I differ from my Lords, I have reached the conclusion that the decision of DEVLIN, J., was correct, and I would dismiss the appeal.

Appeal in respect of the first defendants allowed.
Appeal in respect of the second defendant dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. Edgar Perrins*, town clerk, Southport (for the plaintiffs); *Thomas Cooper & Co.* (for the defendants).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

HEALEY *v.* MINISTRY OF HEALTH.

[QUEEN'S BENCH DIVISION (Cassels, J.), May 31, June 1, 2, 4, 1954.]

National Health Service—Superannuation—Determination of questions by Minister of Health—“Mental health officer”—Shoemaker employed in mental hospital—Periodically in charge of working patients—Finality of determination of status by Minister—National Health Service Act, 1946 (c. 81), s. 67 (1) (c)—National Health Service (Superannuation) Regulations, 1950 (S.I., 1950, No. 497), reg. 60.

The plaintiff, a shoemaker, was employed by the management committee of a mental hospital and was in charge of the shoemaker's shop attached to the hospital. As part of their treatment the patients worked in the shoemaker's shop under the control of a charge-hand, and when the charge-hand was away for any reason the plaintiff was in sole charge of them. On Dec. 31, 1952, the plaintiff received a letter from the Ministry of Health informing him that the Minister had determined, pursuant to his powers under the National Health Service (Superannuation) Regulations, 1950, reg. 60, that the plaintiff was not a mental health officer within the meaning of the regulations and so was not entitled to certain rights relating to superannuation. The plaintiff having brought an action against the Ministry for a declaration that he was a mental health officer within the meaning of reg. 1 (3) of the regulations, the Ministry claimed that the court had no jurisdiction in the matter.

Held: as reg. 60 of the regulations of 1950, which were made under the National Health Service Act, 1946, s. 67 (1), provided that any question arising under the regulations as to the rights of a person to whom the regulations applied should be determined by the Minister of Health, and as s. 67 (1) (i) of the Act empowered the Minister to make a regulation in those terms, the court could not proceed as an appellate authority to review and overrule a determination of the Minister under the regulation, there being no provision as to appeal either in the Act or in the regulations; and, therefore, as the Minister had determined, pursuant to reg. 60, that the plaintiff was not a mental health officer within the meaning of the regulations, the court had no jurisdiction to entertain the action which was, in effect, an appeal against the determination of the Minister.

East Midlands Gas Board v. Doncaster Corpn. ([1953] 1 All E.R. 54) and *Gillingham Corpn. v. Kent County Council* ([1952] 2 All E.R. 1107), applied.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 67 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 394.

Cases referred to:

- (1) *East Midlands Gas Board v. Doncaster Corpn.*, [1953] 1 All E.R. 54; 117 J.P. 43.
- (2) *Crisp v. Bunbury*, (1832), 8 Bing. 394; 1 L.J.C.P. 112; 131 E.R. 445; 3 Digest 135, 98.
- (3) *Crosfield (Joseph) & Sons, Ltd. v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123; 73 L.J.Ch. 345; 90 L.T. 557; 68 J.P. 421; *on appeal*, H.L., [1905] A.C. 421; 74 L.J.Ch. 637; 93 L.T. 141; 69 J.P. 441; 38 Digest 57, 336.
- (4) *Gillingham Corpn. v. Kent County Council*, [1952] 2 All E.R. 1107; [1953] Ch. 37; 117 J.P. 39; 3rd Digest Supp.
- (5) *Barnard v. National Dock Labour Board*, [1953] 1 All E.R. 1113; [1953] 2 Q.B. 18.
- (6) *Cooper v. Wilson*, [1937] 2 All E.R. 726; [1937] 2 K.B. 309; 106 L.J.K.B. 728; 157 L.T. 290; 101 J.P. 349; Digest Supp.
- (7) *Andrews v. Mitchell*, [1905] A.C. 78; 74 L.J.K.B. 333; 91 L.T. 537; 25 Digest 325, 266.

- (8) *Leeson v. General Council of Medical Education & Registration*, (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 34 Digest 544, 30.
- (9) *Allinson v. General Council of Medical Education & Registration*, [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471; 58 J.P. 542; 34 Digest 544, 24.
- (10) *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; [1952] 2 Q.B. 329; 3rd Digest Supp.
- A (11) *R. v. Abbot*, (1783). 2 Doug. K.B. 553 n.; 99 E.R. 349 n.; 16 Digest 418, 2773.
- (12) *Goldsack v. Shore*, [1950] 1 All E.R. 276; [1950] 1 K.B. 708; 2nd Digest Supp.
- (13) *Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395; [1948] L.J.R. 155; 177 L.T. 455; 111 J.P. 508; 2nd Digest Supp.

B TRIAL of a preliminary issue in an action for a declaration that the plaintiff was a "mental health officer" within the meaning of the National Health Service (Superannuation) Regulations, 1950, reg. 1 (3).

C The plaintiff was at all material times a shoemaker employed by the Morgannwg Hospital Management Committee at Morgannwg Hospital, Bridgend, in the county of Glamorgan. The hospital was used wholly or partly for the treatment of mental patients. On Dec. 31, 1952, the plaintiff received a letter signed on behalf of the defendant, the Ministry of Health, saying that the Minister had determined pursuant to reg. 60 of the regulations of 1950 that the plaintiff was not a mental health officer within the meaning of the regulations. The plaintiff commenced an action for a declaration that he was a mental health officer within the meaning of the regulations, and by his statement of claim he alleged, inter alia, that he devoted the whole or substantially the whole of his time to the treatment or care of mental patients at the hospital. By the defence the defendant denied this allegation. By para. 3 of the defence the defendant pleaded that reg. 60 of the regulations of 1950 provided that any question arising under the regulations as to the rights or liabilities of any person claiming to be treated as a mental health officer should be determined by the Minister of Health, and that the defendant would contend that the determination of the Minister in regard to the plaintiff was final and was not subject to review or appeal, that the court had no jurisdiction to grant to the plaintiff the relief sought, and that the statement of claim disclosed no cause of action. Further, or in the alternative, the defendant pleaded that the determination was right. The master directed that the matter raised by para. 3 of the defence should be tried as a preliminary issue.

P. M. O'Connor for the plaintiff.

J. P. Ashworth for the Ministry.

Cur. adv. vult.

G June 4. CASSELS, J., stated the facts, and said: The case raises, not for the first time, questions of considerable importance concerning the powers of a Minister under an Act of Parliament and a statutory instrument, the right of a citizen to seek redress in the High Court when he contends that a determination of a Minister affecting what he considers his rights is wrong, and the powers of the court to review a determination of a Minister made in pursuance of an Act of Parliament and regulations made thereunder. The principle involved in the case is important. The amount of money involved is not of great consequence, H for, if the plaintiff is allowed to proceed with his case and succeeds in the action, I am told that it will not mean much more than that he will become entitled to his superannuation a few years earlier than otherwise.

By the National Health Service Act, 1946, s. 67, the Minister of Health has power to make regulations with regard to the superannuation of officers. Section 67 (1) reads:

Regulations may provide . . . (g) for making special provision for special

classes of persons . . . (i) for the determination of all questions arising under the regulations by the Minister; (k) for such provisions supplementary to and consequential on the matters aforesaid as appear to the Minister to be necessary, including provisions for adapting, modifying or repealing any Acts of Parliament, whether public general, local or private, or any such local Act schemes . . . so far as appears to the Minister to be necessary in consequence of the regulations."

In 1947 the Minister made the National Health Service (Superannuation) Regulations, 1947 (S.R. & O., 1947, No. 1755). By reg. 1 (3):

" 'mental health officer' means an officer on the medical or nursing staff of a hospital used wholly or partly for the treatment of mental patients or an institution so used for the treatment of defectives who devotes the whole or substantially the whole of his time to the treatment or care of such patients or defectives, and such other classes or descriptions of officers employed in such hospitals or institutions as aforesaid as the Minister may designate."

Regulation 53 provided:

" Any question arising under these regulations as to the rights or liabilities of an officer of an employing authority or of a person claiming to be treated as such shall be determined by the Minister."

In 1950 the regulations of 1947 were superseded by the National Health Service (Superannuation) Regulations, 1950, which adopted, in reg. 1 (3), the same definition of a mental health officer as that in the earlier regulations, with an immaterial addition. By reg. 60 of the regulations of 1950:

" Any question arising under these regulations as to the rights or liabilities of an officer or retired officer of an employing authority, or of a person claiming to be treated as such, or of the widow, any dependant or the legal personal representatives of an officer or retired officer shall be determined by the Minister."

The additions made by reg. 60 do not affect the question in the present case, for it is the provision for the determination by the Minister of any question arising under the regulations as to the rights or liabilities of an officer which has to be considered.

Paragraph 3 of the statement of claim in this case reads:

" The plaintiff devotes the whole or substantially the whole of his time to the treatment or care of mental patients at the said hospital, which is used wholly or partly for the treatment of mental patients. Particulars: The plaintiff, together with a charge-hand, conducts the shoemaker's shop at the said hospital and during working hours the mental patients employed therein are in his care. Further, the said charge-hand has other duties which habitually take him elsewhere in the hospital for a substantial part of his time, and whenever the said charge-hand is absent on such other duties or on his annual or sick leave, the plaintiff is in sole charge of the said patients. Further the plaintiff unaided has to convey the said patients to and from the said shoemaker's shop. Further shoemaking and repairing is part of the treatment which the patients receive: it is occupational therapy."

Paragraph 2 of the defence reads:

" The defendant admits that the hospital referred to in para. 1 of the statement of claim is used wholly or partly for the treatment of mental patients but denies that the plaintiff devotes the whole or substantially the whole of his time to the treatment or care of mental patients. The plaintiff works as a shoemaker in the shoemaker's shop at the said hospital as assistant to and under the direction and control of the charge-hand referred to in the particulars under para. 3 of the statement of claim. The

A defendant admits that during periods when the said charge-hand is absent which said periods amount on the average to four hours per week together with fourteen days' annual leave the mental patients employed in the said shop are in the plaintiff's care. The defendant admits that the plaintiff conducts such patients or some of them to and from the said shop and that shoemaking and repairing is occupational therapy forming part of the treatment of such patients. Save as aforesaid the defendant denies each and every allegation contained in para. 3 of the statement of claim and the particulars thereunder as fully as if each of them were herein set out and specifically traversed."

B Those are the issues which would be tried if the action be allowed to proceed, but it is contended on behalf of the defendant that the Act of 1946 and the regulations made in 1950 thereunder oust the jurisdiction of the court. The Minister has determined that the plaintiff is not a mental health officer within the meaning of the regulations. Can that determination be reviewed by a court of law? It is to be noted that the statement of claim does not allege that the Minister had no jurisdiction to do what he did, or that he acted ultra vires, or that he misconstrued the Act and the regulations, or that he acted contrary to the principles of natural justice, or that he was biassed, or that there was error of law on the face of the decision. In effect, what the plaintiff wants to contend in the action is that the Minister determined wrongly, and he wants the court to declare accordingly; or it may be said that the plaintiff is appealing against the determination of the Minister, notwithstanding that there is no provision as to appeal either in the Act or in the regulations.

C On this preliminary issue the defendant contends that, under the Act and the regulations, he is the person to whom Parliament has committed the determination of such a question as the plaintiff raises, and that his decision is, prima facie, conclusive. The plaintiff's answer to that contention is that all citizens have a right to come to the Queen's courts, and that the right cannot be taken away from them except by express words in a statute or, in the case of certain statutes, by necessary implication, or by an agreement between the parties to submit the matter to arbitration. He contends that he has a right to be heard by action. He says that the Minister, acting as sole judge in his own court and cause, has made a determination which he, the Minister, wants to have regarded as unchallengeable in a court of law. If that is right, says the plaintiff, the gravest injustice might be committed, and the victim have no remedy.

E How do the authorities stand? The defendant submits that there is no authority in favour of, and several cases against, the proposition that a declaration can be granted merely for the purpose of establishing that the decision of the tribunal below was wrong. The defendant relies on four cases and submits that one of them, *East Midlands Gas Board v. Doncaster Corpn.* (1), is on all fours with this. In that case the corporation's gas undertaking became vested in the gas board, who claimed money which the corporation had received when conducting the gas undertaking after the vesting date. As the parties could not agree, the claim came to be determined by the Minister of Health, as required by the Gas Act, 1948, s. 37 (2), which reads:

H "Any claim under this section by the appropriate board against the local authority shall be made before the expiration of a period of twelve months beginning with the vesting date, and if so made and not settled by agreement, shall be determined by the Minister of Health."

HALLETT, J., in giving judgment for the gas board, said ([1953] 1 All E.R. 57):

"The second point taken by counsel for the gas board is that, whether the claim was or was not a valid claim under the provisions of s. 37 (1) having regard to the facts of this case, by s. 37 (2) the validity of the claim is expressly referred by the legislature to the Minister of Health for determination, and, accordingly, on well-known principles and in the light of abundant

authority, this court has no jurisdiction to decide whether or not the claim is valid, because its validity was considered by the Minister of Health who determined the question adversely to the defendant corporation. I do not think that the law is in any doubt: see *Crisp v. Bunbury* (2), decided in 1832 and referred to with approval by VAUGHAN WILLIAMS, L.J. ([1901] 2 Ch. 135), in *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (3). The decision in those cases can be summarised as follows. If two persons agree that any dispute which may arise between them in respect of any matter shall be referred to the determination of a third person, that agreement will not oust the jurisdiction of the court, but, since the court attaches importance to the sanctity of contract, the court will, generally speaking, in the exercise of its discretion and in aid of that sanctity of contract, stay an action which is brought in contravention of or non-compliance with what has been agreed. That is what happens in the usual case where there is what is commonly called an arbitration clause and one party, notwithstanding the arbitration clause, seeks to resort to the courts. On the other hand, where the legislature has thought it proper to lay down that the determination of a certain question should be made by some authority other than the courts, the courts have no jurisdiction to override Parliament and no jurisdiction to determine that which Parliament has said shall be determined by some other person or body. If the other person or body, being in the nature of an inferior tribunal, proceeds to exceed its authority or not to exercise it properly, then, in certain appropriate cases, the Queen's Bench Division of the High Court of Justice, acting through the Divisional Court, can restrain the person or body so acting by processes which are well-known, but, apart from that authority which can be exercised over inferior tribunals, the court cannot proceed as an appellate authority to review, and, if it thinks right, overrule, the determination of a person or body to whom Parliament has entrusted the determination of the particular problem."

Counsel for the plaintiff in the present case submitted that, while it was not possible to distinguish the judgment of HALLETT, J., it was not a correct decision: it was too wide and was founded on two cases which were arbitration cases. These two cases happen to be two of the four on which the defendant relies. The first is *Crisp v. Bunbury* (2), where the action was brought against the trustees of a savings bank. The Savings Bank Act, 1828 (9 Geo. 4, c. 92), s. 45, provided that such a dispute should be referred to arbitration and that the award

"shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal . . .".

TINDAL, C.J., said (8 Bing. 401):

"It is evident, therefore, that the legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes by a reference in the mode pointed out in the Act, instead of a more expensive, dilatory, and uncertain remedy by action at law; and we think we should defeat that very serviceable object, serviceable alike to the depositors and to the institution—unless we construe the words used, as words which import an obligation to refer, and which take away the right to sue in the superior courts."

It is to be observed that TINDAL, C.J., lived before the days of legal aid. The second case referred to by HALLETT, J., is *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (3), in the Court of Appeal. At the trial of that action a preliminary objection was taken by the defendants that the Manchester Ship Canal Act, 1885, s. 88 (22), made provision for such a dispute to be referred to arbitration, and that, therefore, the court had no jurisdiction. BYRNE, J.,

overruled the objection. In the Court of Appeal VAUGHAN WILLIAMS, L.J., said ([1904] 2 Ch. 134):

A "I will now proceed to deal with the question whether the effect of s. 88 (22) is to oust the jurisdiction of the court in the fullest sense of the word, that is to say, in the sense that jurisdiction cannot be given to the court to determine a question the determination of which has to be relegated by Act of Parliament, even by the consent of the parties to the litigation in court. That a statute may thus bar a plaintiff from maintaining an action in a court of law and compel him to pursue the course laid down by the statute cannot be doubted: see *Crisp v. Bunbury* (2), a case in which it is to be observed that, although there was a trial at nisi prius and a verdict for the plaintiff, the objection to the tribunal was allowed to prevail, without any plea to the jurisdiction, on a mere objection taken at nisi prius and reserved to be disposed of by the court in banc. The same case shows that it is not necessary that the jurisdiction of the court should be barred by express words: it is sufficient if the jurisdiction is barred by necessary implication."

Later in his judgment the learned lord justice said (*ibid.*, 138):

C "Assuming then, as in my opinion we must, that the jurisdiction of the court may be ousted by statutory provisions which have no express words to that effect, let us see what are the modes by which jurisdiction may be ousted. Sometimes the statute constitutes arbitration the only tribunal in which disputes between certain parties can be determined, and thus ousts the jurisdiction. Sometimes the jurisdiction is ousted because the statute has plainly said that some matter essential to be proved in a particular action shall only be determined by arbitration."

D The last of four cases on which the defendant particularly relied was *Gillingham Corpn. v. Kent County Council* (4), before DANCKWERTS, J. That case concerned a dispute whether a building owned by the corporation and leased to the county council for the purposes of higher education had been transferred to the county council under the Education Act, 1944, s. 6 (3). Section 96 (2) of that Act provides that such a question shall be determined by the Minister of Education. E DANCKWERTS, J., said ([1952] 2 All E.R. 1109):

F "If the clear effect of s. 96 (2) is to refer the dispute to the decision of the Minister, there is authority that the jurisdiction of the court is ousted and is transferred to the tribunal provided for by the statute: see *Crisp v. Bunbury* (2), which was decided in 1832 and approved by the Court of Appeal in *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (3), per VAUGHAN WILLIAMS, L.J. ([1904] 2 Ch. 135). There is no doubt that the principle has often been recognised, but it is argued on behalf of the borough council that I ought to have regard to the purpose of this statutory provision and the nature of the council with which it is concerned and that it cannot have been intended to give to the Minister power to decide what is really a question of the construction of s. 6 (3), and, therefore, a matter of law. But G if I am satisfied on the precise terms of s. 96 (2) of the Act of 1944 that the question is referred to the Minister for decision, it seems to me that I have no choice in the matter. It is plain that the dispute concerns property and whether or not that property has been transferred to the county council by H s. 6 (3) of the Act of 1944. In my opinion, a local education authority for the purposes of the provisions of former Acts is a 'former authority' for the purposes of the Act of 1944 even though under the former Acts the council was only a local education authority for certain purposes, and, therefore, the borough council is a 'former authority' within the meaning of s. 96 (2) of the Act of 1944. It seems to me that the words of s. 96 (2) are perfectly plain and that this is a matter which is not open to consideration by this court because by that sub-section it must be referred to the decision of the Minister

Accordingly, it seems to me that this motion succeeds and that I should set aside the service of the writ."

If a statutory tribunal has exceeded its jurisdiction the court is not powerless to act. In March, 1953, *Burnard v. National Dock Labour Board* (5) was before the Court of Appeal. The court held that the board had no power to delegate its quasi-judicial disciplinary function to the port manager, and that, therefore, notices of suspension given to the plaintiffs by the port manager were a nullity, and so were the decisions of the appeal tribunal which were based on them. On that point the Court of Appeal reversed the judgment of McNAIR, J., but they affirmed his decision on a preliminary point and held that, in proper cases, where persons would otherwise be without a remedy for an injustice, the court had a discretionary power to intervene by way of declaration and injunction in the decisions of statutory tribunals. In his judgment, SINGLETON, L.J., said ([1953] 1 All E.R. 1116):

"The courts have, however, power to grant a declaration or an injunction in certain cases to prevent an injustice."

He referred to *Cooper v. Wilson* (6), where the court granted relief to a police officer who had been dismissed by the watch committee after he had resigned and it was held that the watch committee had acted without jurisdiction. He also referred (*ibid.*, 1117) to *Andrews v. Mitchell* (7), another case of a tribunal acting without jurisdiction. Later in his judgment, SINGLETON, L.J., said (*ibid.*, 1118):

"In the present case, if the question is not one of jurisdiction, it is certainly closely akin to it. The local board had no jurisdiction to delegate; the port manager had no jurisdiction to adjudicate; each purported so to do; and, as in *Cooper v. Wilson* (6), a writ of certiorari was of no use. It could be of no use to the plaintiffs in this case because they did not know of the illegality which gives rise to the preliminary point until long after the time for taking out the writ had expired, and the question which has been argued before us was not before the appeal tribunal at all. In the circumstances, I am of opinion that the court has power to grant to the plaintiffs a declaration that their suspension was wrongful. I am more concerned whether that relief should be granted. It is a matter for the discretion of the court, and that discretion should be exercised sparingly."

DENNING, L.J., said (*ibid.*, 1119):

"Finally, counsel for the defendants said that these courts have no right to interfere with the decisions of statutory tribunals except by the historical method of certiorari. He drew an alarming picture of what might happen if once the court intervened by way of declaration and injunction. It meant, he said, that anyone who was dissatisfied with the decision of a tribunal could start an action in the courts for a declaration that it was bad, and thus, by a side-wind, you could get an appeal to the courts in cases where Parliament intended there should be none. I think there is much force in that contention—so much so that I am sure in the vast majority of cases the courts will not seek to interfere with the decisions of statutory tribunals—but I do not doubt that there is power to do so, not only by certiorari, but also by way of declaration. I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose on itself, and the court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why then should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal

could disregard the law. The authorities show clearly that the courts can intervene. An instance of the remedy by injunction is *Andrews v. Mitchell* (7), where s. 68 of the Friendly Societies Act, 1896, enacted that the decision of a particular tribunal should be binding and conclusive on all parties without appeal and should not be removable into any court of law or restrained by injunction, but, nevertheless, the House of Lords held that the court could, in an action for an injunction, set aside a decision which was not given in accordance with the rules. An instance of the remedy by declaration is *Cooper v. Wilson* (6), where a watch committee, set up under statute, had dismissed a police sergeant when they had no power in law to do so, and had also acted in a way contrary to natural justice. (GREER and SCOTT, L.JJ., held that on both grounds the sergeant was entitled to a declaration that the order of the watch committee was invalid. Furthermore, in *Leeson v. General Council of Medical Education & Registration* (8) and in *Allinson v. General Council of Medical Education & Registration* (9), this court assumed without question that it had power to intervene by declaration and injunction in the case of statutory tribunals just as it had in the case of domestic tribunals, and I do not think we should admit any doubt on it. This is not, however, the occasion to lay down the bounds of the jurisdiction. We have to consider here two decisions: first, the decision to suspend the plaintiffs; secondly, the decision of the appeal tribunal. So far as the decision to suspend is concerned, as I see it, we are not asked to interfere with the decision of a statutory tribunal, but we are asked to interfere with the position of a usurper. Mr. Hogger, the port manager, is in the position of a usurper. He acted in good faith on the authority of the board, but, nevertheless, he has assumed a mantle which was not his, but that of another. This is not a case of a tribunal which has a lawful jurisdiction and exercises it; it is a case of a man acting as a tribunal when he has no right to do so."

ROMER, L.J., said (*ibid.*, 1122):

"As to counsel's preliminary point, *prima facie* it is the right of everyone in this country who is involved in a legal dispute to have that dispute determined by Her Majesty's courts. That right can be taken away sometimes by contract, subject to certain safeguards, and certainly by statute, but except to the extent to which it is taken away (and here we are only concerned with Parliamentary intervention), that *prima facie* right remains."

Lee v. Showmen's Guild of Great Britain (10) was another case in which the courts held that the defendants had exceeded their jurisdiction and had acted *ultra vires*. In that case the area committee of a trade union for travelling showmen fined the plaintiff, a member, for alleged unfair competition, and the plaintiff, failing to pay the fine, was expelled from the union and thus deprived of his right to earn his living as a showman. The decision of ORMEROD, J., in favour of the plaintiff was affirmed by the Court of Appeal. I do not think that the medical cases, which were referred to in the course of the argument and were mentioned in the *Barnard* case (5), carry this case any further.

The first point taken on behalf of the plaintiff is that a heavy onus rests on the defendant to show that by express words Parliament has excluded the jurisdiction of the courts. Counsel for the plaintiff argues that the words of s. 67 (1) (i) of the National Health Service Act, 1946, giving power to make regulations

"for the determination of all questions arising under the regulations by the Minister"

are not sufficient to enable a Minister to say that Parliament has given him exclusive jurisdiction in the matter. He submits that when Parliament gives exclusive jurisdiction it says so in very plain language. He cites the National

Service (Armed Forces) Act, 1939, s. 5, which dealt with conscientious objectors, and s. 6, which dealt with postponement. Section 5 (12) provides:

"No determination of a local tribunal or the appellate tribunal made for the purposes of this Act shall be called in question in any court of law."

Section 6 (9) reads:

"No determination of the Minister, of a Military Service (Hardship) Committee, of the umpire or of any deputy umpire made for the purposes of this section shall be called in question in any court of law."

The defendant replies that these provisions deal with special classes of persons and represent the "high water-mark of exclusion."

Counsel for the plaintiff also cites two Acts of 1946: the National Insurance (Industrial Injuries) Act, 1946, s. 36 (1) and (3), and the National Insurance Act, 1946, s. 43 (1), where, in both instances, it is provided that the determination of questions and claims by certain persons "shall be final", but provision was made for some appeals to the High Court under both Acts. This form of power to a Minister to determine is by no means new. It is to be found in the Roads Act, 1920, s. 10, and the London Traffic Act, 1924, s. 6 (5). In the Town Planning Act, 1925, s. 1 (3), and s. 7 (3), the decision of the Minister is expressed to be "final and conclusive". Counsel for the plaintiff contends that, unless there are such words as appeared in s. 5 (12) of the National Service (Armed Forces) Act, 1939, the defendant cannot succeed in raising the jurisdiction of the courts. I am unable to go so far as that with the plaintiff. Counsel further submits that the defendant, to succeed, must be able to show that the jurisdiction of the courts is taken away by implication, that an implication can only be drawn where the whole object of the statute points plainly to exclusive jurisdiction in the tribunal set up, and that that is not so in the present case. He suggests that in the *Gillingham* case (4) it was necessary to draw the implication, but that case should not be followed, and he submits that from what he describes as the "thin" wording of reg. 60 of the regulations of 1950 an implication cannot be drawn that Parliament intended that the Minister should be the sole tribunal to the exclusion of the court. With respect, I am unable to agree. He cited *R. v. Abbot* (11), where LORD MANSFIELD said (2 Doug. K.B. 555) that

"nothing but express negative words shall take away the jurisdiction of this court."

That was a case of certiorari, and, if the present case concerned jurisdiction, which it does not, or the way in which the tribunal carried out its work, which is not a ground for the claim for relief, certiorari would be one of the methods of approach to the court.

Counsel for the plaintiff referred to *Goldsack v. Shore* (12), a case under the Agricultural Holdings Act, 1948, where the Court of Appeal held that the county court had jurisdiction to determine whether a transaction was an "agreement" within the meaning of s. 2 (1) of the Act. The county court judge had non-suited the plaintiff on the ground that s. 2 (2) of the Act required disputes arising as to the operation of s. 2 (1) in relation to any agreement to be determined by arbitration under the Act. The Court of Appeal accepted the submission that the jurisdiction of the King's courts must not be taken to be excluded unless there was clear language in the Act which was alleged to have that effect, and held that a court must have jurisdiction to decide, aye or no, whether a transaction was, or was not, excluded from the section: ([1950] 1 All E.R. 277, 278, per SIR RAYMOND EVERSED, M.R.). The case was referred back in order that the inquiry might be pursued.

Counsel for the plaintiff also referred to the Asylums Officers' Superannuation Act, 1909, which was repealed by the National Health Service (Superannuation)

Regulations, 1947, reg. 60, and sched. IX. Section 1 of the Act of 1909 divided asylum officers into two classes, first and second, and by s. 15 provided:

“In the case of any dispute as to the right to superannuation allowance of any officer or servant of an asylum, or as to the amount of the superannuation allowance to which any such officer or servant is entitled, such dispute shall be determined by the Secretary of State, whose decision shall be final.”

A Counsel for the defendant contends that the words “shall be final” do not really add anything unless there are other provisions of the statute which give a limited right of appeal. He says that the National Health Service Act, 1946, s. 67 (1) (i), gave the Minister power to make regulations

“for the determination of all questions arising under the regulations

by the Minister”

B and that the important word in that paragraph is “all”.

Counsel for the plaintiff, with some force, criticises modern legislation on the ground that, as he says, it frequently happens that the Minister is, first, a party to the dispute and then, under the relevant regulations, he is the judge. On this point the observations of LORD GREENE, M.R., in *Johnson & Co. (Builders),*

C *Ltd. v. Minister of Health* (13) are of importance. That was a case on the confirmation by the Minister of Health of an order under the Housing Act, 1936. LORD GREENE, M.R., said ([1947] 2 All E.R. 399):

“What is described here as a *lis*—the raising of the objections to the order, the consideration of the matters so raised and the representation of the local authority and the objectors—is merely a stage in the process of arriving at an administrative decision. It is a stage which the courts have always said requires a certain method of approach and method of conduct, but it is not a *lis inter partes*, and for the simple reason that the local authority and the objectors are not parties to anything that resembles litigation. A moment’s thought will show that any such conception of the relationship must be fallacious, because on the substantive matter, viz., whether the order should be confirmed or not, there is a third party who is not present, viz., the public, and it is the function of the Minister to consider the rights and the interests of the public. That by itself shows that it is completely wrong to treat the controversy between objector and local authority as a controversy which covers the whole of the ground. It is in respect of the public interest that the discretion that Parliament has given to the Minister comes into operation. It may well be that, on considering the objections, the Minister may find that they are reasonable and that the facts alleged in them are true, but, nevertheless, he may decide that he will overrule them. His action in so deciding is a purely administrative action, based on his conceptions as to what public policy demands. His views on that matter he must, if necessary, defend in Parliament, but he cannot be called on to defend them in the courts.”

G On the duty to act fairly, LORD GREENE, M.R., said (*ibid.*, 400):

“The last phrase about which I might say a word—and I say it particularly because I am disposed to think that HENN COLLINS, J., in this case really, if I may say so with respect, confused the two meanings and applications of the phrase which I am about to cite—is the phrase ‘duty to act fairly’. As I have said, every Minister of the Crown is under a duty, constitutionally, to the King to perform his functions honestly and fairly and to the best of his ability, but his failure to do so, speaking generally, is not a matter with which the courts are concerned. As a Minister, if he acts unfairly, his action may be challenged and criticised in Parliament. It cannot be challenged and criticised in the courts unless he has acted unfairly in another sense, viz., in the sense of having, while performing quasi-judicial functions, acted

H

in a way which no person performing such functions, in the opinion of the court, ought to act. On the assumption, for instance, that the respondents are wrong in their contention, and that there was no obligation to disclose these documents, I can well understand some people might say: 'Well, unless there was some other objection, the Minister ought, in fairness, to have let these people know what he had got in his file on this particular topic'. If the Crown is right and the respondents are wrong, the statement that in fairness he ought to have disclosed that information means nothing more than that, as a Minister is expected to act fairly, he might have been expected to do it. It would not mean that his failure to do it amounted to a breach by him of any duty imposed on him by law which could be discussed and enforced in the courts. On the other hand, if the expression 'bound to act fairly' is used in strict reference to his semi-judicial functions, it then bears a totally different meaning. It then means, not that a Minister must be expected under his general duty to act fairly, but that, if he does not act fairly, he breaks a rule laid down by the courts for the behaviour of a quasi-judicial officer. Therefore, it is important, in my opinion, if that phrase is used, to be quite sure in which of those two senses it is being used."

It is pointed out that in the present case the plaintiff is not in the employment of the Minister of Health, who supplies the funds for the scheme of superannuation, and thus represents the public. I follow the decisions of HALLETT, J., in *East Midlands Gas Board v. Doncaster Corpn.* (1) and of DANCKWERTS, J., in *Gillingham Corpn. v. Kent County Council* (4). This is not a case in which I can exercise such discretion as I have in favour of the plaintiff. In the light of authority, and of what I regard as the plain words of the regulation, I hold that the plea in bar succeeds. The Minister has determined pursuant to reg. 60, and there is no suggestion that he has not done so. The defendant, therefore, succeeds on the preliminary issue.

It is, I think, a matter of some concern that the question whether the plaintiff (and, it may be, a large number of similarly situated employees) is within or without the superannuation scheme relating to mental health officers should be decided by a court of law instead of, under the Act and regulations, by a Minister acting, doubtless, through one of his departments. It may be that the decision against the plaintiff was correct. It may be that it was wrong. If it were possible to allow the plaintiff to proceed with his case, it would be argued in open court, and, even if he failed, he would, at least, be able to say that he had had a hearing in public. I hope that he derives adequate satisfaction in the knowledge that for that departmental decision against him the Minister is answerable to Parliament.

Judgment for the defendant.

Solicitors: *Foss, Bilbrough, Plaskitt & Co.* (for the plaintiff); *Solicitor, Ministry of Health.*

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

Re WEST TARRING PARISH CHURCH.

[CHICHESTER CONSISTORY COURT (The Chancellor (K. M. Macmorran, Esq., Q.C.)), March 30, 1954.]

Ecclesiastical Law—Ornaments—Royal arms—Display in church to signify royal supremacy—Power of Consistory Court to grant faculty—Need of consent of Home Secretary.

A By a petition dated Mar. 30, 1953, a faculty was sought by the rector and churchwardens to authorise the display of the royal arms over the vestry door in a parish church. The petition was supported by a unanimous resolution of the parochial church council, and the diocesan advisory committee gave its approval. By a circular letter from the Home Office, dated Apr. 2, 1953, it was stated: "... the royal arms, the royal crown and the royal cypher are the personal emblems of the Sovereign and may not be reproduced ... without the Queen's consent ... The Home Secretary is the Minister who advises Her Majesty on such matters, and application for permission should be made to him."

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C
D HELD: the authority to decide whether or not any furniture or ornament is to be admitted to consecrated buildings is the ecclesiastical court, and the opinion set out in the circular letter was an unwarranted interference by a department of State with a court of competent jurisdiction; the present proposal was for the display of the royal arms, not as an artistic embellishment, but to signify the royal supremacy; such a display was a practice which had had a continuous existence from the reign of Henry VIII to the present time, excepting the reign of Queen Mary Tudor; and the proposal was lawful and a faculty would be granted.

AS TO ORNAMENTS AND DECORATIONS OF THE CHURCH, see HALSBURY, Hailsham Edn., Vol. 11, pp. 786-793, paras. 1445-1456; and FOR CASES, see DIGEST, Vol. 19, pp. 435-450, Nos. 2762-2945.

PETITION for a faculty.

E The petitioners in person.

F
G MR. CHANCELLOR MACMORRAN, Q.C.: I wish to emphasise that the petition is for the display of the royal arms on the wall of the church. It is not a proposal to use the arms or any other royal emblem for mere artistic embellishment, as, for example, in a stained glass window. It is simply to implement the desire to display the royal arms as such, and it is stated that the petition is the outcome of a loyal desire on the part of the petitioners to commemorate Her Majesty's coronation. The petition is dated Mar. 30, 1953, and in the ordinary course the faculty would have issued, there having been no opposition or objection, sometime in May, 1953. In the meantime, however, my registrar received what appears to be a circular letter from the Home Office, RYL 250/1/14 dated Apr. 2, 1953, which is in the following terms:

H "An instance has recently come to our notice of the reproduction of the royal arms in a new stained glass window in a church and we have reason to believe that the position regarding the reproduction of the arms and other royal emblems may not be fully appreciated. The position is that the royal arms, the royal crown and the royal cypher are the personal emblems of the Sovereign and may not be reproduced, in whole or in part, without the Queen's consent; such consent is also necessary in the case of emblems of past Sovereigns. The Home Secretary is the Minister who advises Her Majesty on such matters, and application for permission should be made to him. Permission, is, in fact, granted only in very exceptional circumstances, but where, for example, it is desired to instal a stained glass window in a church in commemoration of a particular Sovereign or of a State occasion such as a coronation, it may be possible for the Home Secretary to recommend

the grant of permission to reproduce the personal cypher of the Sovereign. It is, of course, to be expected that the person requiring the work to be done will normally make the application to the Home Office for any necessary permission but we feel that the most practical method of safeguarding against unauthorised reproductions will be to acquaint you of the position, as it is understood, that, in accordance with ecclesiastical procedure, it would in any event be necessary for a faculty to be obtained. We would mention also that the rules governing the reproduction of royal emblems apply equally to the special versions drawn by Mr. Milner Gray for the Council of Industrial Design for use on coronation souvenirs."

My registrar very properly put this communication before me, and I wrote to the Home Secretary on Apr. 20, 1953, a letter, to which I received a reply, dated May 29, 1953, and in the course of that letter, the Home Office view is expressed as follows:

"The Home Secretary appreciates that the arms of previous Sovereigns are displayed in many parish churches, and he would not wish to raise any objection to the renewal or restoration of existing coats of arms. It appears, however, that the practice has very largely fallen into desuetude during the past hundred years, and the Home Secretary does not feel that the existence of this practice should be regarded as overriding the general consideration that since the royal arms and other emblems are personal to Her Majesty it is only proper that her consent should be obtained for their reproduction in any form. It is observed that the applications to which you refer in your letter of May 4 both relate to proposals to place the royal arms in churches in commemoration of the coronation, and the Home Secretary feels that in these circumstances the applications ought to be dealt with as applications for a new use of the royal arms rather than as a revival of the practice of exhibiting royal arms in churches."

It seems to me that the view expressed in the earlier circular letter has been modified, as the point is taken for the first time that the long-established custom to which I had referred "has very largely fallen into desuetude during the past hundred years".

I am thus confronted with the claim by a government department that the royal arms may not be displayed in a parish church without the Home Secretary's consent, in spite of the fact that, as I read the law, the authority to decide whether or not any furniture or ornament is to be admitted to consecrated buildings is the ecclesiastical court. In my view, therefore, the opinion of the circular letter I have quoted above, is an unwarranted interference by a department of State with a court of competent jurisdiction. Nevertheless, I have been anxious throughout these proceedings that the view expressed by the Home Office on the merits of the case should be fully investigated, and, accordingly, I have caused to be served on the Home Secretary on Mar. 12, 1954, a copy of the original citation in this case, with an intimation that, if he wished to oppose the petition and would enter an appearance, I was prepared to hear him on the question whether or not he had such an interest as entitled him to appear, and, if that question was decided in his favour, on the merits of the case. On Mar. 19, 1954, a letter in reply was addressed to my registrar in the following terms:

"With reference to your letter of Mar. 12, regarding the proposal to display the royal arms in West Tarring parish church, I am writing to say that, as you will appreciate, the question of the issue of a faculty is not one which concerns the Home Secretary, who is however responsible for advising the Queen on applications for permission to use Her Majesty's personal arms."

The petition, therefore, remains what it has always been, an unopposed petition, and I must deal with it as best I can. The text-books are not

particularly helpful, but I may quote as an example, CRIPPS ON CHURCH AND CLERGY, 7th ed., p. 406, where the following passage occurs:

A “Thus there can be no doubt as to the legality of the following: galleries erected in the church, bells other than that necessary to ring to church and to toll at funerals as before mentioned, organs, clocks, chimes; the Kings’ arms, which are very commonly set up in churches, pulpit cloths, houseling cloths, cushions or mats, furniture for the vestry, prayer and hymn books.”

This statement which has the authority of the late Mr. CHANCELLOR LAWRENCE and the late SIR STAFFORD CRIPPS is reproduced in the 8th edition edited by myself, p. 235, and there are similar statements in other of the earlier text-books. I am informed by the learned chancellor of the diocese of Southwark, E. GARTH MOORE, Esq., that in a case in his court the Home Secretary was given the opportunity to appear, but did not avail himself of it, and that in that case the faculty was granted.

C The royal arms may, it is said by the Home Office, be lawfully displayed to mark the presence of the Sovereign. That may be a confusion with the use of the royal standard with which at present I am not concerned, but the arms are certainly displayed to mark her authority, witness the use of them in the courts of secular justice, and, indeed, on the letter paper of the Home Secretary himself, but the display in churches, which certainly goes back to the time of Henry VIII, marks the royal supremacy “over all causes and persons as well as ecclesiastical and civil within the realm.” It is stated by Mr. MARCUS WHIFFEN in STUART AND GEORGIAN CHURCHES (1947 ed.), p. 6:

D “Royal arms either painted or carved constituted another standard ornament of churches during our period. Sometimes they were set up over the Commandments; PROFESSOR SYKES (CHURCH AND STATE IN ENGLAND) quotes an early 18th century writer who explains that this position was chosen ‘to satisfy all those who trod the courts of the Lord’s house and are diligent in the performance of their duty, agreeable to the contents of those grand rules of the christian religion, (viz. the Ten Commandments, the Lord’s Prayer and the Creed) that they shall meet encouragement and protection from the State.’ The placing of the royal arms in churches did not become compulsory until 1660, but the practice dated back to the reign of Henry VIII.”

F The illustrations in this book show the arms displayed in the following churches: on the chancel screen, Abbey Dore, Herefordshire, 1634; Ingestre, Staffordshire, 1673; Derby, All Saints, 1725; Staunton Harold, 1720; and on the communion rail, Weston, Staffordshire, 1710; and Castle Bromwich (undated).

G In THE OLD CHURCH GALLERY MINSTRELS by CANON K. H. MACDERMOTT (1948) there is a reproduction of a painting in Isfield Church in this diocese about the year 1840, showing the arms displayed on the west wall, and a photograph of the western gallery in Hampton Gay church showing them on the face of the gallery itself. In THE ARCHITECTURAL SETTING OF ANGLICAN WORSHIP by ADDLESSHAW AND ETCHHELLS, it is stated (1948 ed.), p. 101, that the best-known form of decoration of the nave was the royal arms. The practice grew up during the Reformation.

H “It is a practice not peculiar to the Church of England or reformed christianity. Royal arms used to adorn the churches of France and Spain. In the reign of Mary Tudor the royal arms which had been set up over the rood screen were only placed elsewhere so as to make room for the restored rood and not turned out of the church. It is a matter for regret that the Anglican reformer should not have found some place for them other than that once occupied by the rood, thereby exposing themselves to the taunts from malicious Latinists that they should set up a lion and dog in place of

Our Lady and St. John, the lion and the greyhound argent being supporters of the royal arms of Elizabeth. They [the arms] expressed a fervid loyalty, which at times swept the country, like the royal arms set up at the Restoration with the inscription 'God Bless Charles the Second and send him long to Reign'. They represented a royal supremacy, but the royal supremacy did not mean an authority external to the church. The arms were not those of a purely secular person, because the Sovereign is the centre of a society which is both the church and state. He is himself what 17th century lawyers call, 'a spiritual person capable of jurisdiction in spiritual things, though not of course, of exercising pastoral and priestly powers.' "

The churchwardens' accounts at Yatton in Somerset record the payment of a guilder for gilding the royal arms, 1541-42, and in this same book there are illustrations showing the church of Deptford St. Nicholas built in 1697, and now destroyed by enemy action, with the reredos crowned with the royal arms of William III, and of ACKERMAN'S aquatint, 1825, of St. Martin in the Fields showing the royal arms in the ceiling over the chancel arch, and similarly in the church at High Wycombe, Buckinghamshire. A remarkable instance occurs in three Acts of Parliament during the time of George III under which five churches were built by trustees between the years 1819-31. All these five churches are furnished with a royal coat of arms with supporters of exactly the same pattern, cast in iron, and with the shield of Hanover in the midst.

Recent cases where the royal arms have been introduced are numerous, but the following may be taken as representative: Eversley, Hants; Chatton, Newcastle; Willingdon, Sussex; Stanton, Gloucestershire; Bledlow, Buckinghamshire; Littlehampton, Sussex; and St. Mark's, Marylebone and St. Paul, Stratford, London. It seems to me from what I have stated above that the practice with which I am dealing has a continuous existence from the reign of Henry VIII to the present time, always excepting the short reign of Queen Mary Tudor, and the suggestion that the custom has fallen into desuetude cannot be sustained for a moment. I am satisfied that the present proposal is lawful and, accordingly, I decree that a faculty shall pass the seal as prayed.

Order accordingly.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re ST. PAUL, BATTERSEA.

[SOUTHWARK CONSISTORY COURT (The Chancellor (E. Garth Moore, Esq.)), May 26, 1954.]

Ecclesiastical Law—Ornaments—Royal arms—Display on organ loft to signify royal supremacy—Armorial bearings—Display as decorative scheme—Arms of kingdom of England—St. George's Cross—Arms of borough and county—Arms of province and diocese—Power of Consistory Court to grant faculty—Notice of petition to bearers of arms.

A A faculty was sought, inter alia, to place the royal arms on the organ loft in a church in a place associated by tradition with the display of such arms signifying the royal supremacy, and to place in the chancel six shields displaying the arms of the kingdom of England, of the Church of England (St. George's Cross), of the borough, of the county, of the diocese, and of the province.

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F HELD: on the assumption that there was no legally recognised proprietary right in heraldic emblems it was a matter of discretion for the Consistory Court whether or not to grant applications for the introduction of such emblems, but, where it appeared that an objection could reasonably be entertained, notice of any petition for the introduction of heraldic emblems should be given to the bearers of those emblems; the royal arms had been displayed in churches for about four centuries, and, as in a court of law, signified the highest temporal authority; so long as the Crown claimed supremacy in the established church it seemed unreasonable that it should object to the badge of that supremacy being displayed; and a faculty would be granted as sought: *Re West Tarring Parish Church* (ante p. 591), followed; the arms of the kingdom of England were sought to be displayed as part of a decorative scheme, and the consent of the Sovereign was a condition precedent to their introduction; among the uses to which St. George's Cross was put was to signify the Church of England and there was no reason why that emblem should not be introduced and a faculty would be granted; the borough and county authorities having signified their consent to the use of their arms, a faculty would be granted; although no permission had been sought from the authorities for the use of the arms of the diocese and of the province, there were no reasonable grounds on which a refusal could be based, and a faculty would, therefore, be granted.

AS TO ORNAMENTS AND DECORATIONS OF THE CHURCH, see HALSBURY, Hailsham Edn., Vol. 11, pp. 786-793, paras. 1445-1456; and FOR CASES, see DIGEST, Vol. 19, pp. 435-450, Nos. 2762-2945.

Case referred to:

(1) *Re West Tarring Parish Church*, ante p. 591.

G PETITION by the churchwardens and the secretary of the parochial church council of the church of St. Paul, Battersea, for a faculty. There was no incumbent and the churchwardens were the sequestrators.

The petitioners in person.

H MR. CHANCELLOR GARTH MOORE: It is proposed to place the royal arms on the organ loft in a place associated by tradition with the display of such arms, signifying the royal supremacy. It is also proposed to place in the chancel six decorative shields displaying the following arms:

(i) The arms of the kingdom of England, by which is meant what is now the first and fourth quarter of the royal arms, but was once borne alone by the Sovereign; (ii) the arms of the Church of England, by which is meant St. George's Cross; (iii) the arms of the borough of Battersea wherein the church is situated; (iv) the arms of the county of London, of which Battersea forms part; (v) the arms of this diocese of Southwark; (vi) the arms of this province of Canterbury.

So far as royal arms are concerned, I should have granted a faculty without more ado had it not been for the attitude adopted by the Home Office towards such applications. On Apr. 2, 1953, that Department circularised all diocesan registrars claiming that the royal arms, the royal crown and the royal cypher are the personal emblems of the Sovereign and may not be reproduced without the Queen's consent and that application for that consent should be made to the Secretary of State for Home Affairs. That circular began a considerable correspondence between the Home Office and various persons, including myself and MR. CHANCELLOR MACMORRAN, and, since the Crown is not represented here today, I intend to say no more about it, save that at no time has the Home Office produced any authority in support of its claim. Being aware, however, of the attitude of the Home Office, I have made it a practice of this court that notice of every petition to introduce the royal arms should be given to that Department, so that the Crown may have an opportunity of entering an appearance and arguing both its right to appear, and, if that is granted, the substance of its claim. That course has been taken in the present case, but neither in this case nor in any other has advantage been taken of this opportunity and no argument in support of the contentions of the Home Office have been presented to the court. These are judicial proceedings and the petitioners are entitled to have their case heard on its merits in open court. As the petition is unopposed I must decide it as best I can, and, though unassisted by argument, I have considered carefully the principles on which applications for armorial bearings should be treated.

There is in England—though not, I believe, in Scotland—so far as I know, no legally recognised proprietary right in heraldic emblems. I carefully refrain from stating the matter more dogmatically than that, for it may still be a matter for argument before the Court of Chivalry. But, on that assumption, no one has an absolute right to prohibit the use of his arms and it is a matter of discretion for the Consistory Court whether or not to grant applications for the introduction of heraldic emblems. In general, I should be slow to grant such an application where a reasonable objection could be made by or on behalf of the bearer of those arms, and I shall in future normally require notice of any petition for the introduction of heraldic emblems to be given to the bearers of those emblems, at any rate where it appears to me that an objection could be reasonably entertained.

In the present case I have a number of emblems to consider, and I do not think that any single principle covers them all. First, it is sought to display the royal arms, not as pure decoration, but so as to signify the royal supremacy. The royal arms have been so displayed in churches now for about four centuries. There is ground for thinking that their introduction has sometimes been enforced at the instigation of the Crown. The matter has always been within the faculty jurisdiction of the Consistory Court and has never till 1953, so far as I know, been treated as the concern of the Home Office. In any event, their presence in a church in the manner desired in the present case seems to me to be on a par with their presence in a court of law. In both cases it signifies the highest temporal authority. So long as the Crown claims supremacy in the established church, it seems to be unreasonable that it should object to the badge of that supremacy being displayed. It is as though a principal were to seek to disavow his agent while actively taking all the advantages which that agency confers. For this reason, though for a time at least I shall continue the practice of requiring notice of these applications to be served on the Home Office so that the Crown may continue to have an opportunity of appearing and arguing its case, until some valid argument is presented which will persuade me that these applications should not be granted, I shall in the absence of special circumstances grant them as I grant this one. This is what I have done in the past and I am fortified in my view by the judgment of MR. CHANCELLOR MACMORRAN, delivered in the Consistory Court of Chichester in *Re West Tarring Parish Church* (1), where

identical considerations arose. I adopt the reasoning of that judgment with which I respectfully agree.

A With regard to the so-called arms of the kingdom of England, however, different considerations arise. It is true that they are the arms of the Sovereign and part of the royal arms commonly borne by the Sovereign today, but the petitioners do not seek their introduction in order to signify the royal supremacy, nor are they in this form commonly associated with that signification. They are in the present case sought as part of a general decorative scheme. Their use in the circumstances strikes me as harmless and appropriate, but the consent of their bearer, that is, the Sovereign, has not been given, or, indeed, sought, and on the principle which I have enunciated, I think that this should be a condition precedent to their introduction. I shall, therefore, adjourn this part of the application so as to enable the petitioners to seek the permission of the Sovereign through the proper constitutional channels. They will have liberty to apply again to this court, and, if the Sovereign's permission is given, I shall include these arms in the faculty which will issue. If permission is refused, I shall sympathetically consider any application, whether for consequential variation or otherwise, which the petitioners may make.

B
C With regard to the arms of the borough of Battersea and the London County Council, both those bodies have sensibly and reasonably signified their consent to the use of their arms and I give leave for their introduction.

D With regard to the arms of the diocese and the arms of the province, no permission for their introduction has been sought. The church, however, is part of the diocese and of the province and I cannot conceive the refusal of consent or any reasonable grounds on which such refusal could be based. I, therefore, grant permission for their introduction.

E With regard to St. George's Cross, these arms, so far as I am aware, do not in any sense belong to anybody. Among other uses to which they are put is that of signifying the Church of England. I see no reason, therefore, why they should not be introduced and I give permission for their introduction.

I hope that what I have said may be of assistance to others in the diocese as an indication of the principles on which, as at present advised, similar applications will be considered by this court. It should be remembered that the present petition concerns only the introduction of armorial bearings into a church. I am expressing no view as to what might happen in different circumstances. The flying of flags or the display of banners, for example, may well call for a different treatment, and what that treatment should be still falls to be decided.

Order accordingly.

[Reported by W. H. E. JAMES, Esq., Barrister-at-Law.]

D. v. D.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Grazebrook, Q.C.), May 11, 12, 1954.]

Nullity. Incapacity of wife. Physical defect of wife. Provision of artificial vagina—Incurability.

At the date of the ceremony of marriage the wife was incapable of consummating the marriage. Shortly thereafter she underwent an operation whereby in effect an artificial vagina was created. According to the wife penetration was thereafter achieved to almost the full extent of the passage thus created, but according to the husband the attempts at sexual intercourse were unsuccessful since he was unable to penetrate more than about two inches. On a petition by the husband for a decree of nullity on the ground of the wife's incapacity to consummate the marriage,

Held: to succeed in his petition the husband had to prove not only that the marriage had not been consummated, but also that any impediment was incurable; on the husband's evidence, which would be accepted as correct, the marriage had not been consummated; but, even accepting the wife's evidence, having regard to the artificiality of her organ there was no vera copula, and, therefore, no consummation of the marriage; it would be impossible to cure the defect in the wife to the extent of making her capable of having ordinary and complete sexual intercourse with the husband; and he was, therefore, entitled to a decree.

Observations of DR. LUSHINGTON in *D—e v. A—g (falsely calling herself D—e)* (1845) (1 Rob. Eccl. 298), applied.

AS TO NULLITY ON THE GROUND OF INABILITY TO CONSUMMATE THE MARRIAGE, see HALSBURY, Halsbury Edn., Vol. 10, pp. 640-643, paras. 937-941; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 270-280, Nos. 2158-2251.

Cases referred to:

(1) *D—e v. A—g (falsely calling herself D—e)*, (1845), 1 Rob. Eccl. 279; 163 E.R. 1039; 27 Digest, Replacement, 273, 2187.

(2) *Butler v. Butler*, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479; 27 Digest, Replacement, 280, 2253.

PETITION by the husband for a decree of nullity.

The wife was born with certain male organs which were removed by an operation when she was seventeen years of age. The parties were married on Feb. 26, 1949, and there were unsuccessful attempts to consummate the marriage. In March, 1949, the wife underwent an operation whereby, in effect, an artificial vagina was created, and a cylinder or mould inserted to assist the healing of skin which had been grafted. In April or May, 1949, the husband, who was in the army, received notice of posting overseas. The shock of this news affected the wife so that the cylinder came away and in about July, 1949, she returned to hospital. While she was there the husband went overseas. In September, 1949, the husband received a compassionate posting to England and from then until April, 1952, frequent attempts were made to consummate the marriage. In April, 1952, the husband left the wife. By a petition dated Dec. 9, 1952, the husband prayed for a decree of nullity alleging that the marriage had never been consummated and "3. That the [wife] was at the time of the . . . ceremony of marriage and has ever since been incapable of consummating the same". The wife, by her answer dated Apr. 27, 1953, as amended, denied that the marriage had never been consummated. She admitted that at the time of the marriage she had been incapable of consummating the marriage owing to the malformation of the structure of her sexual organs, but said that that incapacity was curable by surgical means. On June 25, 1953, a medical inspection of the wife was made, and in their report the inspectors stated that at that date the artificial vagina had closed.

Micklethwait for the husband.

P. J. Cox for the wife.

MR. COMMISSIONER GRAZEBROOK, Q.C., stated the facts and continued: The husband says that the attempts between September, 1949, and April, 1952, to consummate the marriage were unsuccessful because he was unable to penetrate more than, he thinks, about two inches. The wife, on the other hand, says that he was able to, and, in fact, did, penetrate, on some of the earlier of these attempts at intercourse, to the extent of about four inches—more or less the full extent of the passage which was said to have been created by the operation. [The Commissioner referred to the evidence and continued:] It has to be borne in mind that the wife is not normal as far as her physical structure is concerned. Apparently, when born she was in possession of certain male organs. Those male organs were, as I understand it, removed by operation when she was somewhere about seventeen years of age. There are certain other matters that have been referred to in the evidence as to her general physical appearance being inconsistent with what one usually finds in a girl. She has no vagina and she never has had menstrual periods, and this passage that was created is artificial. It was made, as I understand it, in a place, according to the doctor's evidence, where the vagina would be normally. Skin from some other part of her was grafted, and in that way a passage of four to six inches was created.

It is clear on the evidence that at the time of the ceremony of marriage it was impossible to consummate the marriage by reason of the defect in the wife. It is clear also, from the medical inspectors' report, that at the time they carried out their inspection on June 25, 1953, by reason of what they found this marriage could not then be consummated. It is true, as has been submitted, that this court acts on the principles that governed the ecclesiastical courts. To succeed in his petition, the petitioner has to satisfy the court that the marriage has not been consummated and, in addition, as I think, he has to satisfy the court that any impediment is incurable. I think apart from what used to be the practice in the ecclesiastical court requiring the incurability to be proved, the allegation in the petition that the wife was "at the time of the said ceremony of marriage and has ever since been incapable of consummating the same", imports the possibility that, if there was an impediment at the time of the marriage, it might be curable, and that it should be cured if it was possible to do so.

The difficult question that I have to determine is whether or not there has been consummation of this marriage. There is a certain amount of assistance given in the authorities. *D -e v. A -g (falsely calling herself D-e)* (1) was concerned with a malformation of the sexual organs of the wife, which malformation allowed only of partial connection. The defect was only a malformation. There was nothing, as I understand it, artificially created. **DR. LUSHINGTON** said (1 Rob. Eccl. 298):

"Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with: but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all. I can never think that the true interest of society would be advanced by retaining within the marriage bonds parties driven to such disgusting practices. Certainly it would not tend to the prevention of adulterous intercourse, one of the greatest evils to be avoided. There is, I think, some ambiguity in the evidence. The two witnesses are both agreed as to the connection being imperfect; but I am not satisfied as to the true meaning of their evidence as to incurability. In one sense of the term, there can be no doubt, namely,

that as relates to conception, the malformation is incurable; but it is to me doubtful whether they mean that it is incurable as to the mere coitus. In this difference, I think, lies the true distinction. If there be a reasonable probability that the lady can be made capable of a vera copula--of the natural sort of coitus, though without power of conception—I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural coitus, I would pronounce the marriage void.”

That case was approved in *Barter v. Barter* (2), in which the question of artificial insemination arose: the facts, of course, being different from the facts in the present case.

That is, as I think, the main matter to be considered in deciding what is sexual intercourse. It is said on behalf of the wife that, if it is possible for the husband to penetrate into the female body, that is sufficient. On the other hand, it is said on behalf of the husband that it cannot be said to be consummation of the marriage where the husband has penetrated an artificial passage which has no relation to the organ which should be there. It is carried further on behalf of the husband and said that if the court is going to say that connection in these circumstances is consummation of the marriage, if you reverse the process and consider, for instance, a man who had no sexual organ and was provided with a sexual organ with which he could penetrate the wife, that that would also be held to be consummation.

It seems to me that in the present case, applying what was said by Dr. LUSHINGTON in *D—e v. A—y* (*falsely calling herself D—e*) (1) there cannot be said to have been proper consummation. If penetration occurred to the extent that the wife has said, it was a mere connection between the parties and could not be said to be vera copula or proper coitus between the husband and the wife. In the first place I accept the husband's evidence rather than that of the wife in regard to the matters in which there is variance between them, and accepting the husband's evidence, as I do, I am satisfied that this marriage was not consummated. Further, I say that, even if the wife had satisfied me that there was this type of connection which she states, in the circumstances, having regard to the artificiality of her organ, I do not consider that it could be held to be consummation. Further, in regard to the question of curability, the conclusion I have reached is that it would be impossible in the present case to cure the defect in the wife to the extent of making her in the real sense of the term capable of having sexual relations with her husband for the reasons I have stated. In these circumstances the petition succeeds and I pronounce a decree nisi on the ground of the wife's incapacity to consummate the marriage.

Decree nisi.

Solicitors: *Field, Roscoe & Co.*, agents for *Brain & Brain*, Reading (for the husband); *Tuck & Mann*, agents for *H. B. Knight*, Birmingham (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

MONTAGUE AND ANOTHER v. BROWNING AND ANOTHER.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), June 17, 18, 1954.]

Rent Restriction—Rent—Rent in form of services—Dwelling-house let to caretaker of landlord's premises—Wages deducted from rent—Rent paid still exceeding two-thirds of rateable value—Subsequent extinction of rent by increase of wages.

A Landlords let a dwelling-house to the caretaker of their premises under an arrangement by which the tenant's wages, £40, were deducted from the agreed rental value of the dwelling-house, £66, leaving him to pay £26 a year rent. It was conceded that the letting was subject to the Rent Restrictions Acts. Subsequently, the tenant's wages were increased to £66, the amount of rent paid being thereby reduced to nil.

B HELD: there was no new tenancy and no alteration in the nature of the existing tenancy by reason of the discontinuance of payment of rent owing to the increase in wages and, therefore, the tenant was still entitled to the protection of the Rent Restrictions Acts.

Hornshy v. Maynard ([1925] 1 K.B. 514), discussed and distinguished and dicta of SHEARMAN, J. (*ibid.*, 524) and SALTER, J. (*ibid.*, 525), doubted.

C Per DENNING, L.J.: where rent is payable in kind, e.g., in goods or services, the value of which has by agreement been quantified in terms of money, the sum so quantified is the rent of the house within the meaning of the Rent Restrictions Acts, and, if it exceeds two-thirds of the rateable value, the house is within the Acts.

D AS TO PREMISES TO WHICH THE RENT RESTRICTIONS ACTS APPLY, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 312-316, paras. 368-373; and FOR CASES, see DIGEST, *Replacement Vol.* 31, pp. 637-657, Nos. 7449-7587.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (7), see HALSBURY'S STATUTES, *Second Edn.*, Vol. 13, p. 1014.

Cases referred to:

- E (1) *Hornshy v. Maynard*, [1925] 1 K.B. 514; 94 L.J.K.B. 380; 132 L.T. 575; 31 Digest, *Replacement*, 677, 7708.
 (2) *Insall v. Nottingham Corpn.*, [1948] 2 All E.R. 232; [1949] 1 K.B. 261; [1949] L.J.R. 156; 31 Digest, *Replacement*, 669, 7670.

F APPEAL by the tenant from an order of His Honour JUDGE LEON at Willesden County Court, dated Apr. 29, 1954, holding in an action for possession that the tenant and his wife were not entitled to the protection of the Rent Restrictions Acts in respect of the dwelling-house let to the tenant by the landlords, on the ground that the rent under the tenancy agreement was paid, not in money, but entirely in services agreed to be worth £66 per annum, the rental value of the dwelling-house.

G *Templeman* for the tenant and his wife.
Ormerod for the landlords.

H SINGLETON, L.J.: The plaintiffs are the trustees of the United Synagogue, and the landlords of a dwelling-house, No. 12, Forty Avenue, Wembley Park. They were responsible for the premises under their control, and in or about 1941, wishing to have someone to clean the synagogue, they decided that the tenant and his wife should have that responsibility. The two of them looked after the synagogue from 1941 to 1953, and they lived at No. 12, Forty Avenue, Wembley Park, the arrangement being as follows, according to the landlords' particulars of claim:

"On or about May 19, 1941, the premises were let to the [tenant] on a weekly tenancy in consideration of his performing the duties of caretaker of the Wembley District Synagogue (which is a district synagogue of the United Synagogue) and paying a rent of 10s. a week".

The house was taken by the parties to be of the rental value of £66 a year. It was calculated that the services that the tenant and his wife would render were worth £40 a year. The difference between £66 and £40 is £26 a year, and, as there are fifty two weeks in the year, that meant 10s. a week. So the tenant and his wife were to look after the synagogue, to have the landlords' house, and to pay 10s. a week rent or balance of rent. That was a letting by the landlords to the tenant, and 10s. a week was paid regularly. Whether the letting was a letting at £66 a year or at 10s. a week is immaterial as it seems to me. There was a letting which created a tenancy of the house between the landlords and the tenant to which it is not disputed that at that time the Rent Restrictions Acts applied.

In 1946 the landlords realised that much more work had to be done in the way of cleaning the synagogue, and that the duties of the tenant and his wife, as caretakers, were much heavier than they had been during the war. They, therefore, passed a resolution dated Feb. 18, 1946, in these terms:

"Mr. P. Milstone proposed and Mr. S. Schonfeld seconded that the wages of the caretaker be increased by £25 per annum, making a total of £66 per annum."

That increase was 10s. a week, and it meant that the wages to be paid to the tenant and his wife, as caretakers, were precisely the same as the yearly value which had been placed on the house. The minister, Mr. Bennett, called to see the tenant's wife, and said to her:

"I have got some good news for you. You won't have to pay the 10s. a week any more. We are raising your wages."

To that the wife replied: "Thank you very much."

It is said on behalf of the landlords that that constituted a new agreement entirely, and that from that moment—I suppose from the moment of the communication to the tenant's wife—there was no tenancy protected by the Rent Restrictions Acts, but that there came about an arrangement, not for the letting of a house for rent, but for the tenant and his wife to have the house in return for services rendered. I do not think that that was the agreement. The tenant said that

"there was no suggestion of a new agreement of tenancy when the [landlords] agreed to pay me or my wife an extra 10s. a week."

The tenant's wife, in response to the news from the minister, had merely said: "Thank you very much". There was nothing to alter the nature of the tenancy between the parties. Indeed, the minutes of the trustees, the landlords, showed that they had agreed to pay the caretaker an extra 10s. a week in wages, which would put up the total payment to £66 a year. If there was (as I think it is clear there was) a tenancy which was covered by the Rent Restrictions Acts between 1941 and 1946, I cannot see that any change was made by what took place in 1946.

Section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided:

"This Act shall apply to a house or a part of a house let as a separate dwelling where either the annual amount of the standard rent or the rateable value does not exceed—(a) in the metropolitan police district, including therein the City of London, £105; (b) in Scotland, £90; and (c) elsewhere, £78; and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies."

That provision was repealed by the Rent and Mortgage Interest Restrictions Act, 1939, which provides by s. 3 (1):

"Without prejudice to the operation of the two preceding sections in

relation to any dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the principal Acts, as amended by the last preceding section, shall, subject to the provisions of this section, apply to every other dwelling-house of which the rateable value on the appropriate day did not exceed—(a) in the metropolitan police district or the City of London, £100 ”.

A It is rateable value which is the test now.

There remains in force, however, s. 12 (7) of the Act of 1920, which is in these terms:

“ Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house, and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed.”

B Before the Rent Restrictions Acts come into operation there must be a tenancy. If there is a tenancy, there is usually a rent. When this house was first let to the tenant, there was a rent. No one disputes that. But it was submitted to the learned county court judge that the change which took place in 1946 took the case out of the Rent Restrictions Acts altogether, and the learned county court judge upheld that submission. He said:

“ On the evidence called before me, I found as a fact (as counsel for the landlords submitted I should find) (i) that from June, 1941, until February, 1946, the tenant was a tenant of the landlords paying a rent partly in money, viz., 10s. per week, and partly in services, the value of those services being agreed between the parties as £40 per annum; (ii) that from February, 1946, no rent in money was paid, credited, offered or demanded and that from that time the tenant was a tenant of the landlords paying his rent entirely in services, which were agreed between the parties as being worth £66 per annum.”

D I do not think that that last finding is warranted on the evidence. The minutes show there was an increase of wages. The wages had to be paid in some way, and it was a saving to the officials of the synagogue not to have to make cross-entries, I suppose. I cannot see that there was an agreement between the parties under which the nature of the tenancy of the house which had existed before that time was altered. There was a tenancy to which the Rent Restrictions Acts applied from 1941 to 1946. That is common ground. There was no change in the character of that merely by the increase of wages or the remarks made by the minister to the tenant's wife: “ We are putting up your wages, so you need not pay the 10s.”

E The learned county court judge would have been inclined to decide the case in favour of the tenant and his wife but for the citation to him of *Hornsby v. Maynard* (1), decided by the Divisional Court in 1924. Passages in the judgments of SHEARMAN, J. ([1925] 1 K.B. 524) and of SALTER, J. (*ibid.*, 525), were relied on by counsel for the plaintiffs, and they impressed the county court judge. Towards the close of his judgment SALTER, J., said (*ibid.*, 525):

F “ The most important of the points taken on behalf of the defendant may be thus stated: Suppose that a dwelling-house, which had been let to a tenant at the full standard rent, was let to a new tenant on the terms that that tenant should pay the full standard rent in money and should allow the landlord the use of part of the house rent free, or should take the landlord as a lodger or render him certain services, is the additional benefit thus given by the tenant to the landlord ‘rent’ within the meaning of the Act of 1920, so that the rent of the house has been thereby ‘increased’

within the meaning of s. 1 of that Act? The pecuniary consideration for the demise is not larger, but the actual consideration is larger. The question is whether or not 'rent' in s. 1 and the other sections of the Act refers only to money. At common law the term 'rent' was not restricted to pecuniary rent. Tenancies under which the rent was payable by way of services were formerly very common, and such tenancies are still to be met with. In this Act, however, having regard to its own provisions and to the authorities decided upon it to which our attention has been called, I think that the term 'rent' applies only to pecuniary rent. I regret to have to come to this conclusion, because it follows that the Act can be in some respects evaded."

It appears to me that those words of *SALTER, J.*, and some words of *SHEARMAN, J.*, to the like effect may have to be re-considered. In the present case there was a letting of a house which was taken to be of a value of £66 a year, the services rendered by the tenant were taken to be of the value of £40 a year in the year 1941, and he paid 10s. a week rent. In the year 1946 it was resolved that his wages should be increased. I do not think that the decision of the Divisional Court in *Hornshy v. Maynard* (1) affects the case before this court in any degree. There was a protected tenancy from 1941 to 1946, and the same class of tenancy remains notwithstanding the increase of 10s. in the wages, and notwithstanding the fact that the one was written off against the other. There was no new agreement which put an end to the old tenancy or which changed its character.

I would add this. Everyone realises that the landlords have been acting as they thought best in the interests of those for whom they are trustees. If this had been, or could properly be considered as, a service letting, and if they required the premises in order to put in another caretaker they might be able to obtain possession. But that part of their claim was not proceeded with before the county court judge, and it does not arise here. The appeal should be allowed and the judgment given in the county court should be reversed.

DENNING, L.J.: Rent is usually quantified in money and paid in money, but it is not necessary in law that it always should be so. The position at common law is stated in *WOODFALL ON LANDLORD AND TENANT*, 25th ed., p. 330:

"... there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters, may be, and occasionally are, rendered by way of rent: it may also consist in services and manual operations; as to plough so many acres of ground, and the like..."

In Rent Restrictions Act cases, according to an observation of *SHEARMAN, J.*, in *Hornshy v. Maynard* (1) the position is different. He said ([1925] 1 K.B. 524) that the term "rent" where it occurred in those Acts was rent payable in money and money alone. I cannot agree with that restricted meaning of the word "rent". It seems to me that, even under the Rent Restrictions Acts, in cases when rent is payable, not in money, but in kind, as in goods or services, then, if the parties have by agreement quantified the value in terms of money, the sum so quantified is the rent of the house within the meaning of the Rent Restrictions Acts, and, if it exceeds two-thirds of the rateable value, the house is within the Acts.

If the tenancy is determined and the landlord has no further use for the services, the landlord can recover the standard rent in lieu of the services. I say nothing as to the position where the services are not quantified in money, which was the case in *Hornshy v. Maynard* (1), except to say that, even on that point, some of the observations in that case may need re-consideration. Suffice it to say in this case that, accepting the findings of fact of the learned county court judge, nevertheless the tenant was protected because there was the quantified sum which the services were worth, £66 a year. The house was, no doubt, let to him in consequence of his employment, but the landlords do not

suggest that they can bring the case within the provisions of the Act so as to recover possession on that account. I agree, therefore, that the appeal should be allowed accordingly.

MORRIS, L.J.: I entirely agree. It seems to me that the evidence does not warrant the conclusion that a new tenancy arrangement was made in February, 1946. The tenant says that there was no suggestion of a new agreement of tenancy when the landlords agreed to pay him an extra 10s. a week, and it seems to me that the case can be decided on that ground. I do not think, therefore, that it is necessary to express any final opinion in regard to *Hornsbly v. Maynard* (1). It is, I think, relevant to note that in *Insall v. Nottingham Corpn.* (2) **SOMERVELL, L.J.**, in his judgment, said ([1948] 2 All E.R. 237) that he would like to reserve for further consideration a case in which the court was confronted with a lease which, on the face of it, had in addition to rent some further consideration which could be evaluated in money. For the reasons given, with which I concur, I agree that this appeal succeeds.

Appeal allowed.

Order of county court judge set aside.

Solicitors: *Stiles, Wood & Co.*, Harrow (for the tenant and his wife); *Hyman Isaacs, Lewis & Mills* (for the landlords).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

J. N. NABARRO AND SONS v. KENNEDY.

D [QUEEN'S BENCH DIVISION (Stable, J.), May 6, 1954.]

Husband and Wife—Necessaries—Right of wife to pledge husband's credit—Dispute as to title to property—Legal proceedings by husband against wife—Wife's costs—Liability of husband—Married Women's Property Act, 1882 (c. 75), s. 17.

E *Solicitor—Costs—Legal proceedings between husband and wife—Title to property—Liability of husband for wife's costs—Married Women's Property Act, 1882 (c. 75), s. 17.*

The common law rule that, in certain circumstances, a wife is entitled to pledge her husband's credit for necessities applies to the costs of proceedings between husband and wife relating to the title to or possession of property under the Married Women's Property Act, 1882, s. 17. The provision in s. 17 that the judge may make such order "as to the costs of and consequent on the application as he thinks fit" merely gives the court complete jurisdiction over the costs inter partes and does not exclude the right of the solicitors retained by the wife, in a proper case, to recover from the husband their professional charges for work done and moneys expended by them on behalf of the wife in proceedings instituted against her by the husband under the section. If it is shown that the wife was reasonable in opposing the husband's application, the solicitors are entitled to recover their costs against the husband provided that they discharge the burden, which is on them, of showing that the wife was compelled by financial stress to pledge the husband's credit.

H *Cole v. James* ([1897] 1 Q.B. 418), distinguished.

Abrahams (M.), Sons & Co. v. Buckley ([1924] 1 K.B. 903), criticised.

AS TO IMPLIED AUTHORITY OF WIFE TO PLEDGE HUSBAND'S CREDIT FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 702-704, paras. 1135-1138; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 197-200, Nos. 1566-1594.

Cases referred to:

(1) *Robertson v. Robertson & Favagrossa*, (1881), 6 P.D. 119; 51 L.J.P. 5; 45 L.T. 237; 27 Digest, Replacement, 570, 5258.

- (2) *Scott v. Morley*, (1887), 20 Q.B.D. 120; 57 L.J.Q.B. 43; 57 L.T. 919; 52 J.P. 230; 27 Digest, Replacement, 169, 1242.
- (3) *Abrahams (M.), Sons & Co. v. Buckley*, [1924] 1 K.B. 903; 93 L.J.K.B. 603; 131 L.T. 412; 27 Digest, Replacement, 199, 1578.
- (4) *Cole v. James*, [1897] 1 Q.B. 418; 66 L.J.Q.B. 249; 76 L.T. 119; 61 J.P. 230; 27 Digest, Replacement, 200, 1589.
- (5) *Durnford v. Baker*, [1924] 2 K.B. 587; 93 L.J.K.B. 866; 132 L.T. 35; 27 Digest, Replacement, 199, 1579.

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ACTION by a firm of solicitors for the sum of £169 14s. 2d., being their professional charges for work done and moneys expended by them on behalf of the defendant's then wife in proceedings instituted against her by the defendant (referred to hereinafter as the husband) under the Married Women's Property Act, 1882, s. 17.

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In April, 1943, the husband and wife were married. On Mar. 20, 1945, quarrels having arisen between them, the husband left the wife permanently, and on June 14 he issued a summons against her under s. 17 of the Act of 1882 in respect of the title to certain moneys and to the lease of the flat which had been the matrimonial home and in which the wife had remained after the husband left her. On May 9, 1947, the wife obtained a decree for the restitution of conjugal rights, but the husband did not obey the decree. On Oct. 20, 1948, the final order in the husband's proceedings under s. 17 of the Act of 1882 was made. By the order the husband's title to the lease and to most of the moneys was established, but the wife was allowed to remain in the flat until the husband found other suitable accommodation for her and to retain some of the furniture. On Jan. 7, 1949, the wife presented a petition for divorce. The husband did not defend the suit. A decree nisi was pronounced on Apr. 27, and was made absolute on Aug. 10. On Nov. 23 the wife's claim for alimony pending suit and maintenance came before the Court of Appeal and was referred back for further inquiry and investigation. On Mar. 25, 1950, the wife re-married, and on May 13, 1951, she accepted a sum of £500 from her former husband in full settlement of her claims. When the present action was brought she and her second husband were living in Australia.

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Faulks for the plaintiffs.

Phillimore, Q.C., and *Harold Brown* for the defendant.

STABLE, J., stated the facts, and said: It was contended on behalf of the husband that the plaintiffs' claim fails on two grounds—(i) that the wife had sufficient private means of her own and was not entitled to pledge his credit, and (ii) that the common law rule under which, in certain circumstances, a wife is entitled to pledge her husband's credit for necessities has no application to the costs of proceedings between husband and wife under the Married Women's Property Act, 1882, s. 17. It seems to me a little unfortunate that the position of the wife has been described in these matters as an agent of necessity. I should have thought that there was a distinction between the position of the agent who derives an authority to pledge the credit of a principal in some sudden emergency, which is an agency of necessity in its strictest sense, and the position of a wife who derives her right to pledge her husband's credit for the necessities of life because she is his wife. This right of a wife, her right at common law, goes back in our social history to the time when a woman was, for practical purposes, a chattel, and, when the husband took the wife, he took, not only the woman, but everything that she had, with the result that, if he did not provide for her, she had no means of providing for herself. It may be that the changed social conditions and the completely changed status of women may ultimately result in some further amendment of the law. As is well known, the authority of the wife derives not so much from necessity as from status, and disappears if she commits adultery and thereby forfeits her rights as a wife, albeit the fact

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of adultery is neither known nor suspected by the solicitor or tradesman or doctor, or whoever it may be, who gives the credit.

A Wholly distinct, of course, from the wife's common law right is the jurisdiction in relation to the wife's costs which is exercised by the Probate, Divorce and Admiralty Division. There a guilty wife is entitled to defend her status and reputation, and the fact that she is unsuccessful does not deprive the court of its power to direct payment to her solicitor by the husband of costs incurred by her. In *Robertson v. Robertson & Favagrossa* (1) the wife's solicitors recovered their costs against the husband although she had been found guilty of adultery in the proceedings in which they were acting on her behalf. SIR GEORGE JESSEL, M.R., said (6 P.D. 122):

B "Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate; so that in the absence of a settlement (which, as we all know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the ecclesiastical court not only provided for the costs of her defence but also gave her alimony pendente lite so as to provide for her maintenance. Of course the husband may say, 'it is a hardship on me to have to pay the costs of my wife's false defence to a charge of adultery, or the costs of a false counter-charge against myself of adultery or cruelty'. No doubt it is a hardship, but what would the wife have to say in answer? Suppose the wife had brought him a sum of £10,000, or £20,000, or £50,000, would not she have a right to say 'You have taken all my property from me, and am I to be left defenceless and not able to meet your false charge of adultery?' Of course it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment, not to the wife, who has nothing, but to the husband; and therefore it was quite right to secure him that payment by getting money paid into court, and finally by payment of the proper costs incurred when the suit was heard."

One is apt to forget that until comparatively recently, unless a married woman carried on a trade on her sole account, it was impossible to obtain a judgment against her which bound her personally. The most one could do was to obtain a judgment which bound any effects which she might have. She was not in a position in which she could make a binding contract; she could only bind her separate estate. The form of judgment in such a case was settled in *Scott v. Morley* (2). It is, of course, clear that the common law right and the right in a matrimonial court are two wholly separate and distinct rights. The common law right is the right of an innocent wife to pledge her husband's credit. The rules that regulate these matters in the Divorce Court are designed to see that women are enabled to defend their status and their reputation even though they may have committed grave matrimonial offences.

H Counsel for the plaintiffs relied on a number of authorities, the first being *M. Abrahams, Sons & Co. v. Buckley* (3), where McCARDIE, J., reviewed the earlier decisions. There is no doubt that that case is an accepted authority for the proposition that the wife may, in certain circumstances, as agent for her husband, render the husband liable at common law to pay the whole of the costs incurred by her in matrimonial proceedings against him. In that case the proceedings, apparently, never reached an issue. None the less, as it was shown that the solicitor acted on reasonable grounds, made adequate inquiries, and showed proper diligence and care, McCARDIE, J., held that he was entitled to recover the costs against the husband. It was suggested by counsel for the plaintiffs in the present action that that case, and some of the older cases cited therein, laid down an exception to the rule that one of the conditions requisite before a

wife can pledge her husband's credit is that she has insufficient means of her own, and that the rule does not apply where the credit is given, not by a tradesman or a doctor, but by a solicitor. I do not think that that is the law. Nor do I think that there are any authorities cited in the *Buckley* case (3) which support it. There are authorities cited in that case which assert the contrary. In my opinion, if a case is similar, exactly the same considerations apply, mutatis mutandis, whether the person by whom the credit is given is a tradesman or a solicitor. A

The next question, therefore, is: Had the wife sufficient private means? I think that the burden of proof in regard to this matter is on the solicitors. Before they can establish the agency of necessity, the burden lies on them to prove that the wife was compelled by financial stress to pledge the husband's credit. [His Lordship reviewed the evidence on the point, and continued:] I have come to the conclusion that, when the plaintiffs were retained by the wife in respect of the application by the husband under s. 17 of the Act of 1882 and throughout the proceedings in connection with the application, the wife was forced by straitened circumstances either to pledge the husband's credit to employ a solicitor or to do without one. As regards the issue of the proceedings, I think that she was perfectly reasonable in opposing the application. It was highly advantageous to her to do so, and she achieved a considerable measure of success. B C

That brings me to the last point, which is the really substantial point in this case. It is a point of considerable importance, and one which has caused me a good deal of vacillation. Counsel for the husband contends that, having regard to the situation which prevailed at the time when the Act of 1882 was passed, the jurisdiction given to the courts in respect of questions between husband and wife is in the nature of an individual compartment in the law wherein any right to costs depends entirely on the award made by the judge who deals with any particular matter. That contention, on the basis of what is convenient, seems to have a good deal of force behind it. Having regard to present-day social conditions, it seems rather remarkable that, if there is a dispute about property between husband and wife and the wife puts forward a claim which she cannot and does not sustain successfully, provided that she is impecunious and has no means of her own, she can employ a solicitor and pledge her husband's credit to pay the solicitor's bill, with the result that, at the conclusion of litigation from which, ex hypothesi, the husband emerges wholly victorious, he has the privilege of paying his own legal expenses as well as those of the wife, which may amount to a sum considerably in excess of the property in dispute. It seems to me, as a matter of convenience, that, where married couples meet on this particular battlefield, rather different rules should apply from those which apply in other branches of domestic strife, and if the contention of counsel for the husband were consistent with the law as stated by the authorities, the result would be by no means undesirable. D E F

In support of his contention, counsel for the husband cited *Cole v. James* (4). It is plain that McCARDIE, J., did not think very highly of that decision, as appears from his observations ([1924] 1 K.B. 913) in *M. Abrahams, Sons & Co. v. Buckley* (3). In *Durnford v. Baker* (5), which is an interesting case with many points of view, ATKIN, L.J., said ([1924] 2 K.B. 600): G

"This is an action by a solicitor against a husband on the ground that the husband has contracted to pay him the costs incurred in presenting a divorce petition on behalf of the wife. The contract depends on whether the wife had authority to pledge her husband's credit. The solicitor in such a case has no independent right. As WRIGHT, J., said in *Cole v. James* (4) ([1897] 1 Q.B. 420): 'It cannot be denied that the solicitor's rights are derivative'. I prefer to say nothing as to whether the actual decision in that case was right". H

I confess that I do not quite follow what the lord justice means when he says that the solicitor has no independent right. It is true to say that he has no additional right or no other right; the right which he has is the right which ATKIN, L.J., states in the first sentence of his judgment:

"This is an action by a solicitor against a husband on the ground that the husband has contracted to pay him the costs incurred in presenting a divorce petition on behalf of the wife."

A

It is true that the wife is the instrument or agent by which the contract is made, and in that sense—and only in that sense—the solicitor's rights are derivative. They are direct rights which he acquires by the instrumentality of the agent, who is able to form a binding contract in his favour, which he, the solicitor, is in a position to enforce.

B

Cale v. James (4), which came before the Divisional Court in 1897, arose out of summary proceedings under the Summary Jurisdiction (Married Women) Act, 1895. That Act created an entirely new jurisdiction in relation to matrimonial proceedings. It was, in a sense, the beginning of a poor person's divorce court, and conferred on courts of summary jurisdiction powers in dealing with complaints of certain kinds by married women against their husbands. By s. 5:

C

"The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing . . . (d) A provision for payment by the applicant or the husband, or both of them, of the costs of the court and such reasonable costs of either of the parties as the court may think fit."

D

In *Cale v. James* (4) the wife instructed a solicitor who acted for her in the matter of two applications made by her against her husband for orders under the Act, the proceedings being based on an allegation of persistent cruelty. A court of summary jurisdiction made no order, which was, apparently, equivalent to dismissing the applications. No provision for payment of costs under s. 5 (d) was made, or asked for by the parties. The solicitor subsequently sued the husband in the county court for his costs as the wife's solicitor in the matter of the two applications, and the county court judge gave judgment for the solicitor for his costs, subject to taxation. On an appeal by the husband, the Divisional Court reversed the judgment of the county court judge. WRIGHT, J., said ([1897] 1 Q.B. 420):

E

F

"I have come to the conclusion that the legislature in passing the Summary Jurisdiction (Married Women) Act, 1895, did not intend that in cases under that Act proceedings for the costs, involving further expense, might be taken in another court. It was not intended that, having made it possible to make the application for costs to a court of summary jurisdiction, an action for costs should be maintainable in any other court. The Act intends that all questions as to costs shall be dealt with by the court of summary jurisdiction, and uses language which strongly indicates that intention. It leaves the court perfectly free to make any order as to costs it may think fit against either the wife or the husband. It may, no doubt, be argued that the provision found in s. 5 (d) does not prejudice the right of the married woman's solicitor to recover his costs against the husband before another tribunal. That question turns on the true construction of the Act, and it cannot, I think, be denied that the solicitor's rights are derivative."

G

H

I find it difficult to appreciate what that means. WRIGHT, J., continued (*ibid.*):

"If it be true to say that the Act intends that all costs should be paid according to the direction of the court of summary jurisdiction, we ought, in my opinion, to hold that the provision binds the solicitor as well as the wife."

BRUCE, J., said (*ibid.*):

"The Act in question gives a summary procedure for the benefit of married women, the object being to enable poor persons to obtain without any great expense the protection which formerly they could only obtain by more expensive proceedings. The Act gives the court of summary jurisdiction full power to deal with all costs; and it is, in my opinion, only reasonable to suppose that the legislature intended that the question of costs should be dealt with exclusively by that court. I therefore come to the conclusion that an action will not lie to recover costs incurred in respect of applications under the Act. That is the ground of my decision".

Although one sees the force of the argument that s. 5 (d) of the Act of 1895 merely defines the power of the court in relation to costs as between the actual parties before it, there is, on the other hand, a great deal to be said in favour of the suggestion that the legislature deliberately intended to set up, if I may call it this, a poor woman's domestic protection court, and to provide that that tribunal alone would have control over any liability incurred in regard to legal expenditure in respect of matters which came before it. That, I venture to think, is the basis for the decision in *Cale v. James* (4).

Taking that case as binding on me, ought I to extend the principle there stated to the case of a summons brought under the Married Women's Property Act, 1882, s. 17? I confess that I feel an inclination to do so if I properly can, but I do not think I can. Obviously, the Summary Jurisdiction (Married Women) Act, 1895, is intended for people in very humble circumstances. Section 17 of the Act of 1882 is equally applicable to a dispute between people in humble circumstances and to a dispute between a millionaire and a millionairess. The section seeks, not to provide a poor man's court, but to get over the difficulty that a husband and wife in the eyes of the law in 1882 were deemed to be one. It provides:

"In any question between husband and wife as to the title to or possession of property, either party . . ."

—and then it is not unimportant to look at the next words—

"or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England . . . and the judge . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit . . ."

I think that the words which I have just read merely mean that the court, *inter partes*, has complete jurisdiction over the costs. By R.S.C., Ord. 65, r. 1:

"Subject to the provisions of the Act and these rules, the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge . . ."

Having regard to the fact that people of wealth, banks, corporations, and all sorts of other important bodies may litigate under the provisions of s. 17 of the Act of 1882, I do not think that it would be right to extend the principle in *Cale v. James* (4) to proceedings under that section.

Judgment for the plaintiffs.

Solicitors: *J. N. Nabarro & Sons* (for the plaintiffs); *Gordon, Dadds & Co.* (for the defendant).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

CAIRNS AND ANOTHER v. PIPER.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), June 21, 22, 1954.]

Rent Restriction—Possession—House required by landlord—“Not being a landlord who has become landlord by purchasing dwelling-house after Sept. 1, 1939”—Purchase in 1950—Order for possession of whole house against tenant in 1953—Action for possession against sub-tenant of upper floor—Landlords of sub-tenant, not by purchase, but through order against tenant—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (h), as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1) and sched. I.

In 1950 the landlords purchased a dwelling-house subject to the Rent Restrictions Acts which was then let to a tenant who occupied the ground floor and sub-let the upper floor to a sub-tenant. In 1953, on the ground that the house was reasonably required by the landlords for occupation as a residence for themselves, the landlords obtained an order for possession of the whole house against the tenant, to whom they had offered the ground floor which he occupied as alternative accommodation. In a subsequent action for possession of the upper floor against the sub-tenant for occupation by themselves,

HELD: the landlords became “landlords” of the sub-tenant of the upper floor, not by “purchasing the dwelling-house” after Sept. 1, 1939, within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, when they became owners of the whole dwelling-house in 1950, but by the order for possession against the tenant of the whole house in 1953 coupled with the operation of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, under which the sub-tenant thereupon became their direct tenant; and, therefore, they were not precluded from recovering possession from the sub-tenant under the paragraph.

AS TO LANDLORD'S RIGHT TO POSSESSION OF A DWELLING-HOUSE FOR HIS OWN OCCUPATION UNDER THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 705, 706, Nos. 7937-7948.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 15 (3), the RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, sched. I, para. (h), and the RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, sched. I, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1019, 1060 and 1081.

Cases referred to:

- (1) *Fowle v. Bell*, [1946] 2 All E.R. 668; [1947] K.B. 242; [1947] L.J.R. 115; 31 Digest, Replacement, 708, 7957.
- (2) *Epps v. Rothnie*, [1946] 1 All E.R. 146; [1945] K.B. 562; 114 L.J.K.B. 511; 173 L.T. 353; 31 Digest, Replacement, 705, 7938.

APPEAL by the landlords against an order of His Honour Judge DRUCQUER at Clerkenwell County Court, dated May 11, 1954, dismissing an action for possession of the upper floor of a dwelling-house on the ground that the landlords became landlords thereof within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (h), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, by purchasing the dwelling-house after Sept. 1, 1939, i.e., in 1950, and, therefore, were not entitled to possession under the paragraph. The landlords contended that, though they became owners of the whole dwelling-house by purchase in 1950, they became the “landlords” of the sub-tenant of the upper floor (against whom the action was brought), not at that time, but by virtue of an order for

possession of the whole house made in their favour in 1953 against the tenant of the whole house and of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, under which, on the making of the order, the sub-tenant was to be deemed to be the tenant of the landlords.

J. W. Wellwood for the landlords."

Gage for the sub-tenant.

SINGLETON, L.J.: Though several authorities have been cited to us, there is no recorded decision covering the point involved in this case under the Rent Restrictions Acts. The plaintiffs, the landlords, are an omnibus driver and his wife, and I suppose they had saved some money. In 1950 they bought a house, 134, Wightman Road, Haringey, because they were threatened with eviction from the adjoining house in which they live, 132, Wightman Road. An order for possession of the part of that house in which they are now living has since been made against them though its operation is postponed for a period. When they bought 134, Wightman Road, the tenant of the whole house was a Mr. Robinson and Mr. Robinson had sub-let the upper part of the house to a sub-tenant, the present defendant. The landlords took proceedings against the tenant, in which they offered him the downstairs flat which he then occupied, and still occupies, as alternative accommodation, and on June 12, 1953, they obtained an order for possession against him from the county court judge, His Honour Judge DORE. Thereupon, it is said that, under the terms of a section to which I shall have to refer, the sub-tenant became the tenant of the landlords and was their tenant when they commenced the present proceedings, which are a claim for possession of the upstairs flat which is required for the landlords' own occupation.

Section 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides:

"No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejection of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in sched. 1 to this Act; or (b) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect."

It follows from that sub-section that, if the court has power to make an order under the provisions of sched. 1, there is no necessity to consider the question of alternative accommodation. In the proceedings against the tenant before His Honour Judge DORE, the landlords did show suitable alternative accommodation, and they obtained the order on that basis. The proceedings in this case were before His Honour Judge DRYGDALE, and the landlords' submission is that s. 3 (1) (a) applies, and that the court need only look at the schedule. Section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides:

"Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejection, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

When the landlords obtained an order for possession against the tenant, his sub-tenant, the present defendant, became tenant of the landlords on the same terms as he would have held from the tenant of the whole house if the tenancy had

continued. Thus, by reason of s. 15 (3) of the Act of 1920, the relationship of landlord and tenant between the landlords, the plaintiffs, and the sub-tenant, the defendant, came about when the order for possession was made by His Honour JUDGE DONE, but not, as I think, until then. It is important to bear in mind that the present proceedings relate only to a part of the house, and that the sub-tenant was a sub-tenant to Mr. Robinson and was not in relationship of any kind with the landlords until after the making of the order against Mr. Robinson.

Schedule I to the Act of 1933 is headed:

“ Possession or ejection without proof of alternative accommodation.”

It begins:

“ A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejection of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . ”,

and then there follow the cases in paras. (a) to (h). The important one for the purpose of this appeal is para. (h), but one other will help to show the scope of the schedule. Paragraph (a) is:

“ any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under the principal Acts), so far as the obligation is consistent with the provisions of the principal Acts, has been broken or not performed.”

When that has to be considered in relation to a sub-tenancy it is obvious, I think, that the terms of the letting must be considered and that the obligation which is referred to in para. (a) is an obligation created by the agreement of sub-letting or arising therefrom. For that purpose at the time of the making of the agreement of sub-tenancy the tenant was the landlord of the sub-tenant.

Paragraph (h) of sched. I to the Act, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, reads:

“ [if] the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after Sept. 1, 1939), for occupation as a residence for— (i) himself; or (ii) any son or daughter of his over eighteen years of age; or (iii) his father or mother: Provided that an order or judgment shall not be made or given on any ground specified in para. (h) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.”

The result is that the court has power to make or give an order for judgment for the recovery of possession of any dwelling-house, or part of the dwelling-house, where the court thinks it reasonable so to do, if the dwelling-house is reasonably required by the landlord for his own occupation, with a proviso that an order or judgment shall not be made under para. (h) if the court is satisfied that greater hardship would be caused by granting the order than by refusing it.

It is claimed on behalf of the sub-tenant that the landlords became landlords by purchasing the dwelling-house after Sept. 1, 1939. It is true that they became owners after that date, but para. (h) of sched. I does not contain the word “ owners ” or “ owner ”. Counsel for the sub-tenant submitted that, if the argument put forward on behalf of the landlords is right, it will deprive sub-tenants of a great part of the protection which is intended to be given to them by the Rent Restrictions Acts. But it must be remembered that s. 3 of the Act

of 1933 provides that no order shall be made unless the court considers it reasonable to make such an order; that at the commencement of sched. 1 there are the words "where the court considers it reasonable so to do"; and that in para. (h) of the schedule there is, first, the provision that the dwelling-house is reasonably required by the landlord, and thereafter the proviso that an order for possession shall not be made if the court is satisfied that greater hardship will be caused by making such an order than by refusing to do so.

The question is whether the landlords lose the benefit of the schedule by reason of the fact that they purchased the house after Sept. 1, 1939. They purchased the freehold in August, 1950, and thus it is submitted by counsel for the sub-tenant that they do not fall within para. (h) because they are to be regarded as landlords who became landlords by purchasing the dwelling-house after Sept. 1, 1939. It appears to me that the words "landlord" and "tenant" in the schedule are related the one to the other, and that they are used to cover the case of two people in contractual relationship. When the landlords acquired the freehold of the whole of the premises in August, 1950, they did not become the landlords of the sub-tenant. The sub-tenant remained the sub-tenant of the tenant. When on June 12, 1953, the landlords obtained an order for possession of the whole house against the tenant on their undertaking to grant him a new tenancy of the ground floor, there came into operation s. 15 (3) of the Act of 1920, and the sub-tenant became tenant of the landlords on the same terms as he had been sub-tenant of the tenant of the whole. Thus, it appears to me, on the reading of the schedule, that the landlords did not become landlords by purchasing the dwelling house after Sept. 1, 1939, but became landlords vis-à-vis the sub-tenant by virtue of the order made in the county court on June 12, 1953, coupled with the operation of law arising from s. 15 (3) of the Act of 1920. In my view, the landlords are entitled to claim in aid the provisions of the schedule. The learned county court judge thought that they were not and gave judgment for the sub-tenant. It was a difficult matter with which he was faced. I think, probably, most help is to be found in the words of BUCKNELL, L.J., in *Foule v. Bell* (1) ([1946] 2 All E.R. 670), though there was really no decision of the court to guide the learned judge.

The appeal should be allowed. The case will have to go back for the consideration of the county court judge on the other points which arise under the Act of 1933, s. 3 and sched. 1.

DENNING, L.J.: In order to debar a landlord from the benefits of para. (h) it is not sufficient that he should have become the "owner" by purchasing the dwelling-house since Sept. 1, 1939. He must have become the "landlord" by purchasing it since that date. Two dwelling-houses are concerned in this case. One of them is the dwelling-house comprised in the whole physical structure of the house, i.e., ground floor plus first floor. The other is the dwelling-house comprised in the first floor. So far as the tenancy of the whole house is concerned, the landlords became landlords by purchasing the house in 1950, and, in consequence, when they sought to obtain an order against the tenant of the whole house they had to provide suitable alternative accommodation. They offered the tenant alternative accommodation in the shape of the ground floor where he was then living. His Honour JUDGE DOWE thought that, in all the circumstances, it was reasonable to make an order against the tenant, and he did so. He made an order as a result of which the tenant became tenant only of the ground floor, and the sub-tenant, who theretofore had been the sub-tenant of the first floor, became direct tenant of the first floor, holding directly from the landlords. In my judgment, the landlords did not by their original purchase become landlords of the sub-tenancy of the first floor. They only became landlords of that tenancy when His Honour JUDGE DOWE made his order, and they became landlords of it, not by the purchase, but by the joint effect of his order and of the order of s. 15 (3) of the

Act of 1920. They need not, therefore, provide alternative accommodation for the sub-tenant. They have only to prove greater hardship, and, of course, to satisfy the judge that it is reasonable to make an order. I agree with my Lord that the appeal should be allowed and the case remitted to the learned county court judge.

MORRIS, L.J.: I agree. When the landlords purchased 134, Wightman Road in 1950, they became the owners of the whole house; they also became the landlords of the then tenant, who became under obligation to pay to them the rent for the whole house. The tenant continued to be the landlord of the sub-tenant, who paid rent to him in respect of the first floor. The landlords, although they had become owners of the whole house, did not become the landlords of the sub-tenant in respect of the first floor. When in 1953 the landlords obtained an order for possession against the tenant, the tenant became their tenant in regard to the ground floor, and, by the operation of s. 15 (3) of the Act of 1920, the sub-tenant then became their tenant in regard to the first floor. In *Fowle v. Bell* (1) Scott, L.J., in his judgment in relation to para. (h) of sched. I to the Act of 1933, said this ([1946] 2 All E.R. 669):

“The phraseology seems to me necessarily to mean this, ‘not being a landlord who, in relation to the tenant before the court, has become that tenant’s landlord by purchasing the dwelling-house . . .’ . . .”.

It is true that the landlords would not have become the landlords of the sub-tenant had it not been for the fact that in 1950 they became the owners of the whole house, but the same would have been true if, when they became the owners of the house, the house had been empty, and, as in the case of *Epps v. Rothnie* (2), they had later granted a tenancy. But they did not in 1950 become the landlords of the sub-tenant. They only became his landlords in 1953. They did not become his landlords by purchasing or at the time of purchasing. They became his landlords by obtaining an order for possession against the tenant and by the subsequent operation of s. 15 (3) of the Act of 1920.

Appeal allowed.

Case remitted to county court for further consideration.

Solicitors: *Hamilton-Hill & Partner* (for the landlords); *Ranger, Burton & Frost* (for the sub-tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

THOMSON v. CHAIN LIBRARIES, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, J.J.), May 13, 1954.]

Criminal Law—Obscene publications—Duty of justices to read and look at publications—Duty of prosecution—Onus of proof—Obscene Publications Act, 1857 (c. 83), s. 1.

Where publications which are alleged to be obscene have been seized under s. 1 of the Obscene Publications Act, 1857, and brought before the justices, it is for the justices to satisfy themselves whether or not the publications are obscene. This they can only do by reading or looking at the publications themselves. It is not for the prosecution to read particular paragraphs of books alleged to be obscene or to indicate in what respect they allege that pictures are obscene unless the justices ask them to address them or point out some particular matter. Where the occupier of the premises where the publications were seized appears in answer to a summons issued against him under s. 1, the onus is on him to show cause why they should not be destroyed.

AS TO INDECENT PUBLICATIONS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 395, 396, paras. 667-669; and FOR CASES, see DIGEST, Vol. 15, pp. 748-751, Nos. 8068-8095, and Digest Supps.

FOR THE OBSCENE PUBLICATIONS ACT, 1857, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 721.

Case referred to:

(1) *Cox v. Sticker*, [1951] 2 All E.R. 637; [1951] 2 K.B. 1021; 115 J.P. 490; 2nd Digest Supp.

CASE STATED by Wiltshire justices.

At a court of summary jurisdiction sitting at Swindon, on the complaint of the appellant, John Bernie Thomson, a special warrant was issued under the Obscene Publications Act, 1857, s. 1, under and by virtue of which warrant the appellant, on Sept. 18, 1953, removed from the premises of the respondents, Chain Libraries, Ltd., at 7, Regent Circus, Swindon, twelve books and four postcards. On Nov. 26, 1953, the books and postcards were laid before the court, whereupon a summons was issued to the respondents to show cause why the books and postcards should not be destroyed under the provisions of s. 1 of the Act. On Dec. 3, 1953, at the hearing of the summons, the respondents asked for an adjournment. The chairman of the bench said that, although the justices had read and considered the books and were ready to proceed, they would adjourn the hearing for six weeks. On Jan. 14, 1954, at the adjourned hearing, the following facts were found. The books and postcards appearing in court were those seized in accordance with the warrant. In the books certain pages were marked with cellophane tape, but no evidence was adduced as to how such marking was introduced or as to what it was intended to mean. The books and postcards were kept on the respondents' premises for the purpose of sale or distribution for gain, and certain of the books had been lent on hire for gain.

It was contended on behalf of the appellant that, in the premises, the onus lay on the respondents to show cause why the books and postcards should not be destroyed. In reliance on such contention and the books and postcards being in court, the appellant did not put them in evidence, did not invite or draw the justices' attention to any one of them or to any particular passage in any book which he relied on as obscene, nor did he, as regards either the postcards or any book, specify in what respect such alleged obscenity existed, nor was any evidence called as to any such matters. The appellant further contended that, having seized the books and postcards and carried them before the justices in accordance with the warrant, he had discharged his duty. It was contended on behalf of the respondents (a) that it was for the appellant to

satisfy the justices that the books and postcards were obscene and to show a prima facie case by putting them in evidence, by indicating passages in the books which were alleged to be obscene, and by indicating in what respects the postcards were alleged to be obscene, and, where an innuendo was relied on, by indicating its nature; (b) that the appellant's refusal to indicate passages in the books which were alleged to be obscene, or to indicate in what respects the postcards were alleged to be obscene, or to state the nature of any innuendo relied on, meant, having regard to the large volume of printed matter concerned, that the respondents could not properly or adequately deal with the questions in issue or put forward arguments on any particular innuendos alleged, and that, therefore, they could not have a fair trial on the matters in issue; and (c) that, as the appellant had not, by evidence or otherwise, specified the nature of the complaint, or shown a prima facie case that the books and postcards were obscene, an order should be made directing the books and postcards to be restored to the respondents. The justices accepted the respondents' contentions and ordered that the books and postcards should be restored to them.

Robert Hughes for the appellant.

G: A. Draycott for the respondents.

LORD GODDARD, C.J.: As I said in *Cox v. Stinton* (1) ([1951] 2 All E.R. 639), the Obscene Publications Act, 1957, "provides its own procedure and is a complete code in itself". It was designed as a preventive measure, to prevent the dissemination of filthy literature, pictures, etc. It is not an Act which, in itself, contains any penalties, except the destruction of obscene publications.

The procedure is this. First, an information has to be laid by someone, generally the senior officer of police, stating on oath that he has reason to believe and does believe that there are, within the justices' jurisdiction, some obscene publications which are being sold or distributed. If the justices are satisfied that the complaint constitutes a proper case for action, they issue a special warrant, which is, in effect, a search warrant. Armed with that warrant, a constable or police officer can go to the premises where the obscene publications are believed to be and seize them. He then brings the articles which are seized before the justices. If the justices, after looking at the publications, considered that they were not obscene, they would, no doubt, do nothing further in the matter. But if they consider that they may be obscene—and it is not for the justices at that stage of the proceedings to come to a decided opinion that they are obscene—they then issue a summons calling on the occupier of the premises where the articles were seized to show cause why they should not be destroyed. Section 1 of the Act provides:

"... such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required, to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time herein-after allowed for lodging an appeal . . ."

It is clear that, when the return day for the summons arrives, the justices have to be satisfied whether or not the publications are obscene. The only way in

which they can be satisfied that books are obscene is by reading them and looking at them. It does not require evidence to satisfy the justices whether or not they are obscene. The justices must look at them for themselves. Exactly the same position prevails in regard to postcards, and it is only confusing the justices to refer to an innuendo. "Innuendo" means a secondary meaning, a meaning because of something which is known to particular people.

In the present case, when the respondents applied for an adjournment the justices said that they had read and considered the books and were ready to proceed. If they had read and considered the books, I do not know why, when the case came on after the adjournment, they did not give their decision. It is not for the prosecution to proceed to read out particular paragraphs unless the justices ask the prosecution to address them or to point out some particular thing. It is for the justices to look at the publications themselves. I do not say that they need read every word of the publications. Of course, the police or other informant might mark certain passages which would show the justices at once that the books were obscene. If the justices think that the publications are obscene, they must order them to be destroyed. They are required to do so by s. 1 of the Act, except where it may be necessary to keep the publications as evidence in other proceedings. The Act obviously contemplates that the owners of these books could be prosecuted. The justices took a wrong view of their functions in this case, and it must go back to them with an intimation that it is for them to say, having read and looked at the publications themselves, whether or not they are obscene. If the justices are satisfied that the publications are obscene, it is their duty to make an order for their destruction.

HILBERY, J.: I am of the same opinion. It was contended on behalf of the respondents that this was a criminal proceeding, and that the general rule in a criminal proceeding was that the prosecutor, who affirmed, had to discharge the burden of proof in regard to what he affirmed, but, as my Lord has pointed out—and as this court pointed out in *Cox v. Stinton* (1)—the Act of 1857, which is a code in itself, provides a special procedure and makes an exception to the general rule. It is important to remember that it is for the justices to satisfy themselves that the books or articles complained of are obscene. The publications are seized under the procedure laid down in s. 1 of the Act and brought before the court, and, when they have been brought before the court, the justices have to be satisfied that they are obscene. As my Lord has pointed out, if the justices thought that publications, which had been seized and brought before them, under s. 1 of the Act, could not be considered as obscene, obviously they would not issue a summons. If, *prima facie*, the publications are obscene when they are brought into court, the justices issue a summons. In the present case they issued a summons. Section 1 of the Act provides that such summons is to call on the occupier of the house or other place which may have been so entered

"by virtue of the said warrant to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed . . ."

That plainly, in the particular circumstances, throws the onus on the person who has been the occupier of the premises where the obscene literature is on sale to show cause why those articles which are before the court should not be destroyed.

The fact that s. 1 goes on to say:

" . . . such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant . . . "

does not mean that the justices are required to go through the books in the court at the hearing of the summons. If they have already read them—the books having been brought into court—and they say, as they said here, that

they have read them and are ready to proceed, as they are the persons to decide whether the publications are obscene or not, they have done all that is necessary as the preliminary which has to be observed before the occupier of the premises discharges the burden which is then put on him, viz., to show cause why the publications should not be destroyed. In the present case, I think that the justices were misled by the contentions on behalf of the respondents about what ought to be proved and shown by the prosecution. What the prosecution had done was all that it was required to do by the statute. I am satisfied that the order should be as my Lord has said.

DONOVAN, J.: I entirely agree.

Case remitted.

Solicitors: *Darley, Cumberland & Co. and Lydall & Sons*, agents for *Townsend*, Swindon (for the appellant); *Buleraig & Davis* (for the respondents).
[Reported by G. A. KIDNER, ESQ., Barrister-at Law.]

NOTE.

LOGAN v. LOGAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), June 23, 30, 1954.]

Husband and Wife—Maintenance—Application to High Court—Maintenance of wife and children—Power of court to order payments direct to children—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410.

APPLICATION by the wife under the Matrimonial Causes Act, 1950, s. 23 (1).

The parties were married on Sept. 6, 1930, and there were three children of the marriage. On July 18, 1953, the husband left the wife. On Mar. 23, 1954, the wife issued an originating summons applying for maintenance under s. 23 (1) of the Act of 1950, on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for herself and the three infant children of the marriage. On June 23, 1954, the application came before COLLINGWOOD, J., and at the conclusion of the argument, counsel for the wife asked that, if an order were made for the payment of maintenance in respect of the children, such payments should be directed to be made direct to them.

Tolstoy for the wife.

Marshall-Reynolds for the husband.

Cur. adv. vult.

June 30. COLLINGWOOD, J., delivered a reserved judgment in which HIS LORDSHIP stated that he was satisfied that the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife and the infant children of the marriage and made an order that the husband should pay certain sums as maintenance for the wife and for each of the children. HIS LORDSHIP concluded: I was invited to order payments direct to the infant children, but, in my opinion, the court has no power to make such an order under s. 23 (1).

Solicitors: *Curwen, Carter & Evans* (for the wife); *Sidney C. Elphick* (for the husband).

A.T.H.

Re WHITE'S WILL TRUSTS. BARROW AND ANOTHER v.
GILLARD AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), June 23, 24, 1954.]

Charity—Charitable bequest—Practicability—Inquiry—Form of inquiry.

By her will a testatrix directed: "The two cottages Kidbrook and Gretna to be used as missionary homes—[Mr. B.] . . . also [Mr. S.] . . . both know my wish how they are to be used rest homes [for] retired aged missionaries". At the date of the proceedings the cottages were occupied by tenants who were entitled to the protection of the Rent Restrictions Acts and there was no indication that either of them proposed or would become liable to leave the premises.

Held: although the gift was charitable, there was no general charitable intention; the gift would fail if the purpose could not be carried out; and in order to avoid keeping the gift in suspense indefinitely the proper form of inquiry which would be directed was "whether at the date of the death of the testatrix it was practicable to carry her intentions into effect or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time".

Form of inquiry in *Re James* ([1932] 2 Ch. 25) and *Re Wright* (ante p. 98), not followed.

Cases referred to:

- (1) *Re James*, [1932] 2 Ch. 25; 101 L.J.Ch. 265; 146 L.T. 528; Digest Supp.
- (2) *Re Wright*, ante p. 98.
- (3) *A.-G. v. Chester (Bp.)*, (1785), 1 Bro. C.C. 444; 28 E.R. 1229; 8 Digest 277, 480.
- (4) *Sinnett v. Herbert*, (1872), 7 Ch. App. 232; 41 L.J.Ch. 388; 26 L.T. 7; 36 J.P. 516; 8 Digest 277, 471.
- (5) *Re White's Trusts*, (1886), 33 Ch.D. 449; 55 L.J.Ch. 701; 55 L.T. 162; 50 J.P. 695; 8 Digest 350, 1453.
- (6) *Blackwell v. Blackwell*, [1929] A.C. 318; 98 L.J.Ch. 251; 140 L.T. 444; Digest Supp.
- (7) *Re Wilson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 8 Digest 313, 948.
- (8) *Wallis v. New Zealand Solicitor-General*, [1903] A.C. 173; 72 L.J.P.C. 37; 88 L.T. 65; 8 Digest 249, 90.
- (9) *Re Monk*, [1927] 2 Ch. 197; 96 L.J.Ch. 296; 137 L.T. 4; Digest Supp.
- (10) *A.-G. v. Ironmongers' Co.*, (1834), 2 My. & K. 576; 3 L.J.Ch. 11; 39 E.R. 1064; subsequent proceedings L.C., (1840), 2 Beav. 313 (48 E.R. 1201); (1841), Cr. & Ph. 208 (41 E.R. 469); sub nom. *Ironmongers' Co. v. A.-G.*, (1844), 10 Cl. & Fin. 908; 8 E.R. 983; 8 Digest 385, 2002.

ADJOURNED SUMMONS to determine (i) whether the direction contained in a document dated Feb. 12, 1952, which together with a document dated Aug. 30, 1940, constituted the will of Caroline Matilda White, that two cottages "Kidbrook" and "Gretna" were to be used as missionary homes and other directions therein contained relating to such cottages constituted a valid charitable gift thereof; (ii) if the said directions did constitute a valid charitable gift, whether, having regard to the existing circumstances, the same could be carried out wholly or in part, and, if, or to the extent that, the same could not be carried out, whether such gift failed or ought to be administered *cy-près*; and (iii) that, if and so far as necessary, a scheme for the administration of the said gift might be settled, and that so far as necessary or expedient retention of the said cottages might be sanctioned under the Mortmain and Charitable Uses Act, 1891, s. 8.

Caroline Matilda White made and duly executed a testamentary document dated Aug. 30, 1940, and thereby, after appointing the first plaintiff, Alfred

Barrow, and the first defendant, John Matthew Gillard, to be the executors and trustees thereof, and after making a specific devise, devised and bequeathed the residue of her property to her brothers, the said John Matthew Gillard and Charles Gillard (who predeceased the testatrix). The testatrix made and duly executed a further testamentary document dated Feb. 12, 1952, and thereby, after appointing the first and second plaintiffs to be executors and trustees thereof and after making certain dispositions not material to this report, proceeded as follows:

"The two cottages Kidbrook and Gretna to be used as missionary homes — Mr. Bell, Green Brac, Wimborne, also Mr. Harry Scott, 31 Danecourt Road, Parkstone, they both know my wish how they are to be used rest homes [for] retired aged missionaries."

- B** The testatrix died on Sept. 16, 1952, and by an order of DAVIES, J., made in the Probate, Divorce and Admiralty Division on Mar. 11, 1953, it was ordered that the said documents of Aug. 30, 1940, and Feb. 12, 1952, be admitted to probate as together constituting the will of the testatrix and the same were duly proved by the plaintiffs on May 12, 1953. The said cottages were at the date of the summons occupied by tenants who were entitled to the protection of the
- C** Rent Restrictions Acts and there was no indication that any of the tenants proposed to leave the premises. It appeared from the evidence that the trustees, having made inquiries, learned (i) that the trustees of an association known as the "Retired Missionary Aid Fund", of which Mr. Bell (referred to in the said document of Feb. 12, 1952) was the honorary treasurer and correspondent, requested that the cottage known as "Kidbrook" should be sold and that the
- D** proceeds of sale thereof should be handed over to them; and (ii) that the trustees of an association known as the "Bournemouth Missionary Homes", of which Mr. Scott (also referred to in the document of Feb. 12, 1952) was the honorary secretary, desired to have conveyed to them the cottage known as "Gretna" with a view to collecting the rents and managing the property for the benefit of the said association, and ultimately, when vacant possession of the
- E** cottage could be obtained, to using it as a missionary home.

Myles for the plaintiffs.

Robert S. Lazarus (with him *T. A. C. Burgess*) for the first defendant, the residuary legatee.

Denys B. Buckley for the Attorney-General.

- F** UPJOHN, J., having decided that the gift of the two cottages contained in the second testamentary document dated Feb. 12, 1952, constituted a valid charitable gift, continued: It has been conceded that there is no general or paramount charitable intention and that if the particular charitable purpose of the testatrix cannot be carried out the gift fails and the cottages fall into residue. Both cottages are at present let to tenants who claim the benefit of the
- G** Rent Restrictions Acts, but there is some evidence to the effect that an existing body would be willing to take over one of the cottages, at any rate, and use it for the purpose mentioned in the testamentary document when they can obtain possession. The first defendant, the residuary legatee, is, in those circumstances, entitled to have an inquiry as to the practicability of carrying the gift into effect. There has been a useful discussion before me as to the form which that inquiry
- H** should take.

Reference has been made to the form of inquiry directed in *Re James* (1), which appears to have been followed by WYNN-PARRY, J., in *Re Wright* (2). In neither case does there appear to have been any argument on the form of the inquiry which was in these terms: "to inquire whether it is or will be at any future time practicable to establish a home such as this". I do not think that form is satisfactory. Where a particular purpose is indicated in a will, it cannot be right to extend an inquiry into the possibility of carrying it out to an indefinite time in

the future. Moreover, in many cases it will be impossible to answer the inquiry. There are many cases where funds have been paid into court until it was seen whether or not a certain purpose became practicable. The earliest of such cases is *A.-G. v. Bishop of Chester* (3). Ultimately, the gift was applied for a bishop in Canada. In *Sinnett v. Herbert* (4) LORD HATHERLEY, L.C., expressed doubts, with which I respectfully agree, whether it was right to keep property given on charitable trusts in suspense indefinitely. After referring to the *Bishop of Chester* case (3) he said (7 Ch. App. 240):

A

"... the court did not direct any application of the fund according to the *cy pres* doctrine; it would not allow the fund to be dealt with immediately, but directed the fund to remain in hand for a time with liberty to apply, because it was not known whether any bishop would be established. But that the court would continue to retain it for ever, waiting until a bishop should be appointed, I think is a very doubtful proposition."

B

Counsel for the Attorney-General, basing himself on some wording to be found in the statement of facts in *Re White's Trusts* (5) (33 Ch.D. 451), has suggested a formula which is acceptable to counsel for the first defendant and which seems to me to put the matter on a more satisfactory basis—viz., an inquiry

C

"whether at the date of the death of the testatrix it was practicable to carry the intentions of the testatrix into effect or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time."

If there be no such reasonable prospect, the residuary legatee is entitled to the two cottages. It would not be right to keep the matter in suspense indefinitely, and I direct an inquiry accordingly.

D

Order accordingly.

Solicitors: *Peacock & Goddard*, agents for *Mouring Aldridge & Haydon*, Christchurch, Hants (for the plaintiffs and the first defendant); *Treasury Solicitor*.

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

RAMSDEN v. RAMSDEN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), June 22, 23, 1954.]

Justices—Husband and wife—Procedure—Right to stop case at conclusion of complainant's evidence—Desirability of hearing both sides in matrimonial dispute.

A

The parties were married in August, 1953, the husband being then twenty and the wife eighteen years of age. The wife was then pregnant by the husband. On Nov. 24, 1953, she left the husband. She complained to the justices that the husband had been guilty of persistent cruelty towards her and applied for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. On Jan. 20, 1954, the wife stated in evidence before the justices that the husband had made excessive sexual demands on her, that there had been blows in the course of quarrels arising out of these demands, and that there had been disputes over money. At the conclusion of the evidence of the wife and of her mother, the justices stopped the case, stating as their reasons that the husband's conduct in respect of the sexual demands had not been unreasonable; that, though the acts alleged to be physical cruelty might have taken place, they did not consider they were "of sufficient persistence or of sufficient seriousness to cause any serious consequences" to the wife's health; and that, "having regard to the short duration of the marriage, the youth of the parties . . . and the lack of substance in the allegations", the wife had failed to make out her case. On appeal by the wife it was contended that the justices were under a duty to hear the whole case if there were prima facie evidence in support of the complaint.

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HELD: it was plain on the face of their statement of reasons that the justices were not purporting to rule as a matter of law that the matters complained of could not, if established, amount to persistent cruelty, but were saying that, in their opinion, the wife's case lacked substance and that they did not wish to hear any more of it; it was advisable for justices to hear both sides in a matrimonial dispute, but in the circumstances they were entitled to act as they did; and, accordingly, the appeal would be dismissed.

F

AS TO THE PROCEDURE UNDER THE SUMMARY JURISDICTION ACTS, 1895 to 1949, see HALSBURY, *Hailsham* Edn., Vol. 10, pp. 844-848, paras. 1346-1354; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 715-717, Nos. 6820-6843.

APPEAL by the wife against an order of the Manchester county justices, dated Jan. 20, 1954.

G

W. F. N. Perry for the wife.

Moylan for the husband.

H

LORD MERRIMAN, P., stated the facts and continued: Having heard the wife's evidence, and such evidence as her mother gave, the justices stopped the case without calling on the husband. It is important to ascertain exactly what that means. On the one hand, it may mean that the justices ruled, either at their own instance, or, possibly, on a submission by the husband, that, taking the evidence at its face value, nothing had been shown which could, in law, amount to persistent cruelty. It is not suggested that there was any such submission on the part of the husband, and, therefore, these justices could have made such a ruling only on their own initiative. On the other hand, the decision may mean merely that they had heard the evidence put forward by the wife in support of allegations of persistent cruelty and did not think there was any substance in it.

In the statement of their reasons, the justices, realising, quite accurately, that the wife's main complaint was about the excessive sexual demands of her husband, add: "but here evidence on this point did not satisfy us that his conduct had been unreasonable". With regard to the physical aspect, they say:

"With regard to the acts of physical cruelty, though these may have taken place, we do not consider they were of sufficient persistence or of sufficient seriousness to cause any serious consequences to the [wife's] health, or to cause danger to life or limb . . . We further are of opinion that, having regard to the short duration of the marriage, the youth of the parties (the [wife] is eighteen and the [husband] twenty) and the lack of substance in the allegations, the [wife] has failed to make out her case".

It is plain, I think, on the face of their statement of reasons, that they are not purporting to rule as a matter of law that the matters complained of could not, if established, amount to persistent cruelty. They are saying, literally and impliedly, throughout the whole of their reasons: "We think this case lacks substance, and we do not want to hear any more of it". It is said that they should not do this, that it was their duty to hear the whole case if there were *prima facie* evidence in support of the complaint. I think that proposition is too wide. Although I cannot put my hand on any authority, counsel for the husband is able, from his own experience, to support my recollection, and I am prepared to say on my certain knowledge that this court on more than one occasion has laid down, in similar circumstances, that justices, like a judge or a jury, are perfectly entitled to say: "We have had enough of this case, and we do not think anything of it", without being said to have misdirected themselves in law. But I am confident that at the same time we have coupled with that the advice that it is usually better to wait to hear both sides in matrimonial cases before coming to a conclusion. I still think that advice is sound, because, if justices do decide a case out of hand on the complainant's case, it is argued, as in the present appeal, that they have ruled, as a matter of law, that there was no case to answer. At any rate, it is liable to give rise to more difficulties than it avoids.

I repeat, however, that the justices have a perfect right to say, if they think fit, that there is nothing in the case and that they do not want to hear any more of it, and it would be wrong for this court to lay down any rule to the contrary of that proposition. I am satisfied beyond any doubt that that is what the justices have done in the present case, and, so far as I am capable of judging the matter from the adequate note, I can see no reason why they should not have come to that conclusion. In these circumstances it seems to me that this appeal must fail.

DAVIES, J.: I agree.

Appeal dismissed.

Solicitors: *Taylor, Jelf & Co.*, agents for *Frank Douglas*, Manchester (for the wife); *Frank, Oldham, Crowder & Cash*, agents for *Alan Ashcroft*, Eccles (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

SOLOMONS v. R. GERTZENSTEIN, LTD. AND OTHERS.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), May 20, 21, 24, 25, 26, June 30, 1954.]

Statutory Duty—Breach—Competence of civil action at suit of injured person—Failure to maintain fire escape in good order—Employee on premises injured in fire—London Building Act, 1930 (c. clviii), s. 5—London Building Acts (Amendment) Act, 1939 (c. xcvi), s. 33 (1), s. 133 (2).

Mortgage—Receiver—Whether “owner” within London Building Act, 1930 (c. clviii), s. 5 and London Building Acts (Amendment) Act, 1939 (c. xcvi), s. 33 (1), s. 133.

The plaintiff was employed by a manufacturing furrier who occupied premises on the second floor of a building. The second defendants, who were the lessees of the whole building under the head-lease, had mortgaged their interest in the premises to a building society by a mortgage which incorporated the statutory power to appoint a receiver. The third defendant was a receiver appointed by the society under the mortgage, and as such was the agent of the second defendants. The third defendant had appointed a manager of the premises. On Nov. 10, 1950, a fire broke out on the premises and the plaintiff, who was on the third floor, being unable to escape by the stairs, climbed out of a window at the back of the premises and was injured. There was a trap-door on the third floor leading to the roof of the premises and a ladder with hooks which could be fixed into holes so as to give access to the trap-door, which had been constructed in 1925 on the order of the London County Council to comply with the requirements of the London Building Acts (Amendment) Act, 1905, regarding the provision of adequate means of escape in case of fire, but at the time of the fire the ladder was not in position and was lying in a passage way on the third floor. In an action for negligence and breach of the statutory duty imposed by s. 133 (2) of the London Building Acts (Amendment) Act, 1939, on owners of premises to maintain means of escape from fire in good condition and efficient working order the plaintiff contended that the third defendant was the “owner” of the premises within that sub-section. As regards the liability of the third defendant,

HELD: (i) the third defendant, being an agent, was not the “owner” of the premises within s. 133 (2) of the Act of 1939, as the definition of “owner” applicable for the purposes of that enactment was the definition prescribed by s. 5 of the London Building Act, 1930, which did not extend to agents, and was not that prescribed by s. 33 (1) of the Act of 1939 which did include an agent; the third defendant was not, therefore, liable to maintain means of escape from fire in good condition and efficient working order within s. 133 (2) of the Act of 1939.

(ii) the plaintiff had failed to show that the means of escape from fire were not in good condition or efficient working order and, although the efficiency of the means of escape might have been impaired, the third defendant, whether directly or because of the inaction of the manager appointed by him, was not responsible for such impairment; and, therefore, the plaintiff failed to establish any breach of s. 133 (2) of the Act of 1939.

HELD, further (SOMERVELL, L.J., dissenting): the duty imposed by s. 133 of the Act of 1939 to keep and maintain means of escape in case of fire was imposed principally for the benefit of a particular, ascertainable class, viz., persons in the building, and those persons had a right of action for a breach of statutory duty notwithstanding that penalties were also imposed for such breaches.

Groves v. Lord Wimborne ([1898] 2 Q.B. 402), applied.

Decision of LORD GODDARD, C.J. ([1954] 1 All E.R. 1008), reversed.

FOR THE LONDON BUILDING ACTS (AMENDMENT) ACT, 1939, s. 33 and s. 133, see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 1214 and 1279.

Cases referred to:

- (1) *R. v. Minister of Housing & Local Government. Ex p. London Corpn.*, [1954] 1 All E.R. 88; [1954] 1 Q.B. 140; 118 J.P. 88.
- (2) *Couch v. Steel*, (1854), 3 E. & B. 402; 23 L.J.Q.B. 121; 22 L.T.O.S. 271; 118 E.R. 1193; 42 Digest 750, 1739a.
- (3) *Anon.*, (1703), 6 Mod. Rep. 27, Case 32 (87 E.R. 791); sub nom. *Ever v. Jones*, 2 Ld. Raym. 934 (92 E.R. 124); 2 Salk. 415 (91 E.R. 360); Holt, K.B. 419 (90 E.R. 1131); 42 Digest 681, 937.
- (4) *Doc d. Rochester (Bp.) v. Bridges*, (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 31 Digest, Replacement, 321, 4569.
- (5) *Pasmare v. Oswaldtwistle Urban Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 42 Digest 752, 1758.
- (6) *Cutler v. Wardsworth Stadium, Ltd.*, [1949] 1 All E.R. 544; [1949] A.C. 398; [1949] L.J.R. 824; 2nd Digest Supp.
- (7) *Black v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 1912 S.C. (H.L.) 33; 81 L.J.P.C. 97; 106 L.T. 161; 5 B.W.C.C. 217; 34 Digest 218, 1809.
- (8) *Graves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 42 Digest 759, 1858.
- (9) *Monk v. Warbey*, [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; Digest Supp.
- (10) *Atkinson v. Newcastle Waterworks Co.*, (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 42 J.P. 183; 42 Digest 759, 1850.
- (11) *Britannic Merthyr Coal Co., Ltd. v. David*, [1910] A.C. 74; 79 L.J.K.B. 153; 101 L.T. 833; 34 Digest 740, 1168.
- (12) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; 93 L.J.K.B. 5; 129 L.T. 777; 42 Digest 870, 197.
- (13) *Biddle v. Truor Engineering Co., Ltd.*, [1951] 2 All E.R. 835; [1952] 1 K.B. 101; 3rd Digest Supp.
- (14) *Dawson & Co. v. Bingley Urban Council*, [1911] 2 K.B. 149; 80 L.J.K.B. 842; 104 L.T. 659; 75 J.P. 289; 42 Digest 753, 1772.
- (15) *Gorris v. Scott*, (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 42 Digest 759, 1853.
- (16) *St. Helen's Corpn. v. Kirkham*, (1885), 16 Q.B.D. 403; 50 J.P. 647; 26 Digest 551, 2468.
- (17) *Britton v. Great Western Cotton Co.*, (1872), L.R. 7 Exch. 130; 41 L.J.Ex. 99; 27 L.T. 125; 36 Digest, Replacement, 158, 833.
- (18) *Read v. Croydon Corpn.*, [1938] 4 All E.R. 631; 108 L.J.K.B. 72; 160 L.T. 176; 103 J.P. 25; Digest Supp.
- (19) *Lavender v. Diamints, Ltd.*, [1949] 1 All E.R. 532; [1949] 1 K.B. 585; [1949] L.J.R. 970; 2nd Digest Supp.
- (20) *Square v. Model Farm Dairies (Bournemouth), Ltd.*, [1939] 1 All E.R. 259; [1939] 2 K.B. 365; 108 L.J.K.B. 198; 160 L.T. 165; Digest Supp.
- (21) *Badham v. Lambs, Ltd.*, [1945] 2 All E.R. 295; [1946] K.B. 45; 115 L.J.K.B. 180; 173 L.T. 139; 2nd Digest Supp.
- (22) *Clarke v. Brims*, [1947] 1 All E.R. 242; [1947] K.B. 497; [1947] L.J.R. 853; 2nd Digest Supp.

APPEAL by the third defendant from an order of LORD GODDARD, C.J., dated Mar. 11, 1954, and reported [1954] 1 All E.R. 1008.

The plaintiff was employed by a manufacturing furrier who occupied premises on the second floor of No. 36, Gerrard Street, Soho, London, W.1. The first defendants occupied premises on the ground and first floors of the building. There were several other tenants carrying on various trades on the premises which were subject to the Factory Acts. The second defendants were the lessees of the building under a head-lease and were entitled to the reversion of the various

tenancies created including those of the plaintiff and the first defendants. They had mortgaged their interest to the Skipton Building Society and as they were in arrears with their payments of interest, the society had appointed the third defendant as receiver of the income, rents and profits of the premises. By virtue of the Law of Property Act, 1925, s. 109, the third defendant, as receiver, was deemed to be the agent of the society. On the third floor of the premises there was a trap-door leading to the roof of the premises and a ladder with hooks which could be fixed into holes so as to give access to the trap-door. The trap-door had been constructed in 1925 as a result of the service of a notice by the London County Council under s. 12 of the London Building Acts (Amendment) Act, 1905, which required the provision of adequate means of escape in case of fire, and the work had been completed to the satisfaction of the district surveyor. On Nov. 10, 1950, the ladder was not in position but was lying in a passage way on the third floor; a fire broke out on the premises and the plaintiff, who was on the third floor, being unable to escape by the stairs, climbed out of a window at the back of the premises and was injured. In an action for negligence and breach of s. 133 (2) of the London Building Acts (Amendment) Act, 1939, LORD GODDARD, C.J., found as a fact that the fire was an accidental fire and was not caused by the negligence of any of the defendants, and held that (i) by reason of the escape ladder not being in position there had been a breach by the "owner" of the premises of his duty to maintain means of escape in an efficient condition under the London Building Acts (Amendment) Act, 1939, s. 133; the third defendant was the "owner" within s. 33 (1) and s. 133 (2); and, therefore, he was responsible for the default; and that (ii) where a duty imposed by an Act of Parliament is intended for the benefit of the public generally a right of action is not given to an individual who may suffer an injury from its breach, but where the duty is imposed for the benefit of a particular, ascertainable class, such as workers in a building, any member of that class injured as a result of the breach had a right of action, and, therefore, the plaintiff had a right of action against the third defendant for damages for breach of his duty under s. 133 of the Act and against the second defendants, who were liable for his acts or defaults.

Marven Everett, Q.C., and Lester for the third defendant.

Lord Hailsham, Q.C., and Perrett for the plaintiff.

Cur. adv. vult.

June 30. The following judgments were read.

SOMERVELL, L.J., stated the facts and continued: There is one point which can be shortly disposed of and that is as to causation. If the fact that the ladder was in the passage constituted a breach, I think on the facts as found it clearly must be treated as the cause of the plaintiff's injuries. He sought to escape by a window, his arm got caught in the curve of a pipe, a bone was broken and he was suspended for some time.

We have to consider in this case the London Building Act, 1930, and the London Building Acts (Amendment) Act, 1939. The latter Act is by s. 1 to be read and construed as one with the former. Part V, s. 33 to s. 43, of the Act of 1939, deals with means of escape in case of fire. "Owner" is defined in s. 33 (1) as follows:

"In this Part of this Act unless the context otherwise requires the following expressions have the meanings hereby respectively assigned to them: . . . 'owner' in relation to any premises means the person for the time being receiving the rackrent of the premises whether on his own account or as agent or trustee for any other person or who would so receive it if the premises were let at a rackrent."

Section 34 provides that new buildings of certain categories are to be provided with means of escape in accordance with plans approved by the council. By

s. 34 (5) where an offence has been committed the court, in addition to imposing a fine, may prohibit the occupation of the building until, presumably, means of escape as required are provided. Section 35 deals with old buildings and provides that the council may serve a notice if in their opinion such a building is not provided with proper and safe means of escape. In this case, also, if the notice is not complied with the court may prohibit the occupation of the building. Section 36 deals with projecting shops and s. 37 is the successor of s. 12 of the London Building Acts (Amendment) Act, 1905. The maintenance of means of escape, etc., is not dealt with in Part V but in Part XII which is headed "Miscellaneous". Section 133 (1) is as follows:

"All arrangements and safeguards for lessening danger from fire provided in pursuance of the provisions of the London Building Acts or of any bye-laws made in pursuance of these Acts shall be kept and maintained in good condition and repair and in efficient working order by the owner of the building and no person shall do or permit or suffer to be done anything to impair the efficiency of any such safeguards or arrangements."

Sub-section (2) contains similar provisions with regard to all means of escape and safeguards. One of the questions which arises is whether the definition of "owner" in s. 33 (1) which is expressly limited to Part V is to be read as applying to s. 133. Section 141 which deals with the power of the owner and others to enter and execute work is relevant on this argument. Section 141 (3) provides expressly that in that section the expression "owner" in relation to any requirement in virtue of any of the provisions of Part V has the same meaning as in that Part of the Act.

It is now possible to formulate the various issues that were argued before us: (i) Is a receiver appointed by a mortgagee within the Law of Property Act, 1925, s. 109, an agent within the definition of s. 33 (1)? (ii) Does the definition in s. 33 (1) apply to the word "owner" where it appears in s. 133? (iii) If the third defendant was an owner within s. 133 did the plaintiff establish that he had failed to keep and maintain in good condition and repair and in efficient working order arrangements and safeguards for lessening danger from fire or means of escape provided in pursuance of the provisions of the London Building Acts, or, alternatively, was he a person who did or permitted or suffered to be done anything to impair the efficiency of any such safeguards or arrangements? (iv) Does a breach of s. 133 give a right to the individual to bring a civil action for damages? I have posed this question as applicable to s. 133 because that is the section relied on, but it is, I think, clear that one has in the first instance to consider whether such a right is conferred by Part V.

I have no doubt that a receiver appointed by a mortgagee is within the definition in s. 33 (1). He collects the rents as agent for the mortgagor. It was pointed out that he would have no power to incur expenditure on matters for which obligations are placed on "owners". The same would apply to other rent collectors. I ventured in *R. v. Minister of Housing & Local Government, Ex p. London Corp.* (1), to express a hope that this definition which occurs in many Acts would some day be re-considered. I hope if this is done the inclusion simpliciter of agents will be considered. One can understand the necessity, for administrative purposes, of bringing in the rent collector if, as was not infrequent in old days, the identity of the landlord was unknown. When it is known it seems illogical that the obligations and the penalties should descend on an agent. On the question of its application to s. 133, I do not think the Lord Chief Justice's attention was drawn to s. 141. Where there are ambiguities or obscurities I take, I hope, a broad view in construing statutes, but there is here no ambiguity, nor is it possible, I think, to imagine an omission per incuriam. As the Act of 1939 is to be read as one with the Act of 1930 and the latter includes a general interpretation section this will apply throughout

unless excluded or modified as it is by s. 33. The definition in s. 5 of the Act of 1930 is as follows:

A "In this Act save as is otherwise expressly provided therein and unless the context otherwise requires the following expressions have the meanings hereby respectively assigned to them (that is to say): . . . 'owner' includes every person in possession or receipt either of the whole or of any part of the rent or profits of any land or tenement or in the occupation of any land or tenement otherwise than as a tenant from year to year or for any less term or as tenant at will."

B The definition in s. 33 (1) of the Act of 1939 is expressly limited to Part V of that Act. One might have thought that it has not been extended to the similar subject-matter of s. 133 per incuriam but for its express extension in s. 141. It was then submitted that the receiver was within s. 5 of the Act of 1930. I think not. One is faced with a general and a special definition. The latter expressly includes an agent and the former does not. One could not possibly in a partly penal statute imply an agent into the former definition. If a statute is plain, one's not to reason why, but it may be that the wide obligations placed on a "person" in s. 133 (1) made it unnecessary to bring in agents through the definition.

C On the question whether there was a breach, the difficulty arises from the doubt as to what the district surveyor required in 1925. In particular, did he make any requirement as to where the ladder should be kept? There was some evidence that, if the ladder was in position, to some extent it blocked the passage. It would seem sensible, if it were not practicable for it to be kept under or by the trap-door, for there to be a notice saying where it was to be found. But was the failure to do either of these things a criminal offence? Was there under the initial approval any condition as to the whereabouts of the ladder? The first suggestion is that it was a failure within s. 133 (2) to keep

E "in good condition . . . [or] in efficient working order . . . the means of escape safeguards or arrangements."

F That is the obligation placed on the owner. I cannot think these words are apt to describe what happened here. In ordinary cases, a landlord who, in accordance with the district surveyor's requirements, had provided a separate ladder, could not, of course, control the movement of it by occupants. Their action would fall under the second part of the sub-section. The hypothetical occupant could be a person who had impaired the efficiency of the arrangements. This pre-supposes, of course, that the arrangements involved the ladder not being kept in the passage. I am not too clear about that. If one assumes that, the question is: did the third defendant do or permit or suffer to be done anything to impair the efficiency of the safeguards or arrangements? If the third defendant had acted merely as a receiver, there could be no such suggestion. G He did more, he appointed his brother who acted more or less as if he was managing the property. He gave evidence, which was not, I think, accepted, as to seeing the ladder in position. Assuming that the brother must be treated as acting for the third defendant as receiver, I think his action or inaction falls short of an offence. There was no satisfactory evidence as to who put the ladder in the passage, but it was not, in my opinion, established that the third defendant was responsible within the sub-section (s. 133 (2)). H I arrive at this conclusion with some hesitation as the learned Lord Chief Justice saw the premises. We are dealing with a penal statute and doubts must be resolved in favour of the "accused".

The final question is whether an offence under the statute confers a civil right of action for damages on a person who suffers, as did the plaintiff here, by the commission of the offence. On the view I have formed on the earlier points it is not necessary to decide this, but as the judgment below dealt with

it I think this court should deal with it. There have been Acts which expressly confer a right of action for a penalty or damages on a person aggrieved by its breach. There have been Acts which impose a duty without any sanction. We are concerned with neither of them, but with Acts which (i) contain provisions which protect members of the public or some members in certain circumstances, (ii) contain their own sanction by penalties or otherwise for the enforcement of these provisions. The courts have held that, under the common law, a person aggrieved by a breach of certain of such Acts has a right to sue for damages, although the Act itself provides only for a criminal sanction. It is unnecessary to refer to the sections in the Act of 1939 prescribing the money penalties, as I do not think their amount assists in deciding the question. Attempts to lay down a principle have, as it seems to me, been unsuccessful. In *Couch v. Steel* (2) a sailor suffered in health from the absence on board of medicines as laid down by 7 & 8 Vict., c. 112, s. 18. The Act imposed a penalty which could be sued for by a common informer. If successful, he retained part and part went to the Seamen's Hospital Society. If there had been no penalty, it was plain that the action would lie, the enactment being for the benefit of sailors. This principle was enunciated as long ago as 1703 by HOLT, C.J., in *Anon.* (3), where he said (6 Mod. Rep. 27, Case 32):

" . . . it would be a fine thing to make a law by which one has a right, but no remedy but in equity . . . "

The public wrong was (the court held) dealt with by the penalty, but there was a special and particular damage as well as the public damage sustained by the plaintiff. The plaintiff, therefore, could recover and it was suggested that the plaintiff's position was, in effect, the same as if there had been no penalty, as the penalty was not claimable by him. This principle has not been followed. LORD TENTERDEN [in *Doe d. Rochester (Bp.) v. Bridges* (4)] in a passage approved by the EARL OF HALSBURY, L.C., said (1 B. & Ad. 859):

" . . . where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner ":

see *Pasmore v. Oswaldtwistle Urban Council* (5) ([1898] A.C. 394). This is a different approach to that suggested in *Couch v. Steel* (2). LORD TENTERDEN'S dictum was approved by LORD SIMONDS in *Culler v. Wandsworth Stadium, Ltd.* (6) ([1949] 1 All E.R. 548). One may contrast with this the statement by LORD KINNEAR in *Black v. Fife Coal Co., Ltd.* (7) ([1912] A.C. 165):

" But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention. Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the *prima facie* right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability."

In *Groves v. Lord Wimborne* (8), the case which decided that a workman could get damages for breach of a provision of the Factory Acts, it is suggested that, for there to be a right to damages, the Act must be in the interest of a particular class of persons (as in the statement I have already quoted from LORD KINNEAR) such as those working in a factory ([1898] 2 Q.B. 407). It is difficult to rely on this as a guide in the light of the decision in *Monk v. Warbey* (9). In that case the owner of a car in breach of the Road Traffic Act, 1930, had permitted his car to be used by a person uninsured against third-party risks. The uninsured driver damaged the plaintiff by negligent driving and the plaintiff recovered against the owner notwithstanding that the offence carried a penalty. There would seem clearly here no particular class. Users of highways include nearly everyone and it would be absurd to describe as a class those in the vicinity of an uninsured and negligent driver. On the other hand, in *Atkinson*

v. *Newcastle Waterworks Co.* (10), the defendants in breach of their statutory duty had failed to keep the water in fire plug pipes at or over the prescribed pressure. This was an obligation clearly imposed for the protection of a class, those whose property was within hose range of the pipe. The plaintiff was a member of the class and as a result of the failure to maintain the statutory pressure his premises were burnt down. This court, declining to follow the principle suggested in *Couch v. Steel* (2), decided that he had no right of action.

A If one passes from attempts to find a principle to what has been decided, the courts clearly lean in favour of conferring on workmen a right to claim damages for breaches of statutory duty imposed on their employers or the occupiers of factories in which they work: *Groves v. Lord Wimborne* (8), *Black v. Fife Coal Co., Ltd.* (7), *Britannic Merthyr Coal Co., Ltd. v. David* (11). Purchasers from vendors on whom statutory obligations have been placed are less favoured: *Phillips v. Britannia Hygienic Laundry Co.* (12), *Biddle v. Trucox Engineering Co., Ltd.* (13). In the former case, ATKIN, L.J., formulated the question in these words ([1923] 2 K.B. 842):

C "Therefore the question is whether these regulations, viewed in the circumstances in which they were made and to which they relate, were intended to impose a duty which is a public duty only or whether they were intended, in addition to the public duty, to impose a duty enforceable by an individual aggrieved."

I think this is the only approach which the decisions justify. The regulations in question made it an offence to sell a car in such a condition as to be likely to cause danger on the road. An offence was committed, but the buyer, although injured, had no right of action. I have already referred to *Atkinson's case* (10).

D There was another case dealing with fire-plugs. In *Dawson & Co. v. Bingley Urban Council* (14), the defendants, in breach of their statutory duty, had failed to denote the situation of a fire-plug. In fact, there was a notice, but in the wrong place. As a result of the delay so caused, damage by fire was done and the plaintiffs recovered. This might seem difficult to distinguish

E from *Atkinson's case* (10). KENNEDY, L.J., having held that the act was a misfeasance and not a nonfeasance, based his decision, in part at any rate, on the fact that the Act in question, the Public Health Act, 1875, contained no specific provision for the recovery of penalties. I hope these citations are sufficient to establish that there is no rule of thumb formula and one must,

F as ATKIN, L.J., said ([1923] 2 K.B. 842), consider the Act. The provisions, like those in *Atkinson's case* (10), are, of course, to prevent or lessen damage and injury by fire. I would myself have read Part V of the Act of 1939 and similar provisions as intended to confer powers on the council rather than rights on individuals. This view is, I think, supported by the definition. It is, no doubt, as I have said, reasonable that a rent receiver other than the landlord

G should be treated as owner for operating the machinery of the Act. I find it impossible to imply an intention that rent receivers should be liable in damages. If one passes from agents to landlords who collect their own rents or owner-occupiers, one is still in a different area quoad this issue from, say, employers of labour or occupiers of factories. If one considers s. 133 (1), the liability would fall on any person who permitted or suffered to be done anything to impair the efficiency of the safeguards. This would be potentially a miscellaneous

H group, which might include any resident in the premises. The character of the potential defendants supports my prima facie view. I think it is also supported by the fact, to which I have already referred, that there is in certain cases in addition to penalties the further sanction of prohibiting the occupation of the building. Reference was made to the Factories Act, 1937, s. 101, dealing with tenement factories as a section under which an "owner" similarly defined would be held liable. The obligations of the Act in that case are primarily placed on the owner, not the occupier. I will assume that an owner would be held

hable at common law, but, apart from the difference in subject-matter, there is an express provision, not to be found in the Act which we are considering, that quoad certain obligations the owner is not to be responsible for matters outside his control. I do not think that that section assists the plaintiff. I, therefore, am of opinion that the plaintiff would not have had a cause of action for damages assuming that he had established a breach of s. 133 (2). I, therefore, would allow the appeal.

BIRKETT, L.J., stated the facts and continued: The statutory duty alleged is contained in s. 133 (2) of the London Building Acts (Amendment) Act, 1939. My Lord has already read sub-s. (1), and I will not read it again, but I will read sub-s. (2):

"All means of escape in case of fire and all safeguards to prevent the spread of fire and any arrangements in connection therewith provided in pursuance of the provisions of Part V . . . of this Act or otherwise shall be kept and maintained in good condition and repair and in efficient working order by the owner of the building and no person shall do or permit or suffer to be done anything to impair the efficiency of any such means of escape safeguards or arrangements."

Part V of the Act, there referred to, is headed "Means of escape in case of fire", and deals in great detail with the duties in that regard laid on the owner of the buildings. "Owner" is defined in s. 33 (1) as

" . . . the person for the time being receiving the rackrent of the premises whether on his own account or as agent or trustee for any other person or who would so receive it if the premises were let at a rackrent ";

and for the purposes of Part V (save for the point raised by **ROMER, L.J.**, in the course of the argument and which had not been raised at the trial and was not relied on) there seems to be little doubt that the third defendant was the "owner" of the premises for the purposes of Part V, and must, therefore, fulfil the duties and obligations laid on him in Part V. But it must be remembered that he is not charged in this action with any failure of statutory duty under Part V. The failure of statutory duty alleged is in Part XII of the Act in failing to fulfil the duties imposed by s. 133 (2) to which I have already referred.

Much, therefore, turns on this question: Does the definition of "owner" in s. 33 (1) of Part V apply to the "owner" in s. 133 (2) of Part XII? It is true that s. 133 (2) begins with the words which are used for the heading of Part V " [All] means of escape in case of fire ", and it is very natural to think that when the section goes on to impose on "the owner of the building" the duty to maintain the means of escape in case of fire "in good condition and repair and in efficient working order" that the "owner" on whom the duty is laid to provide the means of escape in case of fire should be the same "owner" on whom the duty is laid of maintaining the means of escape. But a consideration of s. 141 of the Act shows that the "owner" for the purposes of Part V is not the same "owner" for the purposes of s. 133 (2) in Part XII. Section 141 (1) (a) which gives power to the "owner" to enter the building for all the purposes of Part V, including, of course, the purpose of providing the means of escape in case of fire, also gives power to enter for the purpose of maintaining the means of escape as laid down in s. 133. But by s. 141 (3) it is provided:

"In this section the expression 'owner' in relation to any requirement in virtue of any of the provisions of Part V (Means of escape in case of fire) of this Act has the same meaning as in that Part of this Act."

This would seem to indicate that "owner" in s. 133 (2) was not intended to have the same meaning as in s. 33, Part V of the Act, and the definition of "owner" for the purposes of s. 133 must be found elsewhere.

A Section 1 of the Act of 1939 directs that the Act is to be read as one with the London Building Acts, 1930 and 1935, and s. 5 of the Act of 1930 contains a definition of "owner" from which the words "or as agent or trustee for any other person" are omitted. In view of the wording of s. 141 (3) of the Act of 1939, the definition of "owner" for the purposes of s. 133 (2) is, I think, to be found in s. 5 of the Act of 1930. If that is right, it has the effect of releasing the third defendant from the statutory duty to maintain the means of escape from fire, and as that was the only duty of which he was alleged to be in breach, the action must fail against him. But, in any event, obscure and unsatisfactory as the position of "owner" may possibly be thought to be, if one is to arrive at the meaning of "owner" for the purposes of s. 133 (2) in the way I have described, I do not think that any breach of s. 133 (2) was satisfactorily established against the third defendant or at all. The Lord Chief Justice thought that the receiver was the "owner" within Part V and Part XII of the Act of 1939, as both s. 33 and s. 133 were dealing with the same subject-matter, viz., means of escape in case of fire; and as I have said it was natural to think so if s. 141 (3) is not kept in mind. In his judgment the Lord Chief Justice dealt at length with the circumstances in which the means of escape from fire were installed and, among other things, he said ([1954] 1 All E.R. 1009):

C "It seems that in or about February, 1925, which was long before either the second or third defendants had anything to do with the premises, a notice had been served by the London County Council under s. 12 of the London Building Acts (Amendment) Act, 1905, requiring the owners of the premises to comply with the section to the satisfaction of the district surveyor. The evidence on this point was given by an officer of the London County Council who had a note of the service of this notice, but no copy of it was produced. He said, however, that this was what the notice would require, that such work as was done was completed in April, 1925, and there was nothing to show that the district surveyor had not been satisfied. Under that section the county council could require that there should be a trap-door in a suitable position constructed in accordance with the provisions of the section, which I need not set out in full, with a fixed or hinged step-ladder leading to the roof, or other proper means of access to the roof. It was not suggested by either side that there had ever been a fixed or hinged step-ladder provided, but there had been a ladder with hooks on it which could be fixed on to the trap-door. Having no other evidence than that which I have set out, I must assume that this was regarded by the district surveyor as an adequate means of access to the trap-door and that he was satisfied with the ladder. Another witness from the London County Council said that he had surveyed the property about six months before the fire and did so because the factory inspector had called the attention of the council to the premises. He had, apparently, prepared some survey drawings, and he said in his evidence that at the time of his survey there was no ladder giving access to the trap-door . . . In fact, I find that there was an adequate ladder with hooks provided and kept on the premises, but the ladder was not always—and, as I find, only seldom—kept in position".

H The means of escape was in fact a trap-door and ladder and the breach of s. 133 (2) found by the Lord Chief Justice was that the ladder was not kept in position to be readily available. It is true that the Lord Chief Justice found that

"neither safeguards nor means of escape were kept in good condition or efficient working order",

but it would seem that what the Lord Chief Justice in fact found came more appropriately within the closing words of s. 133 (1):

" . . . no person shall do or permit or suffer to be done anything to impair the efficiency of any such safeguards or arrangements ".

There was no evidence against the receiver, the third defendant, on this matter. I do not think it was proved that the means of escape which had been provided were not in good condition and repair and in efficient working order within the meaning of the section, whatever might be said about the ladder not being in position at the time of the fire.

On the final point in the appeal I am of opinion that the Lord Chief Justice was right in holding that for a breach of the statutory duty imposed by the Act the plaintiff would have a right to sue for damages. Although it does not affect the result in the present case, I should like to state my view in a sentence or two, much as I regret differing from the judgment of my Lord on this point. It is said that this is the first case under the London Building Acts where it has been suggested that a civil action for damages will lie. In the case of *Groves v. Lord Wimborne* (8) it was held that an action would lie against an employer in respect of personal injuries caused to a workman employed in a factory through a breach of the employer's duty to maintain fencing for dangerous machinery imposed on the employer by s. 5 (4) of the Factory and Workshop Act, 1878. A. L. SMITH, L.J., said ([1898] 2 Q.B. 407):

"In the present case it is admitted that machinery on the defendant's premises which came within these provisions was not fenced as required by the Act, and that injury was thereby occasioned to the plaintiff, a boy employed on the works. On proof of a breach of this statutory duty imposed on the defendant, and injury resulting to the plaintiff therefrom, *prima facie* the plaintiff has a good cause of action. I leave out of the question for a moment the provisions of s. 81, s. 82, and s. 86 of the Act. Could it be doubted that, if s. 5 stood alone, and no fine were provided by the Act for contravention of its provisions, a person injured by a breach of the absolute and unqualified duty imposed by that section would have a cause of action in respect of that breach? Clearly it could not be doubted. That being so, unless it appears from the whole 'purview' of the Act, to use the language of LORD CAIRNS in the case of *Atkinson v. Newcastle Waterworks Co.* (10) that it was the intention of the legislature that the only remedy for breach of the statutory duty should be by proceeding for the fine imposed by s. 82, it follows that, upon proof of a breach of that duty by the employer and injury thereby occasioned to the workman, a cause of action is established."

In considering the "purview" of the Act the learned lord justice continued (*ibid.*):

"In dealing with the question whether this was the intention of the legislature, it is material, as KELLY, C.B., pointed out in giving judgment in the case of *Gorris v. Scott* (15), to consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large, or in those of a particular class of persons. The Act now in question, as I have said, was clearly passed in favour of workers employed in factories and workshops, and to compel their employers to perform certain statutory duties for their protection and benefit."

VAUGHAN WILLIAMS, L.J., said in the same case (*ibid.*, 417):

"In each case one must look at the whole of the statute, and gather from all its provisions the answer to the question whether that was the intention [i.e., that the remedy provided by the statute should be the only remedy]". It is said with truth that the provisions of the London Building Acts are designed to secure the safety of the City of London and all its inhabitants from the dangers of fire, and the detailed provisions of the Acts make this design very clear. But that purpose is achieved by laying on individual owners the duties imposed by the Acts. Those duties are to provide means of escape from fire and to maintain such means of escape in efficient working order so that the persons in that particular building are protected. I agree with the Lord Chief Justice that the

duty imposed in the present case was imposed for the benefit of a particular ascertainable class, viz., the persons in the building, and those persons have a right of action for a breach of statutory duty, notwithstanding that penalties are also provided for breaches. I would, therefore, allow this appeal.

ROMER, L.J.: This case has throughout been argued on the footing that the third defendant, who was appointed by the mortgagees of 36, Gerrard Street, as receiver, was the person who was "receiving the rackrent of the premises" within the meaning of the London Building Acts (Amendment) Act, 1939, s. 33 (1). I, accordingly, propose to deal with the position on that footing although it might, I suppose, have been contended that all that the third defendant was receiving at the time of the fire were the rents of certain sub-tenancies which the mortgagors had granted and that this is different from receiving the rackrent of the premises as a whole. On the assumption, then, that the third defendant was in fact receiving the rackrent of 36, Gerrard Street, I have no doubt but that he was the "owner" of the premises within s. 33 notwithstanding his purely representative capacity: see *St. Helen's Corpn. v. Kirkham* (16). However, the definition of "owner" in s. 33 only applies to Part V of the Act and the section which imposes the statutory obligations which the third defendant is charged with failing to perform is s. 133 (2) and that section is not within Part V of the Act but within Part XII. The question, therefore, is as to the meaning of "the owner of the building" in s. 133 (2) and, in particular, whether it includes a person who is receiving the rent of the premises as agent for and on behalf of a third person. The Lord Chief Justice came to the conclusion that as Part V of the Act is dealing with the same subject-matter as s. 133, i.e., safeguards against fires, it would be sensible to assume that in each case the legislature had the same person in mind as "owner". I would respectfully adopt this assumption, which certainly accords with one's sense of the probable, were it not for s. 141 to which I am not sure that the Lord Chief Justice's attention was directed. Section 141 (1) (a) empowers the "owner" of a building to enter it for the purpose of discharging the obligations imposed both by Part V of the Act and by s. 133, and if the section had ended there an inference might well arise that the power of entry was being conferred on one and the same person and that that person was being treated as responsible for both sets of obligations. However, by sub-s. (3) it is provided that in s. 141 the expression "owner" in relation to any requirement in virtue of any of the provisions of Part V of the Act has the same meaning as in that Part, i.e., the meaning attributed to it by s. 33. This provision shows almost beyond doubt, I think, that the expression "owner" in relation to any requirement in virtue of s. 133 of the Act was to have a different meaning and that the draftsman was confirming, as it were, the initial qualification in s. 33 (1) that the definitions therein contained were applicable only to Part V. If, then, the "owner" under s. 133 is excluded from the definition of that term in s. 33, he has to be ascertained in some other way: and having regard to s. 1 of the Act, resort must be had, in my opinion, to the definition section in the London Building Act, 1930, s. 5. The expression "owner" is therein defined as including

"every person in possession or receipt either of the whole or of any part of the rent or profits of any land or tenement or in the occupation of any land or tenement otherwise than as a tenant from year to year or for any less term or as a tenant at will".

This language, if taken alone, might be wide enough to include an agent, for the expressions possession, receipt and occupation are not qualified by the word "beneficial". Nevertheless, it is clear, to my mind, that this definition, in its application to s. 133 of the Act of 1939, does not comprehend a person who receives rent merely as an agent; for when there are two definitions of the same word applicable exclusively to different parts of an Act it would be against all

canons of construction to introduce into one a characteristic which is only to be found in the other.

Accordingly, the third defendant, as receiver, was not, in my judgment, the person on whom, as the owner of 36, Gerrard Street, s. 133 (2) of the Act of 1939 imposed an obligation to keep the means of escape in case of fire in good condition and repair and in efficient working order. Even if he had been, he was not, in my opinion, in breach of either of these statutory duties. I say this for two reasons. First, there was not at the time when the fire broke out anything wrong with the condition of the trap-door or ladder which constituted the means of escape from the building and there was nothing in the evidence to show the contrary. Secondly, I cannot accept the argument that the trap and ladder were not "in efficient working order". I think myself that this expression is applicable principally to fire escapes having mechanism of some kind which, if faulty, might nullify the effectiveness of the apparatus. Assuming, however, that it could be applied to a trap-door and ladder in the sense that they would not be in efficient working order if the trap became stuck and would not open or if a hook or rungs were missing from the ladder, nothing of that kind was suggested in the present case. The trap and ladder would have worked effectively enough if they had been joined together; the complaint is that the ladder was not, having regard to its weight, kept sufficiently adjacent to the trap-door and that its whereabouts was not made sufficiently obvious. This complaint, if justified (as I think on the whole it is), would not, in my opinion, support a charge of failing to keep the means of escape in efficient working order. It would, however, show that the efficiency of the means of escape had been impaired. A prohibition against the doing or permitting or suffering to be done any such impairment is imposed by s. 133 (2) on everyone and the question, therefore, on this aspect of the case is whether the third defendant infringed this prohibition. As to this, it was not proved that he himself was at any material time on the premises or had any knowledge of where the ladder was kept. He had, however, in pursuance of some authority which has never been clearly explained, purported to appoint his brother to "manage" the property and the brother was constantly in and out of the premises in pursuance of the appointment. Whether his activities were known to, or had the approval of, either the mortgagors or the mortgagees, I do not really know, and his position in the matter seems to have been somewhat obscure. Assuming, however, that he himself could have been held guilty of impairing the efficiency of the trap-door and ladder as a means of escape (as to which I express no opinion) I cannot think that vicarious guilt must also be imputed to the receiver. In my opinion, nobody can be said for the purposes of s. 133 (2) to have done or permitted or suffered to be done something which he knew nothing whatever about and was under no duty to know anything about. In the result, the plaintiff has failed, in my judgment, to establish a breach by the third defendant of any of the statutory obligations imposed by s. 133.

In these circumstances the question whether the plaintiff could sue for damages if he had established any such breach does not arise for decision. As, however, the point was so elaborately argued, and was decided by the Lord Chief Justice, I agree with my brethren that we should express an opinion on it. It is, of course, clear that the general purpose of the London Building Acts was to promote the welfare and interests of the very considerable section of the English community which lives in London. With this end in view, the Act of 1939 made legislative provision for such things as the naming and numbering of streets, the construction of buildings, dangerous and neglected structures and so on. There is nothing inconsistent, however, in including in legislation which is generally designed to regulate in various ways the lives of a vast community provision for the safety and protection of individuals; and, in my opinion, it was the object of s. 133 of the Act of 1939 to make provision of this kind. Measures which are taken to

prevent the outbreak and spread of fires in a great city are beneficial to the inhabitants of the city as a whole, for they tend to the protection of the lives and property of the general community. Measures that are taken to facilitate the escape of persons who happen to be in a house in which fire breaks out are also in a sense directed to the general welfare, for the death of a few in circumstances of tragedy is, or should be, felt by all. Nevertheless, I cannot but think that the principal purpose of measures such as are found in s. 133 is the protection of individuals rather than the promotion of the interests of the masses. It is a matter of general sorrow to hear of persons who have been trapped in a burning house without any means of escape, but it is death to the victims themselves. I emphasise this point because it appears to me to be of cardinal importance in considering whether a civil suit lies for breach of a statutory duty to see whether on a broad view that duty has been imposed for the general welfare, on the one hand, or in the interests of individuals or of a defined or definable class of the public on the other.

It is, indeed, difficult to reconcile all the decisions which have been reported on this subject, but this criterion does seem in many cases to have been accepted as a guide to Parliament's intention. In the following cases (inter alia), in all of which the statutory obligation under consideration was regarded as being primarily imposed for the benefit of a class, an action for damages for its breach was held to lie: *Couch v. Steel* (2); *Britton v. Great Western Cotton Co.* (17); *Groves v. Lord Wimborne* (8); *Britannic Merthyr Coal Co., Ltd. v. David* (11); *Dawson & Co. v. Bingley Urban Council* (14); *Black v. Fife Coal Co., Ltd.* (7); *Read v. Croydon Corp.* (18) and *Lavender v. Diamints, Ltd.* (19). Examples of cases in which the statutory duty in question was regarded as imposed for the benefit of the public at large and in which no action by an individual lay for its breach are: *Atkinson v. Newcastle Waterworks Co.* (10); *Pasmore v. Oswaldtwistle Urban Council* (5); *Phillips v. Britannia Hygienic Laundry Co.* (12); *Square v. Model Farm Dairies (Bournemouth), Ltd.* (20); *Badham v. Lambs, Ltd.* (21); *Clarke v. Brims* (22) and *Cutler v. Wandsworth Stadium, Ltd.* (6). In all of the above cases, in each of the two categories, considerations other than those as to the public or individual nature of the obligation were also weighed, e.g., whether penalties were imposed for a breach: if so, whether the injured person was given or shared in the penalty; the nature of the obligation and, above all, the general purview and intent of the Act. No universal rule can be formulated which will answer the question whether in any given case an individual can sue in respect of a breach of statutory duty. In *Cutler's* case (6) LORD SIMONDS said ([1949] 1 All E.R. 538):

"The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted."

Even, however, if one looks to the whole of the Act of 1939 and to the circumstances which LORD SIMONDS mentioned, it is difficult, as I think, to hold that no action lies for a breach of s. 133 (2) without disregarding an element which formed an important ground of decision in most of the cases in the first category to which I have referred and the materiality of which was recognised in the cases in both categories; and, in particular, without disregarding the decision and reasoning of this court in *Groves v. Lord Wimborne* (8). Indeed, this case seems in one sense stronger than *Groves v. Lord Wimborne* (8), for in that case the penalties imposed for infringement might be applied to the benefit of the person injured, but there is no similar provision in the Act of 1939. If I am right in the view which I have already expressed that the main object of the sub-section, or, as has sometimes been said, its pith and substance, was to provide for the safety of individuals as distinct from promoting the welfare of the general community, I find it difficult to appreciate why an "owner" of a house should be exempt from a liability to which an employer on whom similar or equivalent

duties are imposed by the Factories Act, 1937, is subject; for the inhabitants of a house are at least as definite a class as are the workers in a factory and I am not sure what logical distinction there is in this regard between a man who employs labour in his factory and one who, for example, employs a staff in a restaurant, or in a block of service flats which he owns. It is true that in the present case we are not concerned with an "owner" but with the generality of persons who are prohibited by s. 133 (2) from impairing the efficiency of means of escape, but it is difficult to suppose that offenders under the first part of the sub-section are liable to be sued (as I think myself that they are) while those under the later part of the sub-section are immune. Moreover, I see no reason why a wrongdoer should not be answerable in damages even though his identity cannot be described or ascertained in advance.

I do not pretend to find this question other than difficult and it is with no feeling of assurance that I have arrived at a conclusion on it which differs from that which commends itself to my Lord. I would only add that in supporting, as I certainly do, what he has said as to the desirability of re-considering in future legislation the time-honoured but troublesome definition of "owner", I also share to the full the sentiments which LORD DU PARCQ expressed in *Cutler's case* (6) ([1949] 1 All E.R. 549) on the question of civil rights in relation to statutory obligations. With regard to the appeal as a whole, I agree that it should be allowed.

Appeal allowed.

Solicitors: *Spira & Steele* (for the third defendant); *Herbert Baron & Co.* (for the plaintiff).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

SHAW v. SHAW AND ANOTHER.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), June 25, 1954.]

Contract—Breach of promise of marriage—Public policy—Whether promise unenforceable as performance would involve bigamy—Promisee unaware of illegality—Promisor deceased—Special damages—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1).

Warranty—Breach—Marriage contract—Implied continuing term that party was legally in a position to marry—Damages.

Limitation of Action—When time begins to run—Marriage contract—Invalid marriage—Breach of promise—Breach of implied warranty that party was legally in a position to marry—Plaintiff unaware of illegality—Postponement of limitation period—Limitation Act, 1939 (c. 21), s. 2 (1) (a), s. 26 (b).

Before 1937 the deceased left his wife, who was living at the time of the events next mentioned and did not die until July, 1950. In 1937 the plaintiff, then a widow, met the deceased, who described himself to her as a widower. The deceased promised to marry the plaintiff, and in December, 1938, they went through a ceremony of marriage. They lived together as husband and wife until February, 1952, when the deceased died intestate. The net value of his estate was £1,500. In April, 1952, the plaintiff learned that she and the deceased had not been lawfully married. On Apr. 21, 1953, she commenced an action against the administrators of the deceased's estate for damages for breach of a promise of marriage made to her by the deceased. The administrators having pleaded, inter alia, the Limitation Act, 1939, s. 2 (1) (a), the plaintiff alleged fraud on the part of the deceased. The action was dismissed on the ground that, as the deceased's lawful wife was then alive, the agreement between the plaintiff and the deceased was

unenforceable, being contrary to public policy. The defendants by their counsel did not raise the question; and on appeal by the plaintiff,

HELD: (i) by promising to marry the plaintiff, the deceased impliedly warranted that he was in a position to do so; the implied warranty was a continuing warranty, continuing throughout the deceased's lifetime, and the plaintiff's right of action for breach of it was not extinguished by s. 2 (1) of the Limitation Act, 1939.

(ii) by virtue of s. 26 (b) of the Limitation Act, 1939, the running of time against the plaintiff was postponed until a date within the six years allowed by s. 2 (1) of the Act.

Beaman v. A.R.T.S., Ltd. ([1949] 1 All E.R. 465), applied.

(iii) if the plaintiff had been the widow of the deceased, she would have been entitled to, at least, £1,000 out of his estate, and £1,000 should be awarded to her as damages; further, per DENNING, L.J., the £1,000 was recoverable as special damages within the rule that damages in an action for breach of promise after the death of the man proposing marriage are limited to special damages.

(iv) the plaintiff being unaware at all material times that the deceased was married, the court was under no duty to raise the question whether the promise to marry was unenforceable as contrary to public policy, and the action was maintainable.

Wild v. Harris (1849) (7 C.B. 999) and *Millward v. Littlewood* (1850) (5 Exch. 775), considered and applied.

AS TO PROMISE BY PERSON ALREADY MARRIED, see HALSBURY, *Hailsham Edn.*, Vol. 16, p. 553, para. 816; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 298, 299, Nos. 2295-2302.

FOR THE LIMITATION ACT, 1939, s. 2 (1) and s. 26, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1160 and 1188.

Cases referred to:

- (1) *Fender v. Mildmay*, [1937] 3 All E.R. 402; 106 L.J.K.B. 641; 157 L.T. 340; sub nom. *Fender v. St. John-Mildmay*, [1938] A.C. 1; Digest Supp.
- (2) *Re Wallace*, [1920] 2 Ch. 274; 89 L.J.Ch. 459, 123 L.T. 343; 12 Digest, Replacement, 275, 2112.
- (3) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 12 Digest, Replacement, 271, 2084.
- (4) *Wild v. Harris*, (1849), 7 C.B. 999; 18 L.J.C.P. 297; 13 L.T.O.S. 283; 137 E.R. 395; 12 Digest, Replacement, 298, 2295.
- (5) *Millward v. Littlewood*, (1850), 5 Exch. 775; 20 L.J.Ex. 2; 155 E.R. 339; sub nom. *Milward v. Littlewood*, 16 L.T.O.S. 128; 12 Digest, Replacement, 298, 2296.
- (6) *Holman v. Johnson*, (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest, Replacement, 313, 2404.
- (7) *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465; [1949] 1 K.B. 550; 2nd Digest Supp.
- (8) *Riley v. Brown*, (1929), 98 L.J.K.B. 739; 142 L.T. 42; Digest Supp.

APPEAL by the plaintiff from an order of PILCHER, J., at Staffordshire Assizes dated Mar. 9, 1954, dismissing an action for damages for breach of a promise of marriage made by Percy John Shaw, deceased, to the plaintiff. The action was brought against Wilfred John Shaw (the first defendant) and Ethel Gibson (the second defendant), who were a son and daughter of the deceased by his original marriage, as administrators of the estate of the deceased.

At some date before 1937 the deceased (hereinafter described as "Mr. Shaw") and his wife, Cecilia Shaw, parted. Their daughter, the second defendant, thereafter lived with her mother. Their son, the first defendant, lived not very far from his father. Cecilia Shaw died on July 5, 1950, in Leicester. There was

no evidence when Mr. Shaw and his wife parted, when they last saw each other, whether he knew that she was alive at the times of the events in and after 1937 subsequently mentioned or whether he knew of her death in 1950 or before he himself died.

In 1937 the plaintiff, who was then a widow (Mrs. Moseley), met Mr. Shaw, who described himself to her as a widower. Later in that year he proposed marriage to her and she accepted him. On Dec. 10, 1938, they went through a form of marriage at a registry office. They were looked on thereafter as husband and wife, the plaintiff was known as Mrs. Shaw, and the first defendant, who lived nearby, visited them from time to time and treated the plaintiff as his step-mother. Before December, 1938, Mr. Shaw had earned a living by making a few deals in horses and selling scrap metal. After the ceremony of marriage he and the plaintiff lived together, as husband and wife, on a farm until his death in 1952. Between January, 1939, and March, 1941, the plaintiff gave him at different times sums amounting to £200 to buy stock for the farm and in April, 1942, she gave him £53 10s. 7d. to discharge a debt which he owed for agricultural machinery. Mr. Shaw died on Feb. 11, 1952. At his funeral the plaintiff was treated as his widow, and the first defendant walked with her behind the coffin.

Mr. Shaw having died intestate, the plaintiff proposed to take out a grant of letters of administration to his estate, the net value of which was about £1,500, and the first defendant, through his solicitors, agreed to act as joint administrator with her. In April, 1952, the plaintiff's solicitors were informed by the first defendant's solicitors that Mr. Shaw had not been a widower when he went through the ceremony of marriage with the plaintiff, and that his legal wife, Cecilia Shaw, died on July 5, 1950. Until April, 1952, the plaintiff had believed that she and Mr. Shaw were legally married.

A grant of administration having been made to the defendants, the plaintiff, calling herself "Violet Shaw, widow", brought her action for damages for breach of promise of marriage. The writ was issued on Apr. 21, 1953. By her statement of claim the plaintiff alleged that Mr. Shaw had at all material times described himself to her as a widower, and, after setting out the facts in regard to the agreement to marry and the ceremony of marriage which she and Mr. Shaw (who in the pleading was called "the deceased") went through, she alleged:

"4. Unknown to the plaintiff, the deceased was at the time of the said ceremony already married to Cecilia Shaw, who died on July 5, 1950, and whose said marriage to the deceased was never dissolved. The plaintiff did not become aware of these facts until after the deceased's death. 5. The deceased never did marry the plaintiff. 6. By reason of the premises the plaintiff has suffered damage."

She claimed as special damages the sums amounting to £253 10s. 7d. given by her to Mr. Shaw on the ground that she had paid those sums to him in consequence of the promise to marry her and in the belief that she was married to him. By their defence the defendants denied that the plaintiff was ignorant of the fact that Mr. Shaw was already married to Cecilia Shaw, that Mr. Shaw was in breach of the alleged or any promise, and that the plaintiff suffered damage. Alternatively, they pleaded that the plaintiff's right of action was extinguished by the Limitation Act, 1939, s. 2. By her reply the plaintiff pleaded (a) fraud and misrepresentation on the part of Mr. Shaw, (b) that she did not discover the fraud until April, 1952, (c) that she had no means of discovering the fraud earlier, and (d) that Mr. Shaw had deliberately concealed the fraud from her so as to prevent her from discovering it and from taking proceedings in respect thereof. The plaintiff further pleaded that the defendants were estopped from denying that at all material times Mr. Shaw was a widower and free to marry her. At the trial of the action, no evidence was called by the defendants. PILCHER, J., gave judgment for the defendants on the ground that the promise which was alleged was unenforceable, being contrary to public policy in that its execution would

have involved the commission of a crime, i.e., bigamy, by Mr. Shaw. The learned judge held that, although the plaintiff did not know the true position, the promise was none the less unenforceable. He was not satisfied that there was any fraud on the part of Mr. Shaw and he thought that it was unnecessary for the defendants to rely on s. 2 (1) of the Limitation Act, 1939.

A At the hearing of the appeal counsel for the defendants said that he was not called on to address the court, and that he did not raise the question of public policy.

W. A. L. Allardice for the plaintiff.

R. E. Chapman for the defendants.

B SINGLETON, L.J., stated the facts, and said: It is clear from the pleadings that the plaintiff is alleging, in substance, that, when a promise of marriage was made to her, there was an implied warranty that the one who offered marriage to her, and who promised to marry her, was in a position to marry her: in other words, that he was, as he said, a widower. [His LORDSHIP referred to the denials in the defence, as stated previously, and to the plea of the Limitation Act, 1939, s. 2, and to the reply, and continued:] The main argument of counsel for the plaintiff is that the judge was wrong in deciding that the plaintiff could have no right of action on the ground that the enforcement of the contract to marry would be against public policy. We were referred to a number of authorities, one of comparatively recent date, *Fender v. Mildmay* (1), in which it was decided that a promise made by one spouse, after a decree nisi for the dissolution of the marriage had been pronounced, to marry a third person after the decree had been made absolute was not void as being against public policy, and that an action for damages for breach of the promise was maintainable by the third person. Several of the speeches in the House of Lords in that case dealt with the question of public policy. It is sufficient for this purpose if I refer to two passages from the speech of LORD WRIGHT. He said ([1937] 3 All E.R. 424):

E "I must first attempt to explain what I think to be the modern law in regard to the duty of the court concerning rules based on public policy. It is important to realise what is meant by public policy in this connection. In one sense, every rule of law, either common law or equity, which has been laid down by the courts, in that course of judicial legislation which has evolved the law of this country, has been based on considerations of public interest or policy. In that sense SIR GEORGE JESSEL, M.R., referred to the paramount public policy that people should fulfil their contracts. But public policy in the narrower sense means that there are considerations of public interest which require the courts to depart from their primary function of enforcing contracts, and exceptionally to refuse to enforce them. Public policy in this sense is disabling. It is important to determine, first of all, on what principles a judge should exercise this peculiar and exceptional jurisdiction when a question of public policy is raised. What is, I think, now clear is that public policy is not a branch of law to be extended, as LORD BLANESBURGH, then YOUNGER, L.J., said in *Re Wallace* (2) ([1920] 2 Ch. 303); to the same effect the EARL OF HALSBURY, L.C., in *Janson v. Driffield Consolidated Mines, Ltd.* (3) ([1902] A.C. 491) said: 'I deny that any court can invent a new head of public policy.'"

H Later in his speech LORD WRIGHT said ([1937] 3 All E.R. 427):

"The law will not enforce an immoral promise, such as a promise between a man and woman to live together without being married, or to pay a sum of money, or give some other consideration, in return for immoral association. But nothing of the sort was suggested in this case. On the contrary, the promise, if carried out, would have regularised an immoral association."

The second passage from Lord Wright's speech is useful as bearing on what was put forward as an alternative submission on behalf of the plaintiff. The plaintiff's case is that Mr. Shaw promised to marry her, and that promise involved a warranty that he was in a position so to do. As he was not in a position to do so, she claims that she is entitled to damages, but, as an alternative way of putting it, counsel for the plaintiff submitted that when Mrs. Shaw died in 1950 Mr. Shaw could then have married the plaintiff, and that that would have regularised what might be spoken of as an immoral association, for, unknown to herself, the plaintiff had been living with a man to whom she was not married. Until April, 1952, some two months after Mr. Shaw died, she believed that she was legitimately married to him.

It appears to me that, on the authorities which have been cited to the court, there is a great difference between the case in which there is an effort to enforce a marriage when both parties know that the defendant is not able to go through a lawful form of marriage and a case in which that fact is known only to one of them. That is made clear in *Wild v. Harris* (4) and *Millward v. Littlewood* (5). The headnote to *Millward v. Littlewood* (5) reads (5 Exch. 775):

"A declaration alleged, that, in consideration that the plaintiff, at the defendant's request, promised to marry him, he promised the plaintiff to marry her. Averments: that the plaintiff hath continued and still is unmarried, and, until the discovery of the defendant's marriage, was ready and willing to marry him; that, after the defendant's promise, the plaintiff discovered that the defendant, at the time of his promise, was, and still is, married, and that the plaintiff had not, at the time of the defendant's promise, any notice of the defendant's then marriage:—Held, on motion in arrest of judgment, that the declaration was good; and that the plaintiff's remaining unmarried was a sufficient consideration to support the defendant's promise."

The verdict of the jury in favour of the plaintiff with £200 damages stood. In that case counsel for the defendant submitted (*ibid.*, 776):

"... *Wild v. Harris* (4) cannot be supported. A contract of this kind is contra bonos mores, and against public policy. The language of LORD MANSFIELD, in *Holman v. Johnson* (6), with reference to immoral and illegal contracts, applies here. Besides, at the time of the promise, the defendant could not perform it, and, therefore, the promise is void."

POLLOCK, C.B., in the first judgment, said (5 Exch. 777):

"There ought to be no rule. The case of *Wild v. Harris* (4) does not in substance differ from this. Therefore, as there is the judgment of a court of co-ordinate jurisdiction upon the express point, I feel myself bound by it, and must leave the parties to question that decision in a court of error. I own, however, that I am disposed to differ from the authorities which have been referred to. I think it is inconsistent with that affection which ought to subsist between married persons, that a man should, while his wife is alive, promise to marry another woman after his wife's death. Nothing but the judgment of the highest tribunal will compel me to think that, by the law of the land, such a promise is good."

ALDERSON, B., said (5 Exch. 777):

"It is unnecessary to decide whether a promise by a man to marry a woman after his wife's death is good, because here it is found as a fact that the plaintiff had no knowledge that the defendant was married. In my opinion the difficulty arises in respect of the promise alleged being a promise to marry within an indefinite time. What was decided by the recent case in the Court of Common Pleas, I think, was rightly decided."

I come now to the judgment of PARKE, B. (*ibid.*, 778):

“ I entirely concur in what was said by the Court of Common Pleas in *Wild v. Harris* (4). The promise by the defendant to marry the plaintiff implies, on his part, that he is then capable of marrying, and he has broken that promise at the time of making it. The consideration to support the promise is, that the plaintiff, at the request of the defendant, engaged to marry him within a reasonable time, and therefore she remained unmarried; and that is a sufficient consideration to bind the defendant.”

If PARKE, B., had thought that there was anything in the point raised that the contract was against public policy he would have said so. Counsel for the defendants in the case now before us told us that he did not raise the question of public policy. It appeared from the authorities cited by counsel for the plaintiff that such a question might be raised. The judge gave judgment on it. The two authorities [*Wild v. Harris* (4) and *Millward v. Littlewood* (5)] which I have just mentioned show that neither the Court of Exchequer nor the Court of Common Pleas in those years, 1849 and 1850, thought it necessary for the court to raise any such question in a case in which the plaintiff did not know that the defendant was married, and did not know that his promise might be contrary to public policy. I believe that to be right. I do not consider that it is the duty of the court to make such a point on the facts of this case. If ever there was a case in which a plaintiff ought to be entitled to succeed, it is this case, for Mr. Shaw persuaded her to marry him, pretended that he was a widower when he was not a widower, and, having gone through a form of marriage with her, acquired all her savings from her for use in his affairs, and he did not, in fact, marry her. If he knew that his wife died in 1950 he might have done so. I do not know how much he knew. No evidence was given on behalf of the defendants. I do not know the circumstances in which Mr. Shaw parted from his wife, nor whether he heard of her or from her, or whether he knew when she died. It was his duty to make inquiries before he went through a form of marriage with the plaintiff, and, if he knew that his wife was alive after that time, and that she died in 1950, he should have married the plaintiff then, even if it might have led to an inquiry with a possible risk of a prosecution for bigamy. If he had married her after his wife's death, the plaintiff would have been, on his death, in truth and in fact his widow, and she would have had the rights of a widow on his intestacy.

Counsel for the defendants raises two questions of some importance. One is that the cause of action accrued* in 1938, that under the Limitation Act, 1939, s. 2 (1) the period of limitation runs from that time, and, consequently, that an action cannot be brought after six years from 1938. It seems to me that that point can be answered in several ways. In the first place, there was a continuing warranty running along with the promise to marry; a promise which Mr. Shaw never fulfilled. That warranty was the basis of the relationship, as the plaintiff said in her evidence. She would not have gone through a form of marriage with Mr. Shaw unless she had thought that he was a widower. She would not have lived with him as his wife, nor would she have given him her savings. He promised to marry her when he was not in a position so to do; he broke his warranty; but the damage* which she sustained did not arise until after his death. She lived with him as his wife; people believed she was his wife. When his death occurred, his son and his daughter raised the point and it was found that she had none of the rights of a wife. It is then that the damage* accrued. Moreover, in my opinion, s. 26 (b) of the Limitation Act, 1939, covers this point.

* The warranty was a continuing warranty, as stated above, and accordingly the final breach would not have occurred before the deceased's death on Feb. 11, 1952, and the cause of action would thus have accrued within the six-year limitation period. See, as regards the date when time begins to run in actions for breach of contract, HALSBURY, Hailsham ed., vol. 20, p. 604, para. 758. *Ed.*

There was here something in the nature of a concealed fraud, and the case is well within that which was said by this court in *Beaman v. A.R.T.S., Ltd.* (7).

Counsel for the defendants also raised the point that, even if there should be a right of action, it could only be in respect of the special damage alleged and proved, and he cited in support of that proposition the judgment of ROCHE, J., in *Riley v. Brown* (8). I do not think that that judgment helps in this case, for it seems to me that the Law Reform (Miscellaneous Provisions) Act, 1934, has altered the position by these words in s. 1 (1):

"Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate . . ."

On the death of Mr. Shaw, there was a cause of action subsisting against him, and that cause of action survives against his estate. Counsel for the defendants referred the court to s. 1 (2) (b), which, to my mind, does not touch the position which arises. I do not think that that submission is of help to the defendants in this case. In the view which I have formed, the plaintiff is entitled to succeed. She is entitled to damages for breach of promise. There were some special damages claimed which were the advances which she had made to her husband in the belief that she was married. In my opinion, the right way to look at this case is to remember that, if Mr. Shaw had fulfilled his promise, as he might have done, the plaintiff would have been his widow. If she had been, she would have had the rights of a widow.

At the end of his judgment, the learned judge said:

"I should have liked, if I had felt that I was entitled to do so consistently with my duty, to have determined this case in [the plaintiff's] favour, but for the reasons which I have given, and which I do not propose to elaborate further, I have come to the conclusion that this action must fail and there must be judgment for the defendants."

Being asked to make a provisional assessment of the damages, he said that he did not think it was a case in which the damages should be large, and he went on to say:

"I think the [plaintiff] appears to have had a happy life, believing herself to be married for fourteen years, and in her maturer years she now finds that in point of fact she is once again, and always has been, a widow. In the circumstances I think that having been maintained by the deceased man throughout those fourteen years, if she gets back £250 that would be all to which she is entitled."

That was a provisional assessment of the damages without hearing argument on the matter. I do not think that sufficient attention was paid to all the circumstances. The judge said that the plaintiff had been maintained by Mr. Shaw for all those years. During that time she was working on the farm and keeping the house, and helping him. As the judge said, he was more prosperous at the end of his life than he was at the time when he went through the form of marriage with her. She had helped him, she had let him have her money, she might have got something more than £1,000 if she had been his widow, and, for my part, I think that a fair assessment of the damages to which the plaintiff is entitled is the sum of £1,000. I would allow the appeal accordingly and direct that judgment be entered for the plaintiff for the sum of £1,000 damages.

DENNING, L.J.: Every man who proposes marriage to a woman impliedly warrants that he is in a position to marry her, and that he is not himself a married man; and he reaffirms that warranty when he afterwards goes through a form of marriage with her—whether in a church or in a registry office. To take the familiar words of the banns of marriage, he warrants that there is no "cause

or just impediment " why he should not marry her. Every day thereafter of their married life he continues the warranty; he warrants that their marriage was valid and that there was no impediment to it. In this case the law imports to Mr. Shaw such a warranty, a warranty which he gave to the plaintiff. On the faith of it, she went through a form of marriage with him, she lived with him as his wife for fourteen years, she put her money into the farm and did all the work of a farmer's wife, and when he died she followed his coffin to the grave as his widow. His estate was worth £1,500 or more, which she had helped to make, and yet the administrators now turn round and say that she was never his wife because he was already married, and that his real wife did not die until 1950. In my judgment, Mr. Shaw broke his warranty at every point. He broke it when he proposed marriage; he broke it when he married her; and he broke it throughout their married life. The breach continued all the time. The most important breach of all was at the moment of his death, because when he died she was not his widow, as she thought she was. She was in law a stranger. That is the breach for which, in my judgment, damages can be recovered. But what is the proper measure of damages? If he had died and she was his widow, as she thought she was, she would have received as a result of his intestacy the ordinary widow's £1,000 and a life interest in half of the remainder. Those are the direct damages which she has suffered by this breach of warranty, and for which, in my judgment, she is entitled to damages.

It is said that an implied warranty is not alleged in the pleadings, but all the material facts are alleged, and in these days, as long as the material facts are alleged, that is sufficient for the court to proceed to judgment without putting any particular legal label on the cause of action. The same result can be reached, however, by considering it as a claim for breach of promise of marriage. He clearly did promise to marry her, and after his own wife died in 1950 he was in a position to marry her. He was then in a position to implement his promise, but he did not do so. It would not lie in his mouth to say that a reasonable time had expired, because it was all due to him that the marriage had not taken place before. He ought to have married her in 1950 when he was free to do so, and there was a breach at that time for which like damages could be recovered. Although it is true that damages in an action for breach of promise, after the death of the man, are limited to special damage*, I regard the damages which I have mentioned as special damages within that rule.

The Limitation Act, 1939, s. 2 (1), is, in my judgment, no answer to the breach of warranty, because the breach took place on Mr. Shaw's death in 1952. It is also no answer to the breach of promise to marry, because that breach took place in 1950. In any case, as my Lord has said, the plaintiff can rely on s. 26 (b), and the decision of this court in *Beaman v. A.R.T.S., Ltd.* (7). That case shows that the word " fraud " in the statute is not used in the sense of moral turpitude, and that s. 26 (b) avails a plaintiff in circumstances such as have arisen here when knowledge has been kept from her by the conduct of the deceased man. If the plaintiff had known that Mr. Shaw was a married man the case would be altogether different. Then, of course, no court would allow such a contract to be enforced, but, she being quite unaware of the position, the case falls within *Wild v. Harris* (4) and *Millward v. Littlewood* (5), and it is interesting to notice that there are cases in the United States of America on exactly the same lines. I agree with my Lord that the appeal should be allowed, and that the damages should be £1,000.

MORRIS, L.J.: I also agree. Down to the death of Mr. Percy John Shaw the events in the joint lives of him and the plaintiff were those that they would have been had the marriage ceremony that took place been a valid one. Had it

* Authority for this rule will be found in HALSBURY, Hailsham ed., vol. 10, p. 147, text and notes (k) (1); compare Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, HALSBURY'S STATUTES, 2nd ed., vol. 9, p. 792. *Ed.*

been a valid one, then, on the death of Mr. Shaw, in the events which have happened, the plaintiff would, at the least, have been entitled to £1,000 out of his estate. The learned judge did not have very full evidence before him, but in the course of his judgment he said that, for all he knew, Mr. Shaw and his lawful wife might have been parted for ten or fifteen years, and that Mr. Shaw might have had grounds for supposing that his wife was dead when he represented himself to the plaintiff as a widower. The learned judge went on to say that that matter remained unascertainable, and that it was possible that Mr. Shaw had honestly believed that he was a widower, though, of course, on insufficient grounds. Even approaching the case on that footing, I agree that the plaintiff is entitled to succeed. It seems to me that, in conformity with what was said by PARKE, B. (5 Exch. 778), in *Millward v. Littlewood* (5), the promise which was entered into by Mr. Shaw carried with it a promise and an implication that he was capable of marrying. That promise, the warranty that he so entered into, was broken.

The substantial damages arising out of the breach of that promise on his part really arose after his death, but in all the intervening period the plaintiff continued her life in the constant belief that she was lawfully married, and her life was lived in the belief that she was the wife in law of Mr. Shaw. She was confident in that belief, which was a belief wholly induced by him. At the very least, he omitted to make inquiries or get verification. He allowed her to go on in the confident belief to which I have referred, and it was his reckless assurance on so important a matter that caused her to be in complete ignorance of the true position. Having regard to those circumstances, and in view of the principles which were laid down by this court in *Beaman v. A.R.T.S., Ltd.* (7), I think the result follows that under s. 26 of the Limitation Act, 1939, the period of limitation did not in this case begin to run until the plaintiff had discovered the falsity of the belief which was induced in her by Mr. Shaw. I consider, therefore, that the plaintiff was entitled to succeed, and to succeed for the amount which SINGLETON, L.J., has mentioned.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Dallou & Dallou*, Wolverhampton (for the plaintiff); *Peacock & Goddard*, agents for *J. C. H. Bouldler & Sons*, Shrewsbury (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

Re LORD HYLTON'S SETTLEMENT. BARCLAYS BANK, LTD.
v. JOLLIFFE AND OTHERS.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), July 1, 1954.]

A *Settlement—Variation of trusts—Compromise of dispute—Infants possibly interested.*

AS TO COMPROMISE OF PROCEEDINGS ON BEHALF OF INFANTS, see HALSBURY, Hailsham Edn., Vol. 17, p. 716, para. 1469; and FOR CASES, see DIGEST, Vol. 28, pp. 329, 330, Nos. 1973-1980.

AS TO POWER TO EFFECT TRANSACTIONS UNDER ORDER OF COURT, see HALSBURY, Hailsham Edn., Vol. 29, p. 745, para. 1037.

B Case referred to:

(1) *Chapman v. Chapman*, [1954] 1 All E.R. 798.

APPEAL by the first defendant from a decision of HARMAN, J., dated Mar. 5, 1954.

C By a settlement dated Dec. 27, 1925, made between the late Lord Hylton, as settlor, of the first part, the plaintiffs, Barclays Bank, Ltd., as trustees, of the second part, the present Lord Hylton (then and therein described as the Honourable William George Hervey Hylton and hereinafter called Lord Hylton), of the third part, a trust fund was settled on trust (declared by cl. 5 of the settlement) to pay the income to Lord Hylton during his life

D “until some act or event shall be done or happen whereby the income if belonging absolutely to him would become vested in or charged in favour of some other person”,

on which event discretionary trusts were to come into operation for the benefit of Lord Hylton, his wife and issue, and the persons interested in the trust premises after the death of Lord Hylton. Clause 10 of the settlement provided:

E “After the death of [Lord Hylton] the capital and income of the trust fund shall be held in trust for all or such one or more exclusively of the others or other of the issue of [Lord Hylton] whether children or remoter issue at such times and if more than one in such shares and with such gifts over and with such provisions for their respective advancement (either overreaching the interests prior to this power or not) and maintenance and education and otherwise in such manner for the benefit of such issue or some or one of them as [Lord Hylton] shall by deeds revocable or irrevocable or by will or codicil appoint but so that under any appointment a child shall not otherwise than by way of advancement take a vested interest except being a son or sons upon attaining the age of twenty-one years or being a daughter or daughters upon attaining that age or upon marriage And in default of and until and subject to any such appointment in trust for all or any of the child or children of [Lord Hylton] who attain the age of twenty-one years or being female marry under that age and if more than one in equal shares.”

The settlement contained the usual hotchpot clause and ultimate trusts which, in the events which had happened, could not take effect.

H Lord Hylton had three children, viz., the first defendant, the Hon. Raymond Hervey Jolliffe (hereinafter called Mr. Jolliffe), who attained the age of twenty-one years on June 13, 1953, and the second and third defendants, who were aged respectively eighteen and sixteen years.

By an appointment dated May 7, 1951, expressed to be supplemental to the settlement Lord Hylton irrevocably appointed as follows:

“1. The said trust fund and any other property subject to the trusts of the settlement and the income thereof as from the date of this deed shall

be held in trust for Mr. Jolliffe if he shall attain the age of twenty-one years. 2. The statutory power of expending income of the said trust property for or towards the maintenance education or benefit of Mr. Jolliffe shall not be exercised during the lifetime of Lord Hylton except on the request in writing of Lord Hylton. 3. The statutory power of paying or applying capital of the said trust property for the advancement or benefit of Mr. Jolliffe shall be exercisable with the following extension and modification (that is to say) the said power (a) shall extend to and be exercisable over the whole of the said capital (b) shall be exercisable during the lifetime of Lord Hylton so as to overreach all such prior interests as aforesaid and (c) shall during the lifetime of Lord Hylton be exercised in accordance with such directions as he may from time to time give to the trustees in writing and not otherwise."

On June 5, 1951, Lord Hylton signed a request to the plaintiffs as trustees of the settlement requesting and authorising them to advance the whole trust fund, which was valued at £250,000, to Mr. Jolliffe forthwith.

The plaintiffs took out a summons as to the construction of cl. 10 of the settlement and as to the effect of the appointment and the request to advance the trust fund to Mr. Jolliffe. On Mar. 5, 1954, HARMAN, J., held that, by cl. 10, Lord Hylton was authorised to provide for the advancement in life or in the world, in some definite way, of any of his issue, and that the power could be exercised so as to overreach Lord Hylton's life interest and the discretionary trust, so that an advancement of less than the whole of the trust funds could be made without causing a forfeiture of Lord Hylton's life interest in the funds which remained unadvanced; but that the power could not be exercised, so as to make it obligatory on the trustees to make such advancements as Lord Hylton should direct in his lifetime, without the trustees being satisfied as to the purpose for which any such advancement was to be made. HARMAN, J., further held that in the events that had happened the trustees held the trust funds on trust for Mr. Jolliffe absolutely in remainder expectant on the death of Lord Hylton, that no forfeiture of Lord Hylton's life interest had occurred, and that the income thereof was still payable to Lord Hylton under cl. 5 of the settlement (i.e., subject to the protective trust).

Mr. Jolliffe appealed and asked for a declaration that the plaintiffs held the trust funds in trust for him absolutely (i.e., on the footing that the life interest of Lord Hylton had been overreached). Before the appeal was heard the parties agreed to compromise the appeal on the terms that (i) the plaintiffs as trustees should forthwith raise the clear sum of £5,000 out of the trust fund and hold that sum and the investments representing it and the income thereon on trust during the period of twenty-one years for the benefit of any future wife of Lord Hylton and his children and remoter issue excluding Mr. Jolliffe as the trustees should from time to time at their absolute discretion think proper and after the expiration of twenty-one years on trust as both capital and income for the children or remoter issue of Lord Hylton (excluding Mr. Jolliffe) then living equally per capita, whom failing in trust for Mr. Jolliffe absolutely; and (ii) subject thereto, the plaintiffs should hold the trust fund in trust for Mr. Jolliffe absolutely by way of acceleration of the absolute interest to which he was entitled under the appointment and free from all prior trusts to take effect during the life of Lord Hylton. Lady Hylton (the wife of Lord Hylton) consented to that scheme, her consent being in writing exhibited to an affidavit.

When the matter came before the Court of Appeal, the court raised the question whether they had power to approve the scheme on behalf of the infants and other persons who might become interested in the event of Lord Hylton forfeiting his life interest having regard to the decision of the House of Lords in *Chapman v. Chapman* (1). It was questioned whether there could be a real dispute on this point of construction after a judge had decided it. Counsel

for Mr. Jolliffe submitted that there was a real dispute between the parties as to the true construction of cl. 10 of the settlement, the ambiguity of which appeared on its face. The case had been argued before HARMAN, J., for more than a day. The application to approve the compromise fell, it was submitted, within the class of instances in which the court had power to approve a compromise on behalf of infants although the compromise might involve the alteration of beneficial interests under trusts: see *Chapman v. Chapman* (1) per LORD SIMONDS, L.C. ([1954] 1 All E.R. 802, 803), and per LORD MORTON OF HENRYTON (*ibid.*, 808, 811-813).

Cross, Q.C., and *K. J. T. Elphinstone* for the first defendant, Mr. Jolliffe.

J. L. Arnold for the second and third defendants, two infant children of Lord Hylton.

E. I. Goulding for the fourth defendant, Lord Hylton.

Droop for the plaintiffs, the trustees of the settlement.

THE COURT OF APPEAL held that there was jurisdiction to approve the scheme proposed by the parties. Being of the opinion that it was for the benefit of the infant defendants and of all unborn and unascertained persons who might be interested under the trusts of the settlement, the court approved the scheme and dismissed the appeal.

Solicitors: *Slaughter & May* (for the first defendant); *Withers & Co.* (for the plaintiffs and the other defendants). F.G.

D BOWSKILL v. DAWSON AND ANOTHER.

[COURT OF APPEAL (Somervell, Morris and Romer, L.JJ.), April 9, 12, June 1, 30, 1954.]

Negligence—Damages—Deductions from damages—“Contract of assurance or insurance”—Employee killed in road accident—Sum paid on death under employers’ scheme—Contract of group life assurance between trustees and assurance company for employee’s benefit—Fatal Accidents (Damages) Act, 1908 (c. 7), s. 1.

Under a trust deed made between M., Ltd. and trustees, the trustees agreed to carry into effect a policy of group life assurance to cover employees of M., Ltd. and to pay the benefits therein provided for. By the trust deed,

“the fund” was defined to mean and include “all moneys insurance policies investments and property from time to time held by or on account of the trustees upon the trusts of the trust deed”, and the trust deed further provided: “The capital of the fund and the income thereof for the time being shall be held by the trustees upon trust to apply the same at such time or times subject as hereinafter provided for the following purposes, that is to say: 1. To secure to the estate of a member upon his death while in employment with the company before attaining age sixty-five a sum assured calculated [on a certain basis] or a sum assured equal to the member’s salary whichever is the greater. The trustees will insure such sum assured in accordance with the terms and provisions of the said policy . . .” M., Ltd. financed the scheme and provided the money needed to pay the insurance premiums. The trustees made the proposal for the group life assurance policy and the policy was issued. The trustees were the “person assured”, and the employees covered (i.e., the “lives assured”) were all the eligible employees of M., Ltd. in respect of whom forms of application were deposited by the trustees with and accepted by the assurance company.

D., an employee of M., Ltd., and one of the lives assured (none of whom was a party to the contract of assurance), was killed in an accident and, in accordance with the provisions of the policy of assurance, the assurance company

paid, in respect of D.'s death, £3,300 to the trustees, who paid that sum to D.'s personal representatives. In assessing damages payable under the Fatal Accidents Act, 1846, in respect of D.'s death, the court took into account the £3,300 so received by D.'s personal representatives.

Held: D. had a right enforceable in equity to life assurance benefits under the scheme, and the £3,300 was a sum "paid or payable on the death of [D.] under any contract of assurance or insurance" within the Fatal Accidents (Damages) Act, 1908, s. 1; and, therefore, that sum should not be taken into account in the assessment of damages.

Smith v. British European Airways Corpn. ([1951] 2 All E.R. 737), distinguished.

Quere whether if D. or his personal representatives had had no enforceable right to benefit under the scheme a voluntary payment to the estate of D. out of the proceeds of a contract of assurance to which D. was not a party would have fallen within s. 1 of the Act of 1908.

EDITORIAL NOTE. The decision appears from the headnote, but the case also shows that the court, in considering the intention and effect of an employees' assurance scheme established by trust deed, and in this instance in considering whether an employee had a right to benefit under the scheme, did consider not only clauses of the trust deed but also a booklet issued by the employer to the employees in connection with the scheme; see in this respect the judgment of ROMER, L.J., at p. 659 post. There was no decision on admissibility of the booklet in evidence, but in view of the general rule as to admissibility of extraneous evidence where the interpretation or effect of a deed is under consideration (as to this see HALSBURY, Hailsham Edn., Vol. 10, p. 269, para. 336 et seq.), this aspect of the case may be useful in practice.

AS TO WHAT DEDUCTIONS ARE PERMISSIBLE IN ASSESSING DAMAGES IN ACTIONS UNDER THE FATAL ACCIDENTS ACTS, 1846 TO 1908, see HALSBURY, Hailsham Edn., Vol. 23, p. 698, para. 986; and FOR CASES, see DIGEST, Replacement Vol. 36, pp. 221-226, Nos. 1179-1200.

Cases referred to:

- (1) *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2), [1942] 1 All E.R. 657; [1942] A.C. 601; 111 L.J.K.B. 418; 167 L.T. 74; 2nd Digest Supp.
- (2) *Grand Trunk Ry. Co. of Canada v. Jennings*, (1888), 13 App. Cas. 800; 58 L.J.P.C. 1; 59 L.T. 679; 36 Digest, Replacement, 221, 1179.
- (3) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest, Replacement, 223, 1191.
- (4) *Pym v. Great Northern Ry. Co.*, (1863), 4 B. & S. 396; 32 L.J.Q.B. 377; 8 L.T. 734; 122 E.R. 508; 36 Digest, Replacement, 208, 1097.
- (5) *Taff Vale Ry. Co. v. Jenkins*, [1913] A.C. 1; 82 L.J.K.B. 49; 107 L.T. 564; 36 Digest, Replacement, 213, 1124.
- (6) *Hicks v. Newport, Abergarennny & Hereford Ry. Co.*, (1857), 4 B. & S., 403n; 122 E.R. 510; 36 Digest, Replacement, 221, 1178.
- (7) *Johnson v. Hill*, [1945] 2 All E.R. 272; 173 L.T. 38; 2nd Digest Supp.
- (8) *Bishop v. Cunard White Star Co., Ltd.*, *Appleby v. Cunard White Star Co., Ltd.*, *The Queen Mary*, [1950] 2 All E.R. 22; [1950] P. 240; 2nd Digest Supp.
- (9) *Heatley v. Steel Co. of Wales, Ltd.*, [1953] 1 All E.R. 489.
- (10) *Smith v. British European Airways Corpn.*, [1951] 2 All E.R. 737; [1951] 2 K.B. 893; 2nd Digest Supp.

APPEAL by the plaintiff and CROSS-APPEAL by the defendants from an order of DEVLIN, J., dated Nov. 17, 1953, reported (on a point not relevant to this present report) [1953] 2 All E.R. 1393.

The plaintiff, Dr. Bowskill, when driving his car along the Colnbrook by-pass was involved in a collision with a motor cyclist, Dawson, who was killed. The plaintiff brought an action for damages for negligence against the defendants, the widow and other administrator of the deceased, and the defendants counter-claimed for damages under the Fatal Accidents Acts, 1846 to 1908. Before the trial of the action, the plaintiff died and the action was continued by his executor, the National Provincial Bank, Ltd. The defendants, following Dawson's death, received £3,300 as the result of a scheme established by his employers, Mars, Ltd., to provide, inter alia, "benefit relief or assistance for the widow child or children or other dependants" of male employees who should die while in the employment of the company before attaining the age of sixty-five. Under the terms of a deed of trust dated Sept. 6, 1948, between Mars, Ltd. and trustees known as Mars Security, Ltd., the trustees had agreed to carry into effect a policy of group life assurance to cover employees of Mars, Ltd. and to pay the benefits covered by the scheme. Mars, Ltd. had financed the scheme and provided the amounts necessary to pay the assurance premiums. The trustees had made proposal to the Standard Life Assurance Co. for a group life assurance policy which was duly issued—the trustees being the "person assured". The employees who were the "lives assured" were all the eligible employees in respect of whom forms of application had been deposited by the trustees with and accepted by the Standard Life Assurance Co., and included the deceased, Dawson. After Dawson was killed, the assurance company, in accordance with the provisions of the assurance policy, had paid £3,300 to the trustees who in turn had paid that sum to the defendants.

On the issue of liability, which is not material to this report, DEVLIN, J., held that the plaintiff's claim failed and gave judgment for the defendants on the counterclaim. In assessing the amount of damages payable to the defendants under the Fatal Accidents Acts, 1846 to 1908, the learned judge took into account the £3,300 paid to the defendants by Mars Security, Ltd. The plaintiff appealed on the question of liability and the defendants cross-appealed on the question of damages, contending that the £3,300 was a sum "paid or payable on the death of the deceased under any contract of assurance or insurance" within s. 1 of the Fatal Accidents (Damages) Act, 1908, and ought not to have been taken into account in assessing damages payable to them by the plaintiff. The Court of Appeal dismissed the appeal on the issue of liability.

Marven Everett, Q.C., and Tudor Evans for the plaintiff.

Fearnley-Whittingstall, Q.C., and P. M. O'Connor for the defendants.

Cur. adv. vult.

June 30. The following judgments were read.

MORRIS, L.J., having expressed the view that the appeal failed on the issue of liability, continued: It is provided by the Fatal Accidents Act, 1846, s. 1, that if the death of a person is caused by a wrongful act, neglect or default which would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, then the person who would have been liable if death had not ensued is liable to an action for damages. The action is for the benefit of certain relations and by s. 2 of the Act of 1846 it was provided that such damages should be

" . . . proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought . . . "

The effect of this was explained by LORD WRIGHT in his speech in *Davis v. Powell Duffryn Associated Collieries, Ltd.* (No. 2) (1) when he said ([1942] 1 All E.R. 662):

" The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all

circumstances which may be legitimately pleaded in diminution of the damages must be considered (*Grand Trunk Ry. Co. of Canada v. Jennings* (2) [13 App. Cas. 804]). The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing on the one hand the loss to him of the future pecuniary benefit, and on the other any pecuniary advantage which from whatever source comes to him by reason of the death."

Reference may also be usefully made to the decision of this court in *Baker v. Dalgleish S.S. Co., Ltd.* (3). BARKES, L.J., in his judgment said ([1922] 1 K.B. 368):

"I cannot myself see why, when assessing compensation under Lord Campbell's Act, any distinction should be drawn between an assessment of what is a reasonable expectation of benefit had the deceased person lived, and what is the reasonable expectation of benefit in consequence of the deceased person's death. Both must be taken into consideration in arriving at the real loss."

SCRUTTON, L.J., in the course of his judgment said (*ibid.*, 371):

"The claim is a new right given by Lord Campbell's Act on new principles, not the transfer of any existing right of the dead man. The claimant is entitled to damages proportioned to the injury resulting to her from the death, and that injury must be pecuniary injury. She is not entitled to money compensation for mental suffering resulting from the death or for loss of the deceased's society. She is entitled to claim on the one hand any pecuniary benefit which it is reasonably probable she would have received if the deceased had remained alive: per ERLE, C.J., in *Pym v. Great Northern Ry. Co.* (4). It is not necessary that she should have a legal right to have received that benefit from the deceased or should have actually received any such benefit before the death: *Taff Vale Ry. Co. v. Jenkins* (5). It is enough that she had a reasonable expectation of pecuniary advantage in the future had the deceased survived, which pecuniary advantage may be a voluntary contribution from the deceased. On the other hand, as the question is what is her pecuniary loss by the death, any pecuniary advantage she has received from the death must be set off against her probable loss. This is clear if she receives such advantage as of legal right. Thus a sum received by the claimant under an accident insurance policy must have been deducted until the passing of the statute of 1908; in the case of a sum received under a life policy the premiums the deceased would have had to pay if he lived must have been taken into account in assessing his probable income, though the sum paid under the policy need not be deducted: *Grand Trunk Ry. Co. of Canada v. Jennings* (2). And where the claimant received in consequence of the death under a settlement (*Pym v. Great Northern Ry. Co.* (4)) or under a partnership agreement, pecuniary benefit from the death, such benefit must be taken into account. In my view the same principle applies to voluntary benefits conferred in consequence of the death. Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death. Less weight will be given to voluntary contributions than to those made under legal obligation, just because they are voluntary. Still less weight will be given to voluntary contributions in instalments, because they are obviously terminable; and still less weight if the contributor announces he will reduce his contribution by the amount of compensation obtained from a wrongdoer who causes the death."

The position after 1846 was, therefore, that certain pecuniary advantages resulting from the existence of insurance policies might have to be taken into

account. Thus, in *Hicks v. Newport, Abergavenny & Hereford Ry. Co.* (6) (4 B. & S. 403n.), LORD CAMPBELL directed a jury that from the aggregate amount of compensation which they would otherwise be prepared to give there should be a deduction in respect of the amount that the plaintiffs would receive on a policy that insured the deceased against accidents by railways. But different considerations would apply in the case of policies of life assurance. LORD CAMPBELL in his direction to the jury in *Hicks' case* (6) dealt separately with the position consequential on there being a life assurance policy. In regard to such policies the position might simply be that, as a result of the premature death giving rise to the action under the Fatal Accidents Act, 1846, a widow might then receive that which she was already destined to receive. In delivering the judgment of the Privy Council in *Grand Trunk Ry. Co. of Canada v. Jennings* (2), LORD WATSON said (13 App. Cas. 804):

“The pecuniary benefit which accrued to the respondent from his premature death, consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him, out of his earnings. In such a case, the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration: and it was upon that footing that LORD CAMPBELL, in *Hicks v. Newport, etc., Ry. Co.* (6), suggested to the jury, that in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy.”

The nature of any benefit or reasonable expectation of benefit which may be suggested as resulting in consequence of a deceased person's death will require to be considered in each particular case. Thus, apart from any statutory provision, a reasonable expectation of receiving a pension, although not receivable as of right, may reduce a claim: see *Baker v. Dalgleish S.S. Co., Ltd.* (3) and *Johnson v. Hill* (7). But each situation will require separate consideration. Thus, a widow, after the death of her husband intestate, will take his personal chattels absolutely; but these may consist of articles such as furniture of which the widow would have had the use when her husband was alive in the home and which she will continue to use and in respect of which no deduction falls automatically to be made: see the judgment of HODSON, J., in *Bishop v. Cunard White Star Co., Ltd.*, *Appleby v. Cunard White Star Co., Ltd.* *The Queen Mary* (8) ([1950] 2 All E.R. 26). In *Heatley v. Steel Co. of Wales, Ltd.* (9) this court held in a particular case where a husband had purchased the lease of a house which was the family home, that in an action in respect of his death, he having died intestate, as the widow would require to live with the children in the house exactly as before her husband's death, or if the lease were sold in another house, no deduction fell to be made from the damages in respect thereof.

In 1908 there came what LORD WRIGHT described as a “relaxation” (in *Davies v. Powell Duffryn Associated Collieries Ltd.* (1) [1942] 1 All E.R. 662). The Act (the Fatal Accidents (Damages) Act, 1908) then passed was to amend the law with respect to the assessment of damages under the Fatal Accidents Acts. Section 1 provides that:

“... there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance”

LORD WRIGHT pointed out (*ibid.*) that the same principle was extended to pensions under the Widows', Orphans' and Old Age Contributory Pensions Acts, 1925 and 1935: and now by reason of the Law Reform (Personal Injuries) Act, 1948,

s. 2 (5) and (6), no account is to be taken of a right to benefit which on a death may result under the National Insurance Acts, 1946*.

The question which now arises is whether account should be taken of the £3,300 which was received by the personal representatives of the late Mr. Dawson as the result of a scheme established by his employers to provide (inter alia)

“benefit relief or assistance for the widow child or children or other dependants”

of male employees who should die while in employment with the company (Mars, Ltd.) before attaining the age of sixty-five. Under the terms of the deed of trust made Sept. 6, 1948, between Mr. Dawson's employers (Mars, Ltd.) and certain trustees (Mars Security, Ltd.) the trustees agreed to carry into effect a policy of group life insurance to cover employees of the employers and to pay the benefits covered by the scheme. “The scheme” was defined to mean (so far as it is material to be quoted for present purposes)

“the trusts of this trust deed and the terms and provisions to be entered into and carried into effect with such (if any) modifications or alterations as may be agreed on of a draft policy of group life insurance already settled and expressed to be made between the Standard Life Assurance Co. of the one part and the trustees of the other part.”

The trustees agreed to pay (out of the fund's income or out of capital) the benefits chargeable against the fund. “The fund” was defined to mean and include

“all moneys insurance policies investments and property from time to time held by or on account of the trustees on the trusts of the trust deed.”

By cl. 7 (b) of the trust deed it was provided:

“The capital of the fund and the income thereof for the time being shall be held by the trustees upon trust to apply the same at such time or times subject as hereinafter provided for the following purposes, that is to say:

1. To secure to the estate of a member upon his death while in employment with the company before attaining age sixty-five a sum assured calculated on the basis of the table of sum assured in respect of each £1 of salary or alteration in salary according to the age on the birthday nearest to the date of entry to the scheme or alteration in salary as the case may be or a sum assured equal to the member's salary whichever is the greater. The trustees will insure such sum assured in accordance with the terms and provisions of the said policy . . .”

The employers financed the scheme and provided the amounts needed to pay the insurance premiums. The trustees made proposal to the Standard Life Assurance Co. for a group life assurance policy. A policy was duly issued, the trustees being the “person assured”. The employees who were covered (or the “lives assured”) were all the eligible employees in respect of whom forms of application were deposited by the trustees with and accepted by the Standard Life Assurance Co. The late Mr. Dawson was one of the “lives assured”. After he was killed the assurance company, in accordance with the provisions of the policy of assurance, paid £3,300 to the trustees. The trustees then paid that sum to the personal representatives of Mr. Dawson.

In these circumstances, was the sum which the personal representatives received a sum

“paid or payable on the death of the deceased under any contract of assurance or insurance”?

* These Acts are defined by the National Insurance Act, 1946, s. 80 (1) as that Act and the National Insurance (Industrial Injuries) Act, 1946. These Acts have subsequently been amended and new collective titles enacted; for these see HALSBURY'S STATUTES, 2nd ed., and Supplement, title National Insurance and Social Security.

In my judgment it was. It is said that the sum received by the personal representatives was payable under the scheme; and reference is made to cl. 8 of the deed of trust in which it is provided that

“any and all benefits relief or assistance payable under this scheme on the death of a member shall be payable to his personal representatives.”

- A But as referred to above “the scheme” by definition comprehends the trusts of the trust deed and the terms and provisions of the policy of group life insurance; and one of the “benefits” of the scheme is the securing of a sum assured for the estate of a member on his death while in employment. It is true that the deceased was not a party to the contract of assurance, but it is to be noted that s. 1 of the Act of 1908 refers to “any” contract of assurance or insurance and appears, therefore, to cover and include contracts of assurance or insurance
- B other than those made with the deceased. When it is sought to reduce the damages recoverable by the relations of Mr. Dawson because of the receipt of the £3,300, it can, in my judgment, be shown that such sum had the attribute or feature of being a sum paid on the death of Mr. Dawson under a contract of assurance. Mr. Dawson was a “life assured” and, on his death, the Standard Life Assurance Co. were under obligation to pay to the trustees who in turn were
- C under obligation to pay to the personal representatives of Mr. Dawson. The sum received by the latter can be labelled and identified and accurately described as a sum paid on the death of Mr. Dawson under a contract of assurance and Mr. Dawson can be considered to have been a beneficiary under a trust of which Mars Security, Ltd. were trustees.

- D The facts of the present case make it distinguishable from *Smith v. British European Airways Corpn.* (10). It is, I think, only fair to the learned judge to point out that before him counsel for the plaintiff does not appear to have argued that the £3,300 was to be disregarded. In his judgment he said:

- E “Leading counsel for the plaintiff submits, and I do not think leading counsel for the defendants argued to the contrary, that on the authority of *Smith v. British European Airways Corpn.* (10), per HILBERY, J. ([1951] 2 All E.R. 746-748), this sum is to be regarded as part of the deceased’s estate to be set against the financial loss to his dependants resulting from his death and is not excluded by the Fatal Accidents (Damages) Act, 1908.”

- F We allowed the point to be taken and argued before us and the relevant documents of which secondary evidence had been given to be produced. In my judgment, on the facts of this particular case the £3,300 is shown to be a sum which, under the Act of 1908, need not be taken into account. I desire to reserve for future consideration the question whether the application of the Act depends on there being a right in the estate of a deceased to receive the insurance money. A case might arise where the estate receives, although not as of right, or pursuant to a trust, a sum which can in fact be shown to be a sum which had been paid
- G under a contract of assurance. If such sum were received in any circumstances in which, according to the principles to which I have earlier referred, there would apart from the Act of 1908 have to be an accounting, I desire to say nothing which would exclude the applicability of the Act, but to reserve the question open for future decision. I consider, therefore, that the cross-appeal succeeds.

- H ROMER, L.J.: The Fatal Accidents (Damages) Act, 1908, s. 1, is expressed in terms which leave something to the imagination, for in speaking of

“any sum paid or payable on the death of the deceased under any contract of assurance or insurance”

it is silent as to the identity both of the payor and of the payee in relation to the policy moneys with which the section is concerned. If the payor is the insurance company and the payee is the other party (or his personal representatives) to the contract the £3,300 which is in question in the present case would appear to be

outside the section, for Mr. Dawson, to whose administrators the sum was paid, was not a party to the contract of assurance under which the liability of the insurance company arose, nor did the administrators receive it from that company but from Mars Security, Ltd. I think, however, that to interpret the section in this way would result in unduly confining the probable intention of the legislature, and, in my opinion, it can at least be said that if a sum becomes payable on death under a contract of assurance and the estate of the deceased man has a right, albeit indirectly, to receive the moneys payable thereunder, then a position exists which is within the section, even although the deceased man were not himself a party to the contract. The width of this proposition, as also its applicability, if correct, to the present case was challenged by the plaintiffs.

As to the proposition itself it was said that s. 1, in referring to a "contract of assurance or insurance", was intending to deal with a contract into which a man, for the benefit of his estate or dependants, had entered himself. Although this probably would be the position in a considerable number of cases, there is no sufficient reason, so far as I can see, to limit the operation of the section to such cases and more especially, perhaps, where accident policies are taken out by employers for the benefit of their employees under schemes which involve a contribution by the men themselves. But be that as it may, the section does not itself indicate that the deceased men themselves should be parties to the relevant contracts and, indeed, by using the comprehensive phrase "any contract", it rather suggests the contrary. If A, a creditor of B, takes out a single premium policy of assurance on B's life, and on payment of the debt declares himself a trustee of the policy for B it appears to me that the sum payable on B's death would be within the section notwithstanding that he was not a party to the contract under which the money was paid. In my opinion, accordingly, the fact that Mr. Dawson was not a party to the contract of assurance under which the £3,300 was paid does not in itself exclude the operation of the Act. Then it was alternatively contended that, in any case, this sum was not paid to Mr. Dawson's administrators under a contract of assurance, but under the provisions of a scheme which was inaugurated and maintained by his employers for the benefit of himself and of his fellow workers. I confess that this contention has caused me some little hesitation and difficulty. On one aspect of the matter it is true to say that, although the £3,300 in question was, undoubtedly, paid by the insurance company to Mars Security, Ltd., under a contract of assurance, viz., the contract which existed between these two corporations, the effect and force of that contract was thereupon exhausted and the subsequent payment of the sum to the defendants by Mars Security, Ltd., could not have been, and was not, effected by virtue of the assurance contract, but by virtue of the scheme to which I have already referred. If the employees who were within the scheme had no rights under it at all, but merely an expectation of benefit dependent wholly on the volition and good will of their employers, it could, I suppose, be contended (and I express no concluded opinion on the validity of the contention) that such sums as their dependants might receive were mere bonuses and that the fact that they originated from a policy effected by the employers was merely a fortuitous and irrelevant consideration. If, however, the employees had rights, recognisable at law or in equity, in relation to the moneys which became payable under the scheme, it appears to me that there is no room for any such argument. It, accordingly, becomes convenient to inquire what rights and interests (if any) were conferred on such of the employees of Mars, Ltd. as became participants in the scheme.

Under the group life policy which has been effected for the furtherance of the scheme, the "person assured" is described as

"Mars Security, Ltd., being the trustees of the Mars Life Assurance Fund established by trust deed",

and the "lives assured" are

"all eligible employees in respect of whom forms of application have been or are hereafter deposited by the proposer (namely, Mars Security, Ltd.) with and accepted by"

A the insurance company. The amount assured is the sum certified from time to time by a director of Mars, Ltd. to have been calculated in accordance with cl. 7 of the trust deed and is payable to Mars Security, Ltd. The terms and conditions of the scheme are prescribed by the trust deed to which the policy refers and which was a deed dated Sept. 6, 1948, and made between Mars, Ltd. (called "the company") of the one part, and Mars Security, Ltd. ("the trustees"), of the other part. The deed recited that the company was desirous of establishing a scheme to provide, in manner thereafter appearing, benefit, relief or assistance B for the widow, child or children or other dependants of any of its male employees who should die while in employment by the company before attaining the age of sixty-five years or who should become totally disabled as therein mentioned; and that the company in pursuance of such desire had agreed to pay, from time to time, such sums as were thereafter mentioned to the trustees to hold on the trusts and subject to the powers and provisions thereafter contained. By cl. 1 C of the deed "the scheme" was defined as meaning the trusts of the trust deed and the terms and provisions of the assurance policy; the clause also defined "the employees" as meaning or including all male persons employed by the company in a full-time capacity who had not reached the age of sixty-five and who should become and remain "members of the fund" constituted by the deed and in respect of whom the company would be making contributions to the D fund as thereafter provided; and "the fund" was defined as meaning all moneys, insurance policies, investments and property from time to time held by or on account of the trustees on the trusts of the deed. Clause 2 provided and the company as settlor thereby declared that the trustees should stand possessed of the fund on the trusts and provisions of the scheme thereafter declared. Clause 3 (e), after providing that the trustees should out of the income or capital E of the fund pay (inter alia)

"the benefits relief or assistance for the time being chargeable against the fund and all premiums payable on the said policy"

proceeded:

F "Notwithstanding that no employee or other person shall have any claims to benefit relief or assistance except out of the fund and shall not in any case have any claim against the company or the trustees or any one of them the trustees shall have and be deemed to have carried out the trusts and provisions of this scheme and shall have satisfied any and all obligations as to benefit relief or assistance in the case of any particular G member or his estate or personal representatives if they assign or allocate to that member or to his estate or personal representatives the benefits of and all moneys payable under the said policy in relation to that member."

Clause 4 (a) empowered the trustees to effect other policies of insurance

"for the purposes of providing or securing payment of any benefit payable"

H under the scheme. Under cl. 6 (a) it was provided that the company should

"out of its own moneys pay to the trustees a regular contribution in respect of each member at the rate of 3.25 per cent. of the member's salary provided always that in any case where such contribution is insufficient to do so it may be increased to a rate sufficient to assure to the member or to his estate or personal representatives upon his death whilst in the employment of the company before attaining age sixty-five an amount not less than

the salary received by the member over the period of fifty-two full working weeks immediately preceding the date of death."

So far as relevant the beneficial trusts of the fund are expressed as follows by cl. 7 (b):

"The capital of the fund and the income thereof for the time being shall be held by the trustees upon trust to apply the same at such time or times subject as hereinafter provided for the following purposes that is to say (a) to secure to the estate of a member upon his death while in employment with the company before attaining age sixty-five a sum assured calculated on the basis of the table of sum assured in respect of each £1 of salary or alteration in salary according to the age on the birthday nearest to the date of entry to the scheme or alteration in salary as the case may be or a sum assured equal to the member's salary whichever is the greater. The trustees will insure such sum assured in accordance with the terms and provisions of the said policy."

By cl. 8 it was provided that:

"Any and all benefits relief or assistance payable under this scheme upon the death of a member shall be payable to his personal representatives and the trustees shall not be required or in any way concerned to inquire into the distribution thereof."

Clause 9 provided for the dissolution of the fund at the expiration of the prescribed period, and it is sufficient to note with regard to this that the fund will be applied to meeting benefits already accrued and to the provision of pensions on attaining sixty-five for such members as may then be still living. Under cl. 11 the trustees may with the consent of the company

"but not otherwise alter or modify all or any of the trusts or provisions of this scheme provided that no such alteration or modification shall be made as will in the opinion of the actuary directly and substantially prejudice the rights or interests of any member his estate or personal representatives already entitled to benefit at the date of such alteration or modification as to that benefit or alter the main purpose of the fund from that of granting benefits relief and assistance to the dependants of members on the latter's death . . . or permit the return of any moneys to the company."

Finally it was stipulated by cl. 17 that on bankruptcy or alienation of

"a benefit to which the member or his estate or personal representatives may become entitled under this trust deed"

then such benefit shall not be payable.

It is true that there are provisions under the deed under which the position of the members, as formulated by the clauses to which I have referred, could be adversely affected or qualified. By cl. 3 (a) the trustees are given conclusive authority to adjudicate on all claims on the fund and on any question or doubt arising on the construction of the trust deed or otherwise relating to the scheme and by cl. 3 (g) to decide whether or not any particular member of his estate or personal representatives is entitled to benefit under the deed; and, further, it is provided by cl. 10 (b) that the company may in certain events terminate or reduce or suspend its payments and contributions to the fund in which case the trustees are either to dissolve the fund or modify the scheme as therein prescribed. Notwithstanding these elements in the scheme, however, it appears to me that for all practical purposes the members may be regarded as beneficiaries under a voluntary trust (albeit a conditionally revocable one), established by Mars, Ltd., for their benefit. The frequent references in the clauses which I have cited to the "claims" and "rights" and entitlement of the members or their legal personal representatives permit, I think, of no other conclusion. Certain it is that they

A are the only persons having beneficial interests in the fund, for the company, by the trust deed, deliberately excluded itself from any participation therein, either present or future, and the legal owners of the fund, Mars Security, Ltd., are bare trustees to serve the purposes of the trust and have no equitable interest in the fund. Whether the benefits under the scheme form part of the employees' contract of service, I am not altogether clear, although I gather from the booklet "Mars, Ltd. Social Security Plan", to which reference was made during the argument before us, that they do; if so, the legal personal representatives of a deceased member could presumably sue the employers for damages if they withheld payment of the appropriate benefit. But the terms of this booklet seem to me to confirm the impression which derives from the trust deed itself that the members are entitled to be regarded as beneficiaries under an executed trust. B The booklet was issued by the company and addressed to their employees, and on the first page it is stated that

"The trusts established to operate the various funds referred to in this booklet are vested in Mars Security, Ltd."

C Then on p. 22 et seq., which deal with the life assurance fund, the company inform the employees that

D "Benefits under the scheme are provided through a life assurance fund established by trust deed and administered by 'Mars Security, Ltd.' The trustees have secured these benefits under a group life assurance policy with the Standard Life Assurance Co. The assurance policy can be seen by any member on application to the secretary of the trustees. The trustees will hold the policy in trust for the benefit of employees, and their liability for claims thereunder will be limited to the amount paid by the insurance company corresponding to employees' benefits under the scheme. I. Benefits. The following is a summary of the benefits to which you will be entitled as a member of this scheme: (a) Death. If you die whilst in the company's service at any time up to the last day of the month in which you attain age sixty-five, your personal representatives will be paid a lump sum calculated from the table and notes given in Appendix V based on your age on date of entry into the scheme . . . The scheme has been arranged in such a way that the lump sum payable as benefit to your personal representatives in the event of your death is automatically adjusted in respect of any increases or decreases in your weekly earnings . . . We must, however, reserve the right, in the event of unforeseen circumstances, to discontinue the scheme on giving one month's notice or to suspend or amend it from time to time on any anniversary date (May 3) without prejudice to the rights of anyone in respect of benefits already payable."

E Having regard, then, to the terms of the trust deed and to the exposition of the employers' intention in their booklet it is clear, in my opinion, that the members of the fund and their personal representatives had more than mere expectancies, dependent on the good will of the employers, in relation to their life assurance benefits. In my judgment, they had rights which the courts would recognise and enforce; and, although these rights were conferred on them by the scheme itself, they were such as to entitle them as cestuis que trust to call on the trustees to perform the trusts of the deed under which they benefited and to seek the intervention of the court if need arose. It follows that if the trustees had on H Mr. Dawson's death refused to claim from the insurance company the amount due under the policy and pay the sum over to the defendants they could have applied to the court (e.g., under R.S.C., Ord. 55, r. 3 (c)) for an order on the trustees to do so. Indeed, it may well be that had the insurance company refused to pay and the trustees declined to sue, the defendants themselves could have sued the company adding the trustees as defendants to the proceedings. If such, then, was the position of the defendants, they are within the

proposition to which I have earlier referred in that they had a right, enforceable in equity, to receive the moneys which became payable on Mr. Dawson's death under the contract of assurance between Mars Security, Ltd., and the insurance company; and such moneys ought not, accordingly, in my judgment, to have been taken into account in assessing the damages payable to the defendants.

On this point, therefore, I am of opinion that the cross-appeal should be allowed. I would only add that counsel for the plaintiff suggested that the scheme which is in question in the present case is non-contributory so far as the employees are concerned and placed some reliance on the fact. It would not have affected the conclusion which I have expressed if that had in fact been so, for beneficiaries under a trust are more usually volunteers than not; but, in fact, it seems to me that the members of the fund did contribute indirectly to the scheme as appears from the statement on p. 3 of the booklet to which I have already referred that

"Every effort will be made to see that at all times a fair and equitable proportion of the company's sales income is allocated for the benefit of employees either directly as wages or indirectly as social benefits in return for their services to the company."

From this I gather that a portion of the company's income is (very properly) devoted to the scheme which otherwise might have been applied to paying higher wages. So far as the appeal itself is concerned, I agree that it fails and I have nothing to add to the reasons which were given by my Lord for dismissing it.

SOMERVELL, L.J.: I agree with the judgments which have just been delivered.

Appeal dismissed.

Cross-appeal allowed.

Solicitors: *E. P. Rugg & Co.* (for the plaintiff); *Wm. Easton & Sons* (for the defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

STOW BARDOLPH GRAVEL CO., LTD. v. POOLE (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Harman, J.), May 20, 21, 1954.]

Income Tax—Deduction in computing profits—Capital expenditure—Cost of acquiring deposits of sand and gravel—Stock-in-trade of sand and gravel merchants—Income Tax Act, 1918 (c. 40), sched. D, Case I.

A The taxpayers, who carried on business as sand and gravel merchants, purchased for £2,000 the right to a deposit of gravel and sand ballast on land, with options to acquire two other deposits on other land, one of which they exercised, paying £2,250 for the deposit so acquired. They acquired no estate or interest in the land, but had a right of access for the purpose of removing the material. The material had not been raked up. The taxpayers did not work it up or treat it as a raw material, but simply dug it up, carted it away and sold it elsewhere.

B HELD: the cost of acquiring the gravel and sand ballast was not a capital expense but an expense of acquiring stock-in-trade, and, therefore, it was deductible in computing the taxpayers' income for purposes of income tax under Case I of sched. D to the Income Tax Act, 1918.

C AS TO STOCK-IN-TRADE AND CAPITAL EXPENDITURE IN COMPUTING INCOME FOR INCOME TAX PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 122-125, paras. 227-234 and pp. 158-161, paras. 325-327; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. 242-252 and Digest Supps.

D FOR THE INCOME TAX ACT, 1918, sched. D, Case I, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 153 (compare now, INCOME TAX ACT, 1952, s. 123, *ibid.*, Vol. 31, p. 116).

Cases referred to:

- (1) *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1934] 1 K.B. 548; 103 L.J.K.B. 619; 150 L.T. 427; 18 Tax Cas. 280; Digest Supp.
- E (2) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 28 Digest 52, 264.
- (3) *Vallambrosa Rubber Co., Ltd. v. Farmer (Surrey of Taxes)*, 1910 S.C. 519; 5 Tax Cas. 529; 28 Digest 44, k.
- (4) *Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K.B. 674; 83 L.J.K.B. 1721; 111 L.T. 848; 6 Tax Cas. 477; 28 Digest 52, 262.
- F (5) *Anglo-Persian Oil Co., Ltd. v. Dale*, [1932] 1 K.B. 124; 100 L.J.K.B. 504; 145 L.T. 529; 16 Tax Cas. 253; Digest Supp.
- (6) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 1 K.B. 64; 90 L.J.K.B. 113; *affd.* C.A., [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; 42 Digest 666, 765.
- G (7) *Alianza Co., Ltd. v. Bell*, [1904] 2 K.B. 666; 73 L.J.K.B. 755; 91 L.T. 463; *affd.* C.A., [1905] 1 K.B. 184; 74 L.J.K.B. 219; 92 L.T. 184; *affd.* H.L., [1906] A.C. 18; 75 L.J.K.B. 44; 93 L.T. 705; 5 Tax Cas. 172; 28 Digest 47, 238.
- (8) *Russell v. Scott*, [1948] 2 All E.R. 1; [1948] A.C. 422; [1948] L.J.R. 1265; 30 Tax Cas. 394; 2nd Digest Supp.

H CASE STATED by the General Commissioners of Income Tax for Freebridge Marshland, Norfolk.

The taxpayer company appealed against assessments to income tax under Case I of sched. D to the Income Tax Act, 1918, in the sums of £200, £300 and £300 respectively for the years 1948-49, 1949-50 and 1950-51. The company had been incorporated in 1947 and, shortly after commencing business as dealers and merchants in sand and gravel on Apr. 1, 1948, had by oral agreement acquired from Gorbould Bros., in return for a payment of £2,000, the benefit of an agreement which that firm had made with Luddington Estates, Ltd.

Under that agreement, Gorbould Bros. had undertaken to purchase gravel and sand ballast in eight acres of land for £2,000, with an option within five years to purchase an additional deposit in five acres of land at £1,000 an acre, and a similar right in respect of a third piece of land at a similar price. The taxpayer company excavated the deposit in the eight acres and sold the sand and gravel in the course of trade, and in 1949 it exercised the option under the agreement in respect of 2½ acres of land at £1,000 per acre, paying £2,250. The company contended that, in computing its profits for income tax purposes, it was entitled to deduct the two sums of £2,000 and £2,250 paid in respect of the sand and gravel deposits on the ground that they were: (i) expenditure incurred in the acquisition of trading stock, or, alternatively, (ii) expenditure of a revenue character wholly and exclusively incurred for the purpose of its trade. The Crown contended that the two sums were not expenditure on the acquisition of trading stock but were expenditure of a capital nature, and, therefore, were not proper deductions in computing the company's profits. The commissioners held that the sums were not admissible deductions for income tax purposes and accordingly that the appeals must fail in principle. The company appealed.

H. B. Magnus for the company.

Sir Lynn Ungood-Thomas, Q.C., and Sir Reginald Hills for the Crown.

HARMAN, J. : This is an appeal from a finding by the general commissioners for the division of Freebridge Marshland in the county of Norfolk that the appellant company was not at liberty in making up its accounts to charge against its profits the cost of implementing a certain contract. The commissioners do not say why they came to that conclusion but merely:

"We . . . were of opinion that the above payments were not admissible deductions"

and "the appeals must fail in principle", whatever that may mean. The principle was presumably that, if this payment were a capital payment, it could not be a good deduction for income tax purposes, and the question is whether it was a capital payment or an income payment in the way of trade.

It appears that Luddington Estates, Ltd., owned land in and on which was lying a comparatively large deposit of gravel and sand, and on Oct. 29, 1947, entered into a contract with the agent for a partnership firm of contractors, as purchasers, whereby it, as owner of the soil, purported to sell and the purchasers to buy the deposits of gravel and sand ballast contained in and on the land described, the price being £2,000 paid down immediately. Luddington Estates, Ltd. bound itself to allow access to the land to the purchasers for the purpose of removing the gravel and sand through one gateway only. That was the whole transaction so far as concerned the first eight acres, but the contract went on to give the purchasers a five-year option to buy another deposit of gravel and sand on an adjoining five acres, the price to be £1,000 an acre. If they exercised that option, they would acquire a like right over a third piece of land at a similar price. The contract provided that no estate or interest in the land other than as expressly agreed should be given to the so-called purchasers, nor was there any limit to the time in which they must remove the sand and gravel, the only time limit being the five-year periods within which they must exercise the options. They were not the owners of the land obviously, because they only had access to it by one road and the freehold must have remained, I take it, in the vendor. What they got was, apparently, a right of access not limited in time, coupled with a profit-à-prendre, and for that they paid £2,000.

That contract was never operated by the purchasers, but was by word of mouth transferred to the appellant company, which has since exercised the first of the options for a sum of £2,250. It has excavated the deposit of sand and gravel to some extent not specified and has sold it in the course of its trade, which is the trade of sand and gravel merchants. The case has been treated throughout as

being a case under sched. D and not under sched. A. The only question is whether the company was entitled in making up its accounts to debit against the profits of the sale of this gravel the money paid, first, for taking over this contract, and secondly, for exercising the option. No one seeks to make any distinction between the two.

A It is said for the company that this is a mere purchase of its stock-in-trade, sand and gravel, and that all it does is to go on the land, shovel up the sand and gravel into a lorry, and sell it down the road to its customer, so that it is as much its stock-in-trade as any other article in which a trader deals. It is said on behalf of the Crown that the sand and gravel is not a chattel detached from the soil and lying there to be picked up: it is something which must be worked as if it were in a mine or a quarry: that all that was bought under this contract was a capital asset, namely, the right to go on the land and win the gravel and the sand and carry it away. The Crown says that the cost of working the sand and gravel may be charged, but not the price paid under the contract, since the £2,000 and the £2,250 are merely capital expenditure incurred by the company in order to acquire these valuable rights.

C The nearest case to this on the facts seems to me to be *Golden Horse Shoe (New), Ltd. v. Thurgood* (1). In that case the appellant company had bought a dump of what were called "tailings", lying on the soil and containing a certain amount of gold, but not forming part of the land in the sense of being in any way affixed to it. The Court of Appeal, reversing the decision of the lower court, held that the company was entitled to deduct the price paid against its profits. LORD HANWORTH, M.R., referred at length to fixed and floating capital, and said very truly ([1934] 1 K.B. 558):

D "The question involved is always a troublesome one, and is not rendered less difficult by recalling the principle . . ."

E and he then sets out to state that principle. He mentions among others the case of *British Insulated & Helsby Cables v. Atherton* (2) in which an attempt was made to decide what was a capital payment and what an income payment, and continues ([1934] 1 K.B. 560):

F "The above cases serve to establish the difficulty of the question rather than to affirm any principle to be applied in all cases. Indeed, in the last case cited [*Atherton's* case (2)] LORD CAVE says that a payment once and for all, a test which had been suggested by LORD DUNEDIN in *Vallambrosa Rubber Co., Ltd. v. Farmer* (*Surveyor of Taxes*) (3) was not true in all cases, and he found authority for that statement in *Smith v. Incorporated Council of Law Reporting for England & Wales* (4) and *Anglo-Persian Oil Co., Ltd. v. Dale* (5), already referred to, is another. The test of circulating as contrasted with fixed capital is as good a test in most cases to my mind as can be found; but that involves the question of fact: was the outlay in the particular case from fixed or circulating capital? It is clear that there may be an immediate outlay for the purpose of the trade carried on, a large outlay on the stock-in-trade which is to be marketed over such a span of time as the business warrants."

G He cites *Cape Brandy Syndicate v. Inland Revenue Comrs.* (6) for that, and goes on ([1934] 1 K.B. 560):

H "After careful consideration of the present case, in the course of which my mind has fluctuated on either side, I think it is to be decided upon its own facts . . ."

It is clear, therefore, that he is not doing more than deciding the instant case before him, and he decides—and I think this was the ground for his decision—that the company was entitled to make the deduction in question of the price of the "tailings", because, as he says (*ibid.*, 561):

"They had not to win them from the soil; they had been gotten already."

He goes on ([1934] 1 K.B. 562) to quote from *Alianza Co., Ltd. v. Bell* (7) [per CHANNELL, J. ([1904] 2 K.B. 673)]:

“If it is merely a manufacturing business, then the procuring of the raw material would not be a capital expenditure. But if it is like the working of a particular mine or bed of brick earth, and converting the stuff worked into a marketable commodity, then the money paid for the prime cost of the stuff so dealt with is just as much capital as the money sunk in machinery or buildings. In my opinion the particular adventure here belongs to the latter category.”

There CHANNELL, J., had held that, as the company had to work the material up, its purchase price was a capital expense.

ROMER, L.J., gives as usual a brilliantly consistent and clear judgment, but again I think he only decided the case on its own facts. He says ([1934] 1 K.B. 563):

“Unfortunately, however, it is not always easy to determine whether a particular asset belongs to the one category or the other. It depends in no way upon what may be the nature of the asset in fact or in law. Land may in certain circumstances be circulating capital. A chattel or a chose in action may be fixed capital. The determining factor must be the nature of the trade in which the asset is employed.”

I think he too relies on the fact that in that case the “tailings” had already been extracted from the mine.

It is said here that the opposite conclusion should be reached, and I think in substance the reason is because this gravel had never been raked off the soil on which it was lying. There is no question, in any true sense, of extracting gravel. No process, as I understand it, is gone through here. It is not even suggested that a riddle or sieve is used. The gravel is merely dug up or raked up where it lies, put on the lorry and sold wherever it can be. It is said that what was bought was a mere right to go on the place and win the gravel, but, in effect, in the *Golden Horse Shoe* case (1) what was bought was the licence to go on the land and take away the “tailings” and I myself think that it is a distinction without difference to suggest that, because nobody had ever applied a rake to this gravel before, it should be treated as capital, whereas, if somebody had raked it into little heaps before the contract was made, then its purchase would constitute a different form of adventure. It is the same situation. The gravel is no more and no less attached to the land.

It was decided by the House of Lords in *Russell v. Scott* (8) that sand and gravel pits were not taxable under sched. A, No. III, r. 3. They must, therefore, be chargeable under No. I of that schedule. In the present case it was not suggested that sched. A was applicable. If that be right, the basis of charge must be under sched. D on the footing that this was the trade of dealing with sand and gravel. These people were sand and gravel merchants. What they bought under this contract was sand and gravel. They did not work it up or treat it as raw material or do anything with it, so far as I am told, except to load it on to a cart and take it away, and I think it would be to introduce only another artificiality if I were to say that the fact that this gravel was not worked before, or had not been moved, made the expenditure on it a capital outlay when that expenditure would have been a trading cost if it had happened to have been touched with a rake. I think the company was buying its stock-in-trade when it bought the gravel and ought to be allowed to deduct the cost against the money it made by selling it.

Appeal allowed.

Solicitors: *Metcalf, Copeman & Pettefar* (for the appellant company);
Solicitor of Inland Revenue.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

GRAINGER v. GRAINGER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), June 23, 1954.]

Justices—Husband and wife—Maintenance—Reduction of—Dissolution of marriage—Re-marriage of husband—Materiality of second wife's ability by working herself to relieve husband of financial anxieties.

A *Justices—Husband and wife—Appeal—Exhibits—Documents produced and shown to justices not exhibited.*

On Dec. 20, 1949, an order was made in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, whereby the husband was ordered to pay a total sum of £2 10s. per week as maintenance for her and the two children of the marriage. On Mar. 2, 1951, the amount was increased to £4 10s. per week, namely, £3 10s. for the wife and 10s. for each of the two children. On May 28, 1953, a decree nisi, granted to the wife dissolving the marriage on the ground of the husband's desertion, was made absolute. On Aug. 4, 1953, the husband re-married. On Feb. 26, 1954, he applied for a variation of the order by reducing the amount of the weekly payments, on the ground that his means had decreased, that he had re-married, and that the means of the former wife had increased. Before the justices the husband produced a signed certificate from his employers showing his earnings and a letter from his bank showing his indebtedness to the bank. He stated that on his re-marriage a house was purchased in the name of his present wife on mortgage, that he was responsible for repayments under the mortgage amounts to about 25s. weekly, that the house had five bedrooms but that he had not thought of letting any accommodation, that he wanted his present wife at home and not out at work, and that before the marriage his present wife had been a housekeeper. The former wife stated in evidence that she was in a bad state of health, as a result of which the two children were boarded at a children's home. The justices varied the order by reducing by 10s. per week the amount payable as maintenance for the former wife, stating that they did not consider as reasonable the husband's "refusal to consider letting any part of his large house." The husband appealed on the ground that the reduction was insufficient. No documents had been made exhibits in the case.

F **HELD:** if part of the house were let, the present wife could exercise her skill as a housekeeper, thereby reducing the overhead expense of living in the house and thus indirectly relieving the husband of the financial anxieties caused by having to support the former and the present wife; this was a matter which the justices were entitled to consider, and since they were justified in reaching their conclusion the appeal failed and would be dismissed.

G **Per curiam:** the signed certificate and the letter from the bank, which were produced and shown to the justices, and also, if any argument were to be based on it, the mortgage deed, should have been made exhibits, so that they would have been available to the Divisional Court.

H **EDITORIAL NOTE.** The decision that the magistrates were entitled to take into consideration the possibility that a part of the house could be let and that the wife then might exercise her skill as a housekeeper is stated in the headnote above. A submission against this decision was, however, based on the mortgage deed which was alleged to forbid the house to be let. As the mortgage deed had not been made an exhibit in the proceedings before the magistrates and was not before the Divisional Court, the submission was put aside. Attention has been drawn previously to failure to make documents exhibits in matrimonial proceedings before magistrates: see *Stretton v. Stretton* ([1953] 2 All E.R. 1227). The present case illustrates a consequence of such a failure.

AS TO VARIATION OF ORDERS UNDER THE SUMMARY JURISDICTION (SEPARATION AND MAINTENANCE) ACTS, 1895 TO 1949, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 722-728, Nos. 6901-6950.

APPEAL by the husband against an order of the Mortlake justices sitting at Mortlake, dated Mar. 16, 1954.

Irwin for the husband.

Miss Colwill for the wife.

LORD MERRIMAN, P.: It is important to know, as we have been frankly informed by counsel for the husband, that already, during the currency of the orders of Dec. 20, 1949, as modified, arrears had from time to time accumulated, and that arrears are still outstanding. Moreover, so far as we know, there was no suggestion made to the justices on Mar. 16, 1954, that they should exercise the power, which they undoubtedly possess*, to deal with these arrears by remitting the whole or part of them, and I do not think we have any material before us which would enable us to deal with that particular point. It goes without saying that it can be dealt with at any appropriate time when there is any other question of variation before the justices.

Since the variation of the order on Mar. 2, 1951, the wife has obtained a decree of divorce on the ground of desertion by the husband. That was made absolute on May 28, 1953, and it is plain from the evidence that the husband has since re-married. He has married a woman who, according to his evidence, had been employed as a housekeeper. She obtained, on mortgage from the local authority, a house worth £1,000, said to have been acquired cheap because it was large (and, as even judges are entitled to know, smaller houses have an enhanced value in these days). That combination of circumstances suggests that as there are, I think, four, or maybe only three, surplus rooms in the house, possibly a more profitable use of the house could be made than is made at present, e.g., by letting some part of the house to enable the present wife to exercise her skill as a housekeeper, with some reduction in the overhead expense of living in this establishment and to that extent, no doubt, indirectly relieving the husband of the financial anxieties which have been caused by having to support the former wife and the present wife. It is said, however, that this is a most dangerous doctrine. It seems to me to be merely a common-sense comment on the realities of this particular case, and I am not conscious that I am laying down any doctrine. I am merely considering the matter from the point of view which appeared to commend itself to the justices, who gave very careful consideration to the whole matter. We are not convinced by the husband, who, admittedly, had run into arrears and was pleading inability to pay, saying that he did not approve of the present wife being in work, but wanted her in the home. I think the justices realised as well as we do that there were ways in which she could remain in the home but could still do work which would be useful in the circumstances of this particular case.

I regret that, admirable as are the note and the statement of the justices' reasons, there is one defect which crops up much too often. We are told, in response to the usual inquiries made by the registrar, that there were no exhibits in the present case. The fact is that a considerable number of documents were put in, or, at any rate, referred to, including the mortgage deed. It is now suggested that the terms of the deed absolutely prohibit any use of the house in the way I have mentioned. It would have been much better if we had been able to see the document itself. This would have been possible if it had been made an exhibit, as it should have been made if anything turns on it. I am afraid we shall have to leave that matter in the obscurity in which it at present

*See the Magistrates' Courts Act, 1952, s. 76: HALSBURY'S STATUTES, 2nd ed., vol. 32, p. 480. *Ed.*

rests. Amongst other things that were undoubtedly produced was a signed certificate about wages. Nobody has even a copy of it here. It is true that the figures which it sets out are given, but they cover the winter period October, 1953, to March, 1954, give a gross total, and the average. It may be a fair average, but one cannot help reflecting, particularly as there is evidence that the wages one week were greatly reduced by the fact that there had been snow in the district, that, if the man is working out of doors, merely to divide the total by the number of weeks covered may not really give a true average of his earnings if only the winter months are taken. However, I merely make the comment that the certificate and the letter from the bank showing the husband's indebtedness to the bank should have been made available to us by making them exhibits, so that they would come up with the rest of the papers.

[HIS LORDSHIP referred to the state of the wife's health and to the consequent need to board the children at a children's home, and accepted the justices' view that her need was still great. HIS LORDSHIP continued:] The sole question is whether the justices ought to have made a greater reduction in the amount payable in respect of the wife. They came to the conclusion, obviously after careful consideration, that a reduction from £3 10s. to £3 was the most that could reasonably be expected in the circumstances. It seems to me to be impossible to say, looking at their careful statement of reasons, that there is any question of principle in respect of which they have gone wrong, and I do not think there is any ground on which we can say that the conclusion to which they came, after examining the figures resulting from the wife's ill health and the fact that the husband has married again, was not justified. This appeal fails.

DAVIES, J.: I agree.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Blackburn & Co.*, Fleetwood (for the husband); *Musson & Co.*, agents for *Robbins & Fearnley*, Richmond, Surrey (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

MUNDAY v. MUNDAY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), June 25, 1954.]

Justices—Husband and wife—Procedure—Adjournment of complaint—Different justices at different hearings of same complaint—Justice not manifestly seen to be done—Magistrates' Courts Act, 1952 (c. 55), s. 98 (6).

On Oct. 11, 1950, an order for weekly payments was made in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. On Jan. 13, 1954, the husband complained to the justices and sought a variation of the order by a reduction in the amount of the weekly payments. The complaint was heard on Feb. 3, 1954, by three justices; the husband gave evidence in chief and the justices adjourned the case until Feb. 17, 1954, to enable him to produce certain accounts and files. The same three and two additional justices sat at the adjourned hearing on Feb. 17, 1954. A further adjournment was granted to enable the wife's solicitor to examine the accounts and files, but the wife gave her evidence at the hearing on Feb. 17, 1954, to avoid the need for her further attendance at court. The case was concluded at the third hearing on Mar. 3, 1954, and the three justices then sitting, of whom two were the two additional justices on Feb. 17, 1954, and the third had not sat either on Feb. 3, or Feb. 17, 1954, dismissed the husband's complaint. On appeal by the husband.

HELD: it was clear from the statement of their reasons that the three justices who made the order of Mar. 3, 1954, dismissing the husband's complaint, had acted on evidence part of which had been given by the

husband at the first hearing on Feb. 3, 1954, at which none of the three had been present: accordingly, not only had the justices failed to comply with the mandatory provisions of the Magistrates' Courts Act, 1952, s. 98 (6), requiring the justices composing the court to be "present during the whole of the proceedings", but, even more important, justice had not manifestly been seen to be done; the husband's complaint would be remitted for re-hearing by a fresh panel of justices where business would not be conducted by the same justices' clerk.

FOR THE MAGISTRATES' COURTS ACT, 1952, s. 98 (6), see HALSBURY'S STATUTES, Second Edn., Vol. 32, p. 499.

APPEAL by the husband against an order of the Petersfield justices dated Mar. 3, 1954.

On Oct. 11, 1950, the husband was found by the justices guilty of desertion and an order was made in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, whereby she was given the custody of the two children and he was ordered to pay £2 a week as maintenance for the wife and 10s. a week for each child. On Jan. 13, 1954, the husband complained to the justices that his circumstances had been reduced and that the wife now had a regular and substantial income, and applied for a variation of the order of Oct. 11, 1950, by a reduction in the amount of the weekly payments. By that date the order in respect of the elder child had lapsed by reason of that child's age and the husband was, therefore, liable to pay a total sum of £2 10s. a week. The complaint came before three justices on Feb. 3, 1954, and was adjourned to enable the husband to produce certain accounts and files. At the adjourned hearing on Feb. 17, 1954, five justices—being the original three and two additional justices—were sitting. After the wife had given evidence so that her further attendance might be dispensed with, the case was again adjourned to enable the wife's solicitor to examine the accounts and files. On Mar. 3, 1954, the case was concluded, the court then consisting of the two additional justices of Feb. 17, 1954, and one justice who had not been present at either of the earlier hearings. The complaint was dismissed and the husband appealed, alleging, *inter alia*:

"That the provisions of the Magistrates' Courts Act, 1952, s. 98 (6), were not complied with in that the justices composing the court were not present during the whole of the proceedings."

In the statement of their reasons, the justices stated, *inter alia*:

"(i) . . . we considered that he [the husband] has an earning capacity which justifies an order for payment of £2 10s. weekly . . . Furthermore his parents are at present paying £3 a week due under a suspended committal order made on July 22, 1953, in respect of arrears under this . . . order . . . (iii) Two of us on Feb. 17, 1954, found that the wife was earning a net wage of £4 12s. 6d. a week . . . (iv) . . . At the third and final hearing the husband (who was not legally represented) was cross-examined; he also reiterated the substance of his evidence in chief and was given full opportunity to add anything he wished. Nobody gave evidence except the husband and wife . . . Two of us heard evidence of the wife's earnings; all of us heard evidence of the husband's income . . . and of the assistance he receives from his parents."

The justices then stated:

"(v) We consider it proper to add to our reasons given above the following history of this case:"

and set out fourteen occasions on which the husband had appeared before justices at the same court in connection with the order of Oct. 11, 1950, and concluded:

"The husband's evidence on each occasion subsequent to the making of

the order has been to the same effect-- diminishing business, the hope one day of setting matters aright, trade creditors, inability to sell the companies or their assets or to obtain other employment, financial assistance from his parents. Nevertheless we take the view that the husband has the capacity to earn an amount sufficient to keep himself and to pay the amount of the order and even something additional towards the arrears which on Mar. 3, 1954, stood at over £200."

A

B. Garland for the husband.

N. R. Blaker for the wife.

LORD MERRIMAN, P.: Before the justices the husband's case, in a nutshell, was: "I cannot afford to pay". I do not propose to go into the merits of that complaint because, in my opinion, the present case falls to be dealt with on the ground

B

"That the provisions of the Magistrates' Courts Act, 1952, s. 98 (6), were not complied with in that the justices composing the court were not present during the whole of the proceedings."

That is not disputed, except in the sense that it is said that the whole of the proceedings were repeated on the third and last occasion (Mar. 3, 1954), when the three justices who made the order were present. [His LORDSHIP stated the facts and continued:] It is true that there was a quorum on Mar. 3, 1954, but it seems to me to be impossible by any process of reasoning to say of the order arrived at by this curious procedure that the justices composing the court before which any proceedings took place were present during the whole of the proceedings. I am unable to accept the argument that in substance there was a hearing *de novo* before the tribunal of three on Mar. 3, 1954. Suffice it to say that it is plain that a great deal of what the justices who made the order on Mar. 3, 1954, have set out in reasons (i) and (ii) as findings of fact were derived from evidence appearing on the notes of the first hearing (Feb. 3, 1954), at which not one of them was present. One of the three sitting on Mar. 3, 1954, had not been present on any previous hearing of the husband's complaint.

C

D

E

Apart from the consideration that s. 98 (6) of the Act of 1952 is mandatory, and contains no dispensing power relevant to these proceedings, I think there are even wider considerations, for it seems to me that the present is pre-eminently a case in which the principle that justice must not merely be done, but must manifestly be seen to be done, has been infringed. In reason (iii) the justices

F

say: "Two of us on Feb. 17, 1954 [the second occasion] found that the wife was earning a net wage of £4 12s. 6d. a week as a typist."

That is quite wrong. There was, or ought to have been, no finding on Feb. 17, 1954. They must mean that two of them heard evidence to that effect, which may, of course, have been uncontradicted, but they did not "find" anything at all. In contrast with that, the justices continue:

G

"... We considered that the nature of the wife's job, the amount of her earnings and her present circumstances did not of themselves justify us in reducing the amount payable by the husband."

They are there plainly speaking collectively for all three of them, in contrast with the first sentence of the reason, which refers only to "two of us". So three of them, one of whom had not even seen the wife in the witness-box, made a finding about the nature of the wife's job, the amount of her earnings, and the effect of it. Then they say in reason (iv) that they regret that they did not all sit "on the three occasions on which the complaint under review was heard."

H

I find a good deal to regret in the reasons which are given by the justices, for, as counsel for the wife pointed out, the suggestion does appear that this curious procedure has been followed before. I think it more important that it is not

likely to satisfy the husband that justice has been done when, in support of their findings on Mar. 3, 1954, it is recorded (reason (v)) that the three justices sat on Nov. 28, 1951, to consider an application by him to reduce the order and dismissed that application, or that on July 16, 1952, one of the three was party to sending the husband to prison for five days for non-payment of arrears, and that on July 22, 1953, the three justices made a suspended committal order against the husband, on which it was not necessary to send him to prison because, apparently, his aged parent paid and has continued to pay the necessary instalments. I do not think that it makes it any better that the justices add that the same firm of solicitors had represented the husband on three of the specified occasions, and that on each occasion

"... Evidence and accounts similar to those produced to us on the hearing of the complaint now under review were produced then."

They summarise it in this way:

"The husband's evidence on each occasion subsequent to the making of the order [on Oct. 11, 1950] has been to the same effect—diminishing business, the hope one day of setting matters aright, trade creditors, inability to sell the companies or their assets or to obtain other employment, financial assistance from his parents."

I emphasise that they use the words "on each occasion subsequent to the making of the order", not "on the present occasion."

I cannot understand how a man who was not represented could have been subjected to this procedure without any protection either from the court or from the clerk who ought to have seen that the proceedings were rightly conducted. It is impossible to support the order of Mar. 3, 1954, thus arrived at. The dismissal of the husband's complaint must be set aside, and when DAVIES, J., has given judgment we will consider how best to ensure that an appearance of justice is produced on a re-hearing.

DAVIES, J.: I entirely agree, and save for the fact that this is obviously a matter of some public importance I would not add anything. As LORD MERRIMAN, P., has said, s. 98 (6) of the Magistrates' Courts Act, 1952, is mandatory, and ought to have been within the knowledge of the clerk, if not of the justices themselves, and ought to have been acted on by him.

Speaking for myself, I am not prepared to go through the notes of the evidence with a tooth-comb, as we were invited to do by counsel for the wife, to decide whether or not the hearing on Mar. 3, 1954, was a hearing *de novo*. In so far as we did embark on that examination, it appeared to be plain, as LORD MERRIMAN, P., said, that these three justices who sat on Mar. 3, 1954, were acting in part on evidence which none of them had heard. But, to my way of thinking, the real point is broader. Every layman would believe that all three hearings were part of the same case. Indeed, the justices themselves in reason (ix) speak of "the three occasions on which the complaint under review was heard" so that each is treated as a part of the hearing. It seems to me impossible that any layman could believe that justice had been done in the circumstances of the present case when three persons heard it on the first day, those three plus two others heard it on the second day, and the second two plus a third and without the original three heard and determined it finally. Any member of the public would rightly think that that was no way for any legal proceedings to be conducted, and would at once come to the conclusion that no fair or proper decision could be arrived at in proceedings conducted in such a manner.

I have said that it was the duty of the clerk to know the proper procedure under s. 98 (6), and I cannot help feeling that, apart from the sub-section, the justices themselves ought in common fairness and in common sense to have realised that to conduct proceedings as they did in the present case was wholly and obviously wrong. I hope that if, as appears to be the case from the justices'

reasons, there is some tradition or practice of this kind in this court of summary jurisdiction, it will now for ever cease.

LORD MERRIMAN, P.: The appeal is allowed, the order dismissing the complaint set aside, and the complaint remitted for re-hearing by a quorum of justices none of whom has taken any part in the disputes between the husband and the wife. We are told that there is no deputy clerk, but it is open now, as
 A I understand it, for justices to appoint a deputy for the purpose. It is not for me to say how that shall be done. One knows that as a matter of practice it often happens that a clerk from a neighbouring petty sessional division is borrowed, and I see no reason why that should not be done in this case. We are determined that on the next occasion the tribunal shall manifestly be seen and known to be differently constituted in every respect from that which has hitherto
 B dealt with the affairs of these spouses. If possible, no single justice shall sit who has at any time taken part in any of the proceedings between these spouses, including the making of the original order on Oct. 11, 1950. If it is physically impossible to do that, one of those who has merely concurred in a formal adjournment, or something of that sort, can be brought in. We desire to make plain our wish that the tribunal shall be wholly disconnected from any previous
 C hearings as between these spouses, and that another clerk shall be invited to conduct the business ad hoc.

Order accordingly.

Solicitors: *Charles Russell & Co.*, agents for *Johnson & Clarence*, Midhurst (for the husband); *Gibson & Weldon*, agents for *Burley & Geach*, Peterstield (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

NOTE.

ARDING v. ARDING.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 27, 1954.]

Divorce—Practice—Trial—Right to begin—Burden of proof—Matrimonial Causes Act, 1950 (c. 25), s. 4 (2).

The husband petitioned for dissolution of the marriage on the ground of the wife's desertion. The wife denied desertion, admitted that she had refused to cohabit with the husband for the three years immediately preceding the petition and alleged that she had just cause for her refusal. On a submission by the wife that, since on the pleadings the burden lay on her to prove "just cause", she had a right to begin,

HELD: there was no doubt, especially having regard to the Matrimonial Causes Act, 1950, s. 4 (2), that in a suit for dissolution of marriage the burden of proof lay on the petitioner; in the present case the burden of proving desertion lay on the husband and, therefore, it was his duty to begin.

Hewitt v. Hewitt ([1948] 1 All E.R. 242), distinguished.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 4 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 394.

Case referred to:

(1) *Hewitt v. Hewitt*, [1948] 1 All E.R. 242; [1948] P. 150; [1948] L.J.R. 843; 27 Digest, Replacement, 544, 4931.

PETITION by the husband for dissolution of the marriage.

In 1940 the husband became a voluntary patient in a mental hospital. On Jan. 30, 1950, the husband left the hospital. The wife had at all times thereafter

refused to resume cohabitation with the husband. By his petition presented on Apr. 15, 1953, the husband alleged that the wife had deserted him on a date in or about March, 1950, when the wife had refused to resume cohabitation with him. By her answer the wife denied desertion but admitted that she had not lived with the husband for the three years immediately preceding the presentation of the petition and alleged that she had good cause for refusing so to do.

It was submitted on behalf of the wife that the burden of proving "good cause" was on the person alleging it, and as a matter of general law and practice the right to begin rested on the person who had to discharge the burden of proof: *RAYDEN ON DIVORCE*, 6th ed., p. 140, para. 125, last sentence, and p. 444, para. 13, first sentence; and that, accordingly, since on the pleadings the burden of proof lay on the wife, she had the right to begin. *KARMINSKI, J.*, referred to *Howitt v. Howitt* (1) and to the Matrimonial Causes Act, 1950, s. 4 (2). On behalf of the husband it was contended that since the present case was a suit for dissolution of marriage it was necessary for him to satisfy the court that the marriage should be dissolved, and that *Howitt v. Howitt* (1), being a suit for restitution of conjugal rights, was not an authority to be applied in the present case.

H. S. Law for the husband.

H. B. Grant for the wife.

KARMINSKI, J.: There is no doubt that the practice with regard to suits for restitution has, if I may respectfully say so, been for many years exactly as the Court of Appeal described it in *Howitt v. Howitt* (1). The issues, however, are different.

I think the present case [being a petition for dissolution of marriage on the ground of desertion] is one which should follow the ordinary course of events, and, the burden of proof being on the husband, he should begin. I have no doubt where the burden of proof lies, especially having regard to the provisions of s. 4 (2) of the Matrimonial Causes Act, 1950. The husband has to prove desertion, the burden of proof lies on him, and I rule that it is his duty to begin.

Rule accordingly.

Solicitors: *Bulcraig & Davis* (for the husband); *Blyth, Dutton, Wright & Bennett*, agents for *Johnson, Milham & Scatliff*, Brighton (for the wife).

A.T.H.

MORELLE, LTD. v. WATERWORTH. RODNAL, LTD. v.
LUDBROOK.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), June 16, 1954.]

Company—Foreign company—Mortmain—Acquisition of lease—Residue of lease for ninety-nine years—Mortmain and Charitable Uses Act, 1888 (c. 42), s. 1 (1), s. 10—Mortmain and Charitable Uses Act, 1891 (c. 73), s. 3.

- A A limited company registered in the Republic of Ireland, which had no licence from the Crown to hold lands in mortmain and had not complied with the provisions of the Companies Act, 1948, concerning the delivery of particulars by overseas companies to the registrar of companies, brought an action for possession of a dwelling-house occupied by a statutory tenant.
- B The company derived title as landlord by an assignment to the company of the residue of nineteen years of a ninety-nine year lease.

HELD: the assignment was an assurance of land prohibited by s. 1 (1) of the Mortmain and Charitable Uses Act, 1888; the dwelling-house was forfeited to the Crown by virtue of that sub-section and the company was not entitled to recover possession of it.

- C Statement of WILLS, J., in *Truro Corp'n. v. Rowe* ([1901] 2 K.B. 875), disapproved.

Appeals dismissed.

AS TO THE LAW RELATING TO MORTMAIN, see HALSBURY, Hailsham Edn., Vol. 8, pp. 82-85, paras. 135-137; and FOR CASES, see DIGEST, Vol. 13, p. 371, Nos. 1025-1028.

- D AS TO THE LAW RELATING TO THE REGISTRATION OF PARTICULARS OF OVERSEA COMPANIES, see HALSBURY, Simonds Edn., Vol. 6, p. 834 et seq.

FOR THE MORTMAIN AND CHARITABLE USES ACT, 1888, s. 1 (1) and s. 10 and THE MORTMAIN AND CHARITABLE USES ACT, 1891, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 2, pp. 910, 916, and 921.

- E Cases referred to:

(1) *Truro Corp'n. v. Rowe*, [1901] 2 K.B. 870; 70 L.J.K.B. 1026; 85 L.T. 422; 65 J.P. 806; *on appeal* C.A., [1902] 2 K.B. 709; 71 L.J.K.B. 974; 87 L.T. 386; 66 J.P. 821; 13 Digest 371, 1027.

(2) *Abbot of Boveley's Case*, (1426), 4 Hen. 6, fol. 9, pl. 1; Bro. Abr. Mortm., pl. 27, 39; Vin. Abr. Mortm. (B) pl. 21.

- F (3) *Vigers v. St. Paul's (Dean)*, (1849), 14 Q.B. 909 (117 E.R. 349); 18 L.J.Q.B. 97; *reversd.* Ex. Ch., (1849), 14 Q.B. 920 (117 E.R. 353); 19 L.J.Q.B. 84; 14 L.T.O.S. 446; 18 Digest 263, 36.

APPEALS by the plaintiff companies against orders of His Honour JUDGE CLOTHIER, at Lambeth County Court, dated Apr. 8, 1954, dismissing actions for possession of dwelling-houses for breach of covenants of the tenancies, on the ground that the plaintiff companies were registered in the Republic of Ireland and not in the United Kingdom, that they had no licence from the Crown to hold lands in mortmain, and that they had no place of business in the United Kingdom and had not complied with s. 408 and s. 409 of the Companies Act, 1948. The plaintiff companies contended that a licence in mortmain was not necessary in the case of a short lease such as they held. The term acquired by

H Morelle, Ltd. was a residue of about nineteen years unexpired of a ninety-nine year lease.

Widgery for the plaintiff companies.

K. R. Bagnall for the defendant, Waterworth.

Mildon for the defendant, Ludbrook.

SINGLETON, L.J.: We heard these two appeals together, as we were assured by counsel that the decision in one would cover the other. I propose

to deal with the first case alone, the appeal of Morelle, Ltd. The particulars of claim dated Feb. 13, 1954, state:

" (1) The plaintiff is and was at all material times owner of the premises known as 18 Rodney Road, S.E.17, and is let to the present statutory tenant at a weekly rental of 37s. 5d. or £97 5s. 8d. per annum inclusive. - (2) The plaintiff claims that it was an express term of the tenancy that the defendant would not sub-let or part with the premises in any way. (3) The plaintiff's case is that the defendant did on or about March, 1952, sub-let a part of the said premises. (4) The plaintiff contends that the defendant has committed a breach of covenant of the tenancy and is not entitled to the protection of the Acts."

Then it is stated that notice to quit was duly served, and the plaintiff company claims possession and costs.

The defendant took advice from those who attend at Cambridge House where possibly someone whom she consulted recognised the name of the plaintiff company. She signed a form of request for further and better particulars of the claim, which asked for details of the title of the plaintiff company, and in the next paragraph put this question:

" Has the plaintiff company a licence in mortmain to hold No. 18 Rodney Road. If so the date of the licence and particulars of that licence."

We are told that the plaintiff company was a company registered in Eire. It was not registered under the Companies Acts in this country, it had no place of business in this country, and no licence of any kind material to this case. The reply to the request for further and better particulars contains these two paragraphs:

" Re: 18 Rodney Road. (1) The plaintiff company acquired the property by way of assignment from John Henry Taylor dated Nov. 29, 1950. Inspection of the deeds can be arranged at this office on short appointment. (2) No, a licence in mortmain is not necessary in the case of land held under a short lease—see *Truro Corpn. v. Rowe* (1) ([1902] 2 K.B. 709), quoted with approval in the 1949 edition of HALSBURY, vol. 5, p. 936. See also TUDOR ON CHARITIES (5th ed.), p. 415. A lease is not an assurance in mortmain unless it is for so long a term as to amount to a permanent grant under colour of a lease."

It is on the second paragraph of the further particulars that this appeal has been fought. The case was heard before His Honour Judge CLOTHIER, who, on Apr. 8 of this year, gave judgment in favour of the defendant. The question arises under s. 1 (1) of the Mortmain and Charitable Uses Act, 1888, an Act to consolidate and amend the law relating to mortmain and to the disposition of land for charitable uses. Section 1 (1) of the Act provides:

" Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly."

Section 2 of the Act provides:

" It shall be lawful for Her Majesty the Queen, if and when and in such form as she thinks fit, to grant to any person or corporation a licence to assure in mortmain land in perpetuity or otherwise, and to grant to any corporation a licence to acquire land in mortmain and to hold the land in perpetuity or otherwise."

I draw attention to the words "in perpetuity or otherwise".

The answer raised by the defendant was that the plaintiff company, not having a licence in mortmain to acquire and hold the said property, had forfeited the same by virtue of s. 1 (1) of the Mortmain and Charitable Uses Act, 1888. The case put forward for the plaintiff company was that the assurance or assignment of the reversion of the lease to it did not fall within s. 1 (1) of the Act of 1888 because the company only acquired the residue of a lease, which lease, indeed, it was claimed was not covered by s. 1 (1) of the Act. We were told by counsel for the plaintiff company that the person from whom the company acquired the residue of the term had a ninety-nine year lease, and that there were about nineteen years of that lease to run at the time of the assignment of the residue of the term to his clients.

Section 10 (i) of the Act of 1888, the definition section, provides:

“ ‘ Assurance ’ includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will, or other instrument; and ‘ assure ’ and ‘ assurator ’ have meanings corresponding with assurance.”

And s. 10 (iii) provides that

“ ‘ Land ’ includes tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land.”

The definition of “ land ” was replaced by the Mortmain and Charitable Uses Act, 1891, s. 3*, which omits the concluding words “ and any estate and interest in land ” of the former definition in s. 10 (iii) of the Act of 1888. The alteration of s. 3 of the Act of 1891 made by the Statute Law Revision Act, 1908, is not material.

Counsel for the plaintiff company submitted that the transfer or assignment to his clients of the residue of the lease was not an assurance for the benefit of a corporation in mortmain. He submitted that no question of mortmain arose unless the lease was a long lease, and he called in aid the note under s. 1 of the Act of 1888 in TUDOR ON CHARITIES, 5th ed., p. 415:

“ It has been held that a lease for a long term, as one hundred years or two hundred years, is within the mortmain statutes, but not a lease of twenty, forty, or even ninety-nine years.”

Then there is a reference to the *Abbot of Boxley's Case* (2) and *Truro Corpn. v. Rowe* (1), and the note continues:

“ It was considered, however, in *Vigers v. St. Paul's (Dean)* (3) that the statutes of mortmain only forbade a corporation to hold that which was in itself perpetual; and if this be so, the grant of a lease cannot be mortmain unless it is for a term which may be considered to be equivalent to an absolute alienation.”

It appears to me that that note does not pay sufficient attention to the words of the section itself. The note continues:

“ A grant of a rent-charge to an abbot and his successors for eighty years was held to be a mortmain ”,

and there is another reference to the *Abbot of Boxley's Case* (2).

It was pointed out to us that in vol. 8 of HALSBURY'S LAWS OF ENGLAND, Hailsham ed., the note under “ Mortmain ” at p. 83 is not in agreement with that which is stated in TUDOR ON CHARITIES. This is the note [p. 83, note (g)]:

“ ‘ Assurance ’, for this purpose, includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest,

* The terms of the definition in s. 3 of the Mortmain and Charitable Uses Act, 1891, as amended by the Statute Law Revision Act, 1908, s. 1 and schedule, are —“ ‘ Land ’ in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land.”

and every other assurance by deed, will, codicil, or other instrument . . . Formerly it was held that leases for long terms, as one hundred or two hundred years, were alienations in mortmain, but not leases for twenty, forty or even ninety-nine years . . . In *Vigers v. St. Paul's (Dean)* (3) it was considered that the mortmain restrictions were aimed only at preventing corporations holding that which was perpetual. These authorities, however, were all earlier than the Mortmain and Charitable Uses Act, 1888. In *Truro Corpn. v. Rowe* (1) the point that 'assurance' includes 'lease' was not brought before the notice of the court, and it was there held that the statutes of mortmain had nothing to do with short leases, a decision which, though applicable to the old mortmain statutes cannot be supported in connection with the Act of 1888."

Truro Corpn. v. Rowe (1) was before the court of first instance in August, 1901, and WILLS, J., said ([1901] 2 K.B. 875):

"The statutes of mortmain appear to me to have nothing to do with a short lease of fourteen years. It does not seem to be open to the class of objections which gave rise to the statutes of mortmain; and I find that both SHELFORD (LAW OF MORTMAIN, ed. 1836, p. 9) and TUDOR (CHARITABLE TRUSTS, 3rd ed. 1889, p. 382) treat this as clear law, and give a number of authorities for the proposition. These objections, therefore, may be shortly dealt with and put on one side; and I may add that, as the statutes of mortmain do not apply, the licence to hold lands in fee, which it is plain from the charter of Elizabeth existed in the old charters, and which had no application to leaseholds, is equally beside the question."

I think it is clear that the note in HALSBURY'S LAWS OF ENGLAND expresses the position accurately, and that the point for decision in this case was not argued before WILLS, J., and that would appear to be so from the above reference to the report of the case in the Court of Appeal.

Two other extracts are useful. In the introduction to TUDOR ON CHARITIES, 5th ed., there appears this passage:

"Alienation in mortmain, in mortua manu, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal."

In STROUD'S JUDICIAL DICTIONARY I find almost the same definition of "mortmain":

"'Mortmaine' signifies an alienation of lands and tenements to any guild, corporation, or fraternity, and their successors, e.g., bishops, parsons, vicars, etc."

and there is a reference to COWELL, see TERMES DE LA LEY. Alienation for this purpose means a transfer or conveyance of property to another.

If, then, there is an alienation of lands to a foreign corporation, such as the plaintiff company is for this purpose, the question of mortmain arises, so it seems to me. I cannot go with the argument of counsel for the plaintiff company that one must look at the section in order to see whether there is a long lease or a short lease. A ninety-nine year lease of the premises had been granted at some time. The plaintiff company claims that that lease came into its ownership; it became the holder of the residue of the lease by assignment. Thus, it claims to hold the residue of a ninety-nine year lease, and it seems to me that that falls within the provisions of s. 1 (1) of the Mortmain and Charitable Uses Act, 1888. If I am wrong in that view it would be necessary each time to look at the length of a lease and to say whether it was within the provisions of the section. I cannot think that is necessary from any point of view, and I am confirmed in that view by the fact that, in s. 2 of the Act, there is a provision that Her Majesty may grant to any person or corporation a licence to assure in mortmain land in perpetuity or otherwise,

This case falls within the provisions of s. 1 (1) of the Act of 1888. The plaintiff company was a company registered in Eire and not in this country. It had no licence or authority, and consequently there was a breach of the terms of that sub-section. It seems to me that it follows from the wording of the Act that, if the land is so assured otherwise than as aforesaid,

A "the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly."

The appeal of the plaintiff company fails.

There is no difficulty in the ordinary way of a company to hold land whether it is registered under the Companies Acts or registered abroad. Section 14 (1) of the Companies Act, 1948, provides:

B "A company incorporated under this Act shall have power to hold lands, and as regards lands in any part of the United Kingdom without licence in mortmain . . ."

Section 408 of that Act provides:

C "Where an oversea company has delivered to the registrar of companies—
D (a) in the case of a company to which sub-s. (1) of the last foregoing section applies, the documents and particulars therein mentioned; (b) in the case of a company mentioned in sub-s. (1) or (2) of s. 344 of the Companies Act, 1929, the documents and particulars specified in sub-s. (1) of that section; (c) in the case of any other company, the documents and particulars specified in paras. (a), (b) and (c) of sub-s. (1) of s. 274 of the Companies (Consolidation) Act, 1908, as amended by the Companies (Particulars as to Directors) Act, 1917; it shall have the same power to hold lands in the United Kingdom as if it were a company incorporated under this Act: Provided that nothing in this section shall affect the power of a company to hold lands by virtue of registration in Northern Ireland."

By s. 407 (1) of the Companies Act, 1948, it is provided that:

E "Oversea companies which, after the commencement of this Act, establish a place of business within Great Britain shall, within one month of the establishment of the place of business, deliver to the registrar of companies for registration:—(a) a certified copy of the charter, statutes or memorandum and articles of the company or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof; (b) a list of the directors and secretary of the company containing the particulars mentioned in the next following sub-section; (c) the names and addresses of some one or more persons resident in Great Britain authorised to accept on behalf of the company service of process and any notices required to be served on the company."

G "Thus, it will be seen that an oversea company (within which description the plaintiff company falls) may hold property in just the same way as a company registered in this country if it follows the procedure laid down in s. 407 and s. 408 of the Companies Act, 1948. This company did neither, nor did it apply for a licence. The county court judge, in the course of his judgment, said:

H "I am invited to dismiss these actions on grounds urged by counsel for the defendants that the plaintiff Irish companies have no right to own the properties. Before a company can hold land as part of its permanent possessions a licence in mortmain is necessary. The principal Acts are those of 1888 and 1891. Under those Acts land may not be held by a corporation save by licence from the Crown unless the company is incorporated or registered under the Companies Act. Companies not incorporated or registered have no right to hold land unless they have a licence."

The learned county court judge considered the judgment of WILLS, J., to which I have referred, and he held that he ought not to follow it on the facts of this case as the relevant matters for consideration had not been before WILLS, J. I agree with the learned county court judge, and, in my view, the appeal should be dismissed.

DENNING, L.J., asked this morning what was the purpose of this: why did the company register itself in Eire, or why was an Irish company holding property in south-east London? It appears from what we have been told that the two plaintiff companies are in just the same position. Both companies are in Eire and both have acquired properties in south-east London. How many properties they have and how and when they came to acquire them I do not know. The case gives rise to some interesting speculations which have been mentioned. One is that, if the company has not a place of business in this country it is rather difficult to serve the company with notices under the Housing Acts or under other Acts. I draw attention to s. 407 (1) (c) of the Companies Act, 1948, and to the provision that

"the names and addresses of some one or more persons resident in Great Britain authorised to accept on behalf of the company service of process and any notices required to be served on the company."

That is if a company is carrying on business in this country. If the company has no place of business in this country and is an overseas company, I do not know how notices could be served so as to be effective. That may be the reason for an overseas company holding property here remaining without a place of business in this country. It may be, too, as was suggested, that it is regarded by the company as being some help to them in regard to Revenue questions, though I hope the Revenue authorities can look after that side of the matter. It may also be that, if the company has no place of business in this country, the collection of rates by the local authority is made more difficult in the case of house property such as this. One of the learned counsel told us this was not the only case of the kind, but we are not concerned with that. If an overseas company wants to do business in this country, and to do it properly, there are no difficulties. This company [Morelle, Ltd.], by reason of s. 1 (1) of the Mortmain and Charitable Uses Act, 1888, is not entitled to succeed in these proceedings. The same applies, as learned counsel has told us, to the second appeal, and it follows that both appeals should be dismissed.

DENNING, L.J.: In order that land should be caught by s. 1 (1) of the Mortmain and Charitable Uses Act, 1888, it must be assured to a corporation in mortmain, and counsel for the plaintiff company urged before us that these words "in mortmain" must be given their proper effect. But what do they mean? Lord COKE in his COMMENTARY UPON LITTLETON (p. 2b) said that

"the true cause of the name, and the meaning thereof, was taken from the effects, as it is expressed in the statute itself."

He then refers to statute 2 of 7 Edw. I. and gives the true origin of the phrase:

"The lands were said to come to dead hands as to the lords, for that by alienation in mortmain they [the lords] lost wholly their escheats, and in effect their knights-services for the defence of the realme, wards, marriages, reliefs, and the like: and therefore was called a dead hand, for that a dead hand yeeldeth no service."

In other words, when land was transferred to a corporation, or in those days to a religious person, it ceased to render its dues and services to the lord from that time forward. It was in the hands of a person who was useless to the lord, indeed, just as useless for rendering services as a dead hand would be. It was, therefore, in a dead hand, in mortmain. All such alienations were by the statute liable to be forfeited to the lord or to the king, as the case might be.

Under these old statutes it was held that a lease for one hundred years would be mortmain, but a lease for ninety-nine years was not mortmain (see VINER'S ABRIDGMENT of the 15th vol., p. 485). In *Vigers v. St. Paul's (Dean)* (3) LORD DENMAN, C.J., delivering the judgment of the court, said (18 L.J.Q.B. 103):

" . . . we have not been able to find any authority for the proposition that the statutes of mortmain forbid a corporation to hold that which is not in itself perpetual."

- A But the position is different since the Act of 1888. The definition sections and the whole tenor of the Act show that the grant or assignment to a corporation either of a freehold or of a lease, long or short, is an assurance in mortmain. In order to be valid it requires a licence from the Queen, or else the licence must be dispensed with by statute. I cannot help observing that in this particular
- B case we have a modern instance of a dead hand. Here is a foreign company which does not establish any business office in England and does not register itself in any way. By so doing it puts itself in a position, if not to defeat its obligations entirely, at least to make it most difficult for its dues to be collected from it. It makes it difficult for the tenant to recover on the landlord's covenants. It makes it difficult for the rating authority to obtain rates, or the housing
- C authority to see that the houses are kept in proper condition, or even for the Revenue authorities to obtain their proper taxes. So far as all those matters are concerned, it is like unto a dead hand. We have a modern application of the law of nearly seven hundred years ago. The transfer to this company is void without a licence from the Queen, and no licence has been granted.

- D In the old days the forfeiture was not automatic, but under the wording of this statute it is quite clear that the forfeiture is from " the date of the assurance ", so that it operates at once without any entry by the Crown, and the tenant can take advantage of it, because he is liable to the Crown for the rent from that date. I agree, therefore, with my Lord that the appeals should be dismissed.

- E **MORRIS, L.J.:** I agree fully with the two judgments which my Lords have delivered, and I do not feel I could usefully add anything.

Appeals dismissed.

Solicitors: *S. A. Bailey & Co.* (for the plaintiff companies); *Lewis Silkin & Partners* (for the defendant, Waterworth); *Cliftons* (for the defendant, Ludbrook).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

F Re HALL'S SETTLEMENT. SANDERSON AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), June 30, 1954.]

Estate Duty—Valuation of shares in company—Gift inter vivos by way of settlement—Shares notionally passing on settlor's death—Finance Act, 1940 (c. 29), s. 55 (1).

- G By deed dated July 27, 1942, the deceased settled four hundred shares in a private limited company on trust for the benefit of his son and daughter. On Sept. 30, 1943, the deceased died. Estate duty was leviable on the shares by virtue of the Finance Act, 1894, s. 2 (1) (c). On a summons to determine whether the principal value of the shares should be estimated in accordance with the provisions of s. 55 of the Finance Act, 1940, or with the provisions
- H of s. 7 (5) of the Act of 1894,

HELD: for the purposes of estate duty the shares settled by the deceased, which notionally passed on his death under the Finance Act, 1894, s. 2 (1) (c), passed on his death within s. 55 (1) of the Finance Act, 1940, and, therefore, the value of the shares was to be estimated in accordance with the provisions of s. 55 of that Act.

A.-G. v. Milne ([1914] A.C. 765), considered.

EDITORIAL NOTE. The legal question in this case was whether property which was deemed to pass on death under the Finance Act, 1894, s. 2 (1) (c), was caught by s. 55 of the Finance Act, 1940, which predicates of property to which it applies that it should "pass" on death, not that it should be deemed to pass on death. The court held that the property deemed to pass on death under s. 2 (1) (c) of the Finance Act, 1894, was within the Finance Act, 1940, s. 55. Accordingly the property, which consisted of shares in a company to which s. 55 applied, had to be valued in accordance with that section. The Finance Act, 1940, s. 55, has been amended by the Finance Act, 1952, s. 72. The amendments are not relevant to this case.

FOR THE FINANCE ACT, 1940, s. 55, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 483.

Cases referred to:

(1) *A.-G. v. Milne*, [1913] 2 K.B. 606; 82 L.J.K.B. 773; 108 L.T. 772; *affd.* H.L., [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, 296.

(2) *Strathead, Lord v. Inland Revenue Comrs.*, 1929 S.C. 800; [1929] S.L.T. 629; Digest Supp.

(3) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27.

ADJOURNED SUMMONS to determine whether the principal value of certain shares settled by the deceased, Harold Hall, on his son and daughter within three years of his death, should be estimated in accordance with the provisions of the Finance Act, 1940, s. 55, or in accordance with the provisions of the Finance Act, 1894, s. 7 (5).

The deceased, Harold Hall, was at all material times, down to the settlement, the owner of some 2,500 shares in a company known as Thomas Hamling & Co., Ltd., that holding representing over fifty per cent. of the total issued shares of the company. By deed dated July 27, 1942, the deceased settled four hundred of the shares on trusts for the benefit of his son and daughter. On Sept. 30, 1943, the deceased died. It was agreed that the shares were liable to estate duty under the Finance Act, 1894, s. 2 (1) (c), being "deemed to pass" on the deceased's death by virtue of that enactment. If the principal value of the shares were to be estimated by reference to the net value of the assets of the company in the manner prescribed by the Finance Act, 1940, s. 55, it was agreed that the value would be £90 10s. per share; and if the value of the shares were to be estimated in accordance with the Finance Act, 1894, s. 7 (5), i.e., at their open market value, the value was thought to be approximately £22 10s. per share.

F. N. Bucher and J. A. Armstrong for the plaintiffs, the trustees of the settlement.

Bathurst, Q.C., and *J. H. Stamp* for the Inland Revenue Commissioners.

UPJOHN, J.: This summons raises an interesting point on the true construction of the Finance Act, 1940, s. 55, which imposes (provided certain conditions are satisfied) a method of valuation of shares in a company. The section is, no doubt, a valuation section: it does not impose a liability. On the other hand, it is fair to say that the plain object of the section is, by imposing a different method of valuation (shortly called the "assets valuation"), to produce a larger liability to duty than if the shares in the company were valued under the Finance Act, 1894, s. 7 (5), the basis of that valuation being, of course, as between a willing vendor and purchaser in the open market. [His LORDSHIP stated the facts and continued:] Section 55 (1) of the Finance Act, 1940, is in these terms:

"Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of

a company to which this section applies, then if [and then follow certain conditions, which, it is conceded, are satisfied] the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of s. 7 (5) of the Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding sub-section."

- A Sub-section (2) lays down provisions for ascertaining the value of the shares. Sub-section (2) (a) is in these terms:

"the net value of the assets of the company shall be taken to be the principal value thereof estimated in accordance with the said sub-s. (5), less the like allowance for liabilities of the company as is provided by s. 50 (1) of this Act in relation to the assets of a company passing on a death by virtue of s. 46 of this Act, but subject to the modification that allowance shall be made for such a liability as is mentioned in para. (b) of that sub-section unless it also falls within para. (a) thereof."

- B

I do not think that I need read s. 50: it is sufficient to say that the valuation proceeds on a stringent basis, looked at from the point of view of the subject.

- C I think I need only look at two other sections of the Act of 1940, the first being s. 57 (1) which is in these terms:

"The provisions of s. 8 (5) of the Finance Act, 1894 (which relate to the delivery of particulars relating to property forming part of an estate in respect of which estate duty is leviable on a death) shall, on a death on which it appears to the commissioners that s. 46 or s. 55 of this Act has effect, apply to the company, and to any other company to which the said s. 46 or s. 55, as the case may be, applies, and to every person who is or was at any time an officer or auditor of that company or of any such other company, as those provisions apply to a person who has administered any part of the estate."

- D

In other words, where, as in this case, s. 55 is admittedly applicable at any rate to the shares vested in the deceased at the time of his death, the Crown have powers of a most powerful character to obtain information with regard to the company. The remaining section is s. 65, sub-s. (5) of which provides that

- E

"Part IV of this Act [which contains s. 55 and s. 57] shall be construed as one with Part I of the Finance Act, 1894."

The question which I have to determine is whether the four hundred shares

- F settled by the deceased have to be valued in accordance with s. 55 or on the usual open market basis. Counsel for the plaintiffs says, and I think says rightly, that s. 55 is a section intended to produce an additional liability to estate duty although it is, strictly speaking, not a charging section but a valuation section; and for the reasons I have already given I agree with that submission. The

whole object of the section is to produce an artificial method of valuation which

- G will produce a larger liability than under the old method of valuation. Counsel points out that very grave hardship may arise if s. 55 be applied to a case such as this, for whereas the Crown has ample powers to obtain information to enable it to make an assets valuation, it may well be impossible for the trustees of the settlement to obtain the like, or, indeed, any, information from the company. If the trustees still hold the shares they will, no doubt, have the advantage of a

- H balance sheet and a profit and loss account, but that does not assist them greatly in an assets valuation; and, of course, the company in any given case may well refuse to give the trustees any additional information to enable them to resist the demands of the Crown. Counsel rightly points out that the section, if it is to be applied in circumstances such as these, may well work a great hardship on the subject. Ultimately, however, it is a question of construction of s. 55. I have been referred to a number of sections in the Finance Act, 1894, and in other Acts, where the words used have been somewhat similar to the words in

s. 55: that is to say, there has been a reference to "property passing upon the death". In some cases those words have been held to include, or obviously do include, property which, although not actually passing on the death, is to be deemed to be included in property passing on the death, by virtue of the Finance Act, 1894, s. 2. For instance, it is obvious that the references to "property passing on the death" in s. 4 and in s. 7 of the Act of 1894 includes property which is deemed (to put it shortly) to pass on the death. Section 4 is the aggregation section and s. 7 is the valuation section; and if one did not include, in references in those sections to "property passing", property which is to be included in the property passing although not actually passing, it is clear that one would make nonsense of the whole scheme of the Act, therefore one must give a wide meaning to the phrase. There is no such compelling necessity in this case. The property does not escape taxation. The only question is, what is the basis of valuation? Then, again, there are other sections (a number have been mentioned to me) where the context plainly requires that "property passing" should include property which is deemed to pass. I need only mention s. 51 of the Finance Act, 1947, where it is plain that the section has made its own dictionary with regard to the "property passing".

There is at any rate one instance where "property passing" has been held to exclude property which was deemed to be included in the property passing; that was under s. 5 of the Finance Act, 1894. The decision was *A.G. v. Milne* (1). Section 5 was* a charging section which imposed on the property in certain circumstances a further duty called settlement estate duty.

Speaking for myself, I do not derive a great deal of assistance from the consideration of similar words in other sections of other Acts. It seems to me that the only safe canon of construction I can adopt is to give the words their natural meaning, unless the context otherwise requires. In s. 55 (omitting for the moment the opening words) the reference is:

"Where . . . there pass, on the death of a person . . . shares . . . or debentures":

then certain consequences follow. Prima facie the reference to "there pass . . . shares . . . or debentures" as a matter of grammar means an actual passing and does not include a notional passing. Strong support for that view is to be found in *A.G. v. Milne* (1), and although it is true that it is distinguishable from this case because it imposed a new liability and because the Finance Act, 1894, s. 2, had no reference to settlement estate duty, yet, nevertheless, it is plain that at any rate LORD PARKER and VISCOUNT HALDANE, L.C., intended to decide the case on a broader principle. VISCOUNT HALDANE, L.C., said ([1914] A.C. 771):

"Having come to this conclusion, I see no answer to the reasoning of BUCKLEY, L.J., in the Court of Appeal."

BUCKLEY, L.J., quite plainly decided the matter on the broad principle that it did violence to the language of s. 5 of the Act of 1894 to construe the word "passes" in that section as "notionally passes". LORD PARKER OF WADDINGTON in the House of Lords expressed the same view at the end of his speech (*ibid.*, 781):

"The Finance Act [1894], is a taxing statute, and if the Crown claims a duty thereunder it must show that such duty is imposed by clear and unambiguous words. All the words of s. 5 can be satisfied without having recourse to any notional passing of property, and in my opinion considerable violence would be done to these words if the idea of a notional passing of property were introduced into the section."

However, the words "there pass" in the Finance Act, 1940, s. 55 (1) do not stand by themselves. They are preceded by words which I regard as of great

*The Finance Act, 1894, s. 5 (1), which was the charging enactment, was repealed by the Finance Act, 1914, s. 18 and sched. II, in relation to deaths after May 11, 1914.

importance. They are: "Where for the purposes of estate duty there pass". I do not propose to read s. 1 and s. 2 of the Finance Act, 1894: it is well known that s. 1 imposes a charge to estate duty on property actually passing. Section 2 is a "deeming" section and starts in this way:

"Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . .",

A and then it sets out four classes of property which do not actually pass on the death, but which, in order to give effect to the whole scheme of estate duty legislation, it was necessary to include in property as though they did pass. The point was put very shortly by LORD SANDS in *Lord Strathearn v. Inland Revenue Comrs.* (2), where he said this (1929 S.C. 807):

B "The theory underlying a revenue Act must bow to its express provisions, but an appreciation of the theory may sometimes help to elucidation. It appears to me that the theory of the provisions here in question was, just as in the case of the Act of 1881, that, in order to avoid disappointment of the estate duty, the property donated should be treated just as if no donation had been made, and the property in question had remained part of the deceased's estate and had actually passed upon his decease. The property is
C deemed to pass; that is to say, for the purposes of estate duty, it shall be treated as if it had passed."

It is worthy, I think, of note that the words of the section are not "deemed to pass." but "property passing . . . shall be deemed to include" certain property. On the other hand, the side-note is: "What property is deemed to pass."

D Now the real question I have to consider in this context is: "For the purposes of estate duty", do "there pass" shares which have been given by the testator within three years of his death? There is no doubt that those shares are caught by the provisions of s. 2 (1) (c) of the Finance Act, 1894. That, of course, is conceded. Ought I, therefore, to say that for the purposes of estate duty those shares, being caught by s. 2, do pass; or ought I to give the section
E a meaning which excludes those shares? It is well known, since *Earl Cowley v. Inland Revenue Comrs.* (3) was decided, that s. 2 is not a definition section as to the meaning of "property passing"; but when I see that in s. 2 the "property passing on the death" is "deemed to include" certain property which includes the property in question here, it seems to me that the natural meaning of the opening language of s. 55 of the Finance Act, 1940, is apt and appropriate to
F include property which actually passes under s. 1 of the Finance Act, 1894, and also property which is to be deemed to be included in that property by virtue of s. 2 of the Act of 1894. I declare accordingly. *Declaration accordingly.*

Solicitors: *Peacock & Goddard*, agents for *Sanderson & Co.*, Hull (for the plaintiffs); *Solicitor of Inland Revenue.*

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

G R. v. MARTIN SECKER WARBURG, LTD. AND OTHERS.

[CENTRAL CRIMINAL COURT (Stable, J.), June 29, July 2, 1954.]

Criminal Law—Obscene publications—Contemporary novel—Test of obscenity—
I *Tending to corrupt and deprave according to the standards of the present day.*

H "In applying the test of obscenity laid down in *R. v. Hicklin* (1868) (L.R. 3 Q.B. 371) the jury must decide whether the tendency of any publication alleged to be obscene is to corrupt and deprave those whose minds today are open to immoral influences and into whose hands the publication may fall at the time when it is published or in the future. Accordingly, in deciding whether a recently published novel, admittedly absorbed with the sex relationship of man and woman and purporting to describe contemporary life, is an obscene libel, it is necessary to take into account the changed

approach to the question of sex since *R. v. Hicklin* was decided. A book is not obscene merely because it is in bad taste or because it is an undesirable book.

AS TO INDECENT PUBLICATIONS, see HALSBURY, Halsbury Edn., Vol. 9, pp. 395, 396, paras. 667-669; and FOR CASES, see DIGEST, Vol. 15, pp. 748-751, Nos. 8068-8095 and Digest Supps.

Case referred to:

- (1) *R. v. Hicklin*, (1868), L.R. 3 Q.B. 360; 37 L.J.M.C. 89; sub nom. *R. v. Wolverhampton (Recorder)*, 18 L.T. 395; sub nom. *Scott v. Wolverhampton J.J.*, 32 J.P. 533; 15 Digest 748, 8070.

TRIAL ON INDICTMENT.

Martin Secker Warburg, Ltd., publishers, of John Street, London, W.C., Frederic John Warburg, a director of that firm, and the Camelot Press, Ltd. of Stanley Road, Southampton, printers, were charged on indictment with publishing an obscene libel, to wit, a novel called "The Philanderers" by Stanley Kauffman. All pleaded Not Guilty. After evidence had been heard STABLE, J., directed that the members of the jury should each be given a copy of the book so that they might take it home and read it for themselves.

J. M. G. Griffith-Jones for the Crown.

Winn for the defendant, Frederic John Warburg.

M. J. H. Turner for the defendant companies, Martin Secker Warburg, Ltd. and the Camelot Press, Ltd.

STABLE, J.: The charge against two limited liability companies, and one individual, is a charge of publishing what is called an obscene libel. Everybody agrees here that the two companies and the individual director stand or fall together. There can be no dispute that the verdict that you will give is a matter of the utmost consequence. It is a matter of very real importance to the accused and to the individuals who are associated with them. It is of importance to authors who, from their minds and imagination, create imaginary worlds for our edification, amusement, and sometimes, too, for our escape. It is a matter of importance to the community in general, to the adolescent, perhaps, in particular. In addition to that, it is of great importance in relation to the future of the novel in the civilised world and the future generations who can only derive their knowledge of how persons lived, thought, and acted from the contemporary literature of the particular age in which they are interested. Your verdict will have a great bearing on where the line is drawn between liberty, that freedom to read and think as the spirit moves us, on the one hand, and licence which is an affront to the society of which we are all members, on the other.

The important duty of deciding rests fairly and squarely on your shoulders. It is not what I think about this book; it is the conclusion that you reach. You represent that diversity of minds and ages which represents the reading public of the English-speaking world. You and you alone must decide this case and if, in the course of this summing-up, I express my opinion about the matter, you are entitled to ignore it. During the closing speech for the prosecution it seemed to me that there was, if I may say so without offence, a certain confusion of thought. It was suggested that you are, by what you decide today, to determine whether books like this will or will not be published in the future. May I venture to say that your task is nothing of the kind. We are not sitting here as judges of taste. We are not here to say whether we like a book of that kind. We are not here to say whether we think it would be a good thing if books like that were never written. You are here trying a criminal charge. In a criminal court you cannot find a verdict of "Guilty" against the accused unless, on the evidence that you have heard, you are fully satisfied that the charge

against the accused person has been proved. The burden of proof in this criminal case, as in all criminal cases, rests on the prosecution from start to finish.

The test today is extracted from a decision of 1868, and the test of obscenity is this (*R. v. Hicklin* (L.R. 3 Q.B. 371)):

- “ . . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”
- A Because that is a test laid down in 1868, that does not mean that what you have to consider is, supposing this book had been published in 1868 and the publishers had been prosecuted in 1868, whether the court or the jury, nearly a century ago, would have reached the conclusion that the book was an obscene book.
- B Your task is to decide whether you think that the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose hands the book may fall in this year, or last year when it was published in this country, or next year or the year after that. Considering the curious change of approach from one age to another, it is not uninteresting to observe that in the course of the argument of the case in 1868 the rhetorical question was asked (*ibid.*, 365):
- C “ What can be more obscene than many pictures publicly exhibited, as the Venus in the Dulwich gallery ? ”
- There are some who think with reverence that man is fashioned in the image of God, and you know that babies of either sex are not born into this world dressed up in a frock-coat or an equivalent feminine garment.
- D This book, as I venture to think you will have already appreciated, is a book which obviously and admittedly is absorbed with sex, the relationship between the male and the female of the human species. I, at all events, approach that great mystery with profound interest and at the same time a very deep sense of reverence. We cannot get away from it. It is not our fault that but for the love of men and women and the act of sex the human race would have ceased to exist thousands of years ago. It is not our fault that the moment in, shall we say, an over-civilised world—if “ civilised ” is an appropriate word—sex ceases to be one of the great motive forces in human life, the human race will cease to exist. It is the essential condition of the survival and development of the human race, for whatever ultimate purpose we have been brought into this world. Speaking to a representative group of
- F people, nine men and three ladies, I suppose each one of you is of good will and anxious that in our approach to this great mystery today we should achieve some solution which will lead to personal happiness between individuals of the opposite sex in millions of homes throughout this island. This, after all, is the only possible foundation on which to build a vigorous, strong and useful nation.
- G It is interesting that, throwing one’s mind back over the ages, the only real guidance we get about how people thought and behaved is in their contemporary literature. Where should we be today if the literature of Greece, Rome and other past civilisations portrayed, not how people really thought and behaved, but how they did not think and how they did not speak and how they did not behave ? Rome and Greece, it is not uninteresting to reflect, elevated human love to a cult, if not a religion, represented by Venus in the Roman world and Aphrodite in the Greek, two goddesses in the form of woman. Then Greece and Rome, like other civilisations, were swept away. When we reach the Middle Ages we find an entirely different approach. The priesthood was compelled to be celibate and a particular qualitative holiness was attached to the monks and the nuns who dedicated themselves to a cloistered and sheltered life. You may think it is lucky that the people were not all quite as holy as that because, if they had been, we should none of us have been here today.

Approaching this matter which—let us face it—throughout the ages has been one of absorbing interest to men and women, you get two schools of thought poles apart and in between those two extremes you have a variety of opinion and thought. At one extreme you get the conception, I venture to think, illustrated in some of the teachings of the mediæval church; that sex is sin; that the whole thing is dirty; that it was a mistake from beginning to end (and, if it was, it was the great creator of life who made the mistake and not you or I) and the less that is said about this wholly distasteful topic the better; let it be covered up and let us pretend it does not exist. In speaking of the birth of a baby let us refer to “the happy event on Monday” instead of saying “a baby was born on Monday”—it means exactly the same thing. I suppose the high tide was reached in the Victorian era (possibly as a reaction against the coarseness of the Georges and the rather libertine attitude of the Regency) when I understand that in some houses legs of tables were actually draped and rather stricter females never referred to gentlemen’s legs as such but called them their “understandings.” At the other extreme you get the line of thought which says that nothing but mischief results from this policy of secrecy and covering up, that the whole thing is just as much a part of God’s universe as anything else, and the proper approach to the matter is one of frankness, plain speaking, and the avoidance of any sort of pretence. I suppose that the extreme expression of that view is to be found in the nudist colonies where people, I understand, walk about, weather permitting, without any clothes on at all. Somewhere between these two poles the average, decent, well-meaning man or woman takes his or her stand.

Turning for a moment to the book that you have to consider, it is, as you know, in the form of a novel. Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. The charge is that the tendency of the book is to corrupt and deprave. Then you say: “Well, corrupt and deprave whom?” to which the answer is: those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. What, exactly, does that mean? Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? Or do we go even further back than that and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making those works available to the general public. I venture to suggest that you give a thought to what is the function of the novel. I am not talking about historical novels when people write a story of some past age. I am talking about the contemporary novelist. By “the contemporary novelist,” I mean the novelist who writes about his contemporaries, who holds up a mirror to the society of his own day. The function of the novel is not merely to entertain contemporaries; it stands as a record or a picture of the society when it was written. Those of us who enjoy the great Victorian novelists get such understanding as we have of that great age from chroniclers such as Thackeray, Dickens, Trollope, Surtees, and many others of that age.

In the world in which we live today it is equally important that we should have an understanding of how life is lived and how the human mind is working in those parts of the world which are not separated from us in point of time but are separated from us in point of space; and that we should have this understanding (particularly at a time like today when ideas and creeds and processes of thought seem, to some extent, to be in the melting pot and people are bewildered and puzzled to know in what direction humanity is heading and in what column we propose to march). If we are to understand how life is lived in

A the United States of America, France, Germany, or elsewhere, the contemporary novels of those nations may afford us some guide, and to those of us who have not the time, opportunity, money or, possibly, the inclination to travel, it may even be the only guide. This is an American novel written by a citizen of the United States of America, published originally in New York, purporting to depict the lives of people living today in New York, and to portray the speech, the turn of phrase, and the current attitude towards this particular aspect of life in New York. If we are going to read novels about how things go in New York, it would not be of much assistance, would it, if, contrary to the fact, we were led to suppose that in New York no unmarried woman or teenager has disabused her mind of the idea that babies are brought by storks or are sometimes found in cabbage patches or under gooseberry bushes?

B This is a very crude work, as you may think. You will consider whether or not it does seek to present a fair picture of aspects of contemporary American thought in relation to this problem. You will, no doubt, further consider whether or not it is desirable that on this side of the Atlantic we should close our eyes to a fact because we do not find it altogether palatable. You have heard a good deal about the putting of ideas into young heads. Really, is it books
C that put ideas into young heads, or is it nature? When a boy or a girl reaches that stage in life's journey when he or she is passing from the state of blissful ignorance through that perilous part of the journey which we call "adolescence" and finds himself or herself traversing an unknown country without a map, without a compass, and sometimes, I am afraid, from a bad home, without a guide, it is the natural change from childhood to maturity that
D puts ideas into young heads. It is the business of parents and teachers and the environment of society, so far as is possible, to see that those ideas are wisely and naturally directed to the ultimate fulfilment of a balanced individual life.

I am going to say a few words about the book itself, again reminding you that the determination of this case is a matter exclusively for you. If you do not agree with any view that I may indicate or express, well, you do not agree with it;
E that is all, and your disagreement is paramount. You may agree that it is a good book, or a bad book, or a moderate book. It is at least a book. It is the creation of a human mind and it depicts people created by the author in the environment in which that portion or portions of their lives with which the book deals were spent. You may agree or you may not—I do not know—that it is not mere pornographic literature, the filthy, bawdy muck that is just filth for filth's
F sake. Probably you, ladies, have never seen such a work except, perhaps, by accident. Some of the men, in their younger days, may furtively have glanced at the literary output of Port Said and felt rather ashamed of themselves afterwards. This book purports to be a picture of contemporary life in New York and the subject-matter of the work is largely the relationship of the two sexes. If you look at the front page, you will see the text. It is taken from a Victorian
G poet, Browning:

"What of soul was left, I wonder,
When the kissing had to stop?"

I suppose men and women of all ages have wondered that.

H The theme of this book is the story of a rather attractive young man who is absolutely obsessed with his desire for women. It is not presented as an admirable thing, or a thing to be copied. It is not presented as a thing that brought him happiness or any sort of permanent satisfaction. Throughout the book you hear the note of impending disaster. He is like the drunkard who cannot keep away from drink although he knows where it will land him in the end. So far as his amatory adventures are concerned, the book does deal with
endour or, if you prefer it, crudity with the realities of human love and of human intercourse. There is no getting away from that, and the Crown say:

"Well, that is sheer filth." Is it? Is the act of sexual passion sheer filth? It may be an error of taste to write about it. It may be a matter in which, perhaps, old-fashioned people would mourn the reticence that was observed in these matters yesterday, but is it sheer filth? That is a matter which you have to consider and ultimately to decide.

There is another aspect of the book, which certainly is not pretty or particularly attractive, but that is not what you have to consider. I have told you the test and I will not repeat it. That part of the story deals with this young man's adolescence, and begins on p. 76:

"But Russell never told Robert that his own first memory, dating from about the age of three, was of being waked in the middle of the night by two shouting voices, of hearing a plate crash and his father's voice raised almost to a high-pitched scream,"

and so on. The author is tracing the moral decline of this man back to his childhood where the unhappy relations between his mother and his father left a sort of permanent bruise on his personality. It goes on to describe the pitfalls of slime and filth into which the unhappy adolescent, without knowledge or experience, without the map and the compass and without the guiding hand of a wise parent or the example of a well-ordered, decent, home, stumbles. You will have to consider whether in this the author was pursuing an honest purpose and an honest thread of thought or whether that was all just a bit of camouflage to render the crudity, the sex of the book sufficiently wrapped up to pass the critical standard of the Director of Public Prosecutions.

The literature of the world from the earliest times when people first learned to write so far as we have it today—literature sacred and profane, poetry and prose—represents the sum total of human thought throughout the ages and from all the varied civilisations the human pilgrimage has traversed. Are we going to say in England that our contemporary literature is to be measured by what is suitable for the fourteen-year-old schoolgirl to read? You must consider that aspect of the matter. And there is another aspect of the matter which I should like you to consider before you come to your conclusion. I do not suppose there is a decent man or woman in this court who does not wholeheartedly believe that pornography, filthy books, ought to be stamped out and suppressed. They are not literature. They have got no message; they have got no inspiration; they have got no thought. They have got nothing. They are just filth, and, of course, that ought to be stamped out; but in our desire for a healthy society, if we drive the criminal law too far, further than it ought to go, is not there a risk that there will be a revolt, a demand for a change in the law, so that the pendulum will swing too far the other way and allow to creep in things that under the law as it exists today we can exclude and keep out? Remember what I said when I began. You are dealing with a criminal charge. This is not a question of what you think is a desirable book to read. It is a criminal charge of publishing a work with a tendency to corrupt and deprave those into whose hands it may fall. Before you can return a verdict of "Guilty" on that charge you have to be satisfied that that charge has been proved. If it is anything short of that the accused companies and individual are entitled to a verdict at your hands of "Not guilty."

Verdict: "Not Guilty."

Solicitors: *Director of Public Prosecutions* (for the Crown); *Oswald Hickson, Collier & Co.* (for the defendant and the defendant companies).

[Reported by T. J. KELLY, ESQ., Barrister-at-Law.]

PEACOCK v. AMUSEMENT EQUIPMENT CO., LTD.
AND ANOTHER. SAME v. SAME.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), July 6, 7, 1954.]

Fatal Accident—Damages—Deductions from damages—Property left by deceased wife to two children—Voluntary payment of one third of estate to husband.

A The plaintiff was the husband of a woman who had died as a result of injuries sustained while a passenger on a miniature railway conducted by the first defendants and owned by the second defendants. By her will the wife left her whole estate, of which the principal asset was a grocery business, to her two children by a previous marriage, and nothing to the plaintiff. The business was sold and the two children voluntarily paid to the plaintiff £575 which was said to represent about one third of the estate. In an action for damages under the Fatal Accidents Acts, 1846 to 1908,

B HELD: the payment made by the children was a voluntary payment made out of consideration or affection for the plaintiff and was not made in consequence of or by reason of the death and must not, therefore, be taken into account in assessing the damages to which the plaintiff was entitled.

C *Baker v. Dalgleish S.S. Co., Ltd.* ([1922] 1 K.B. 361), considered.

Decision of PARKER, J. (ante, p. 123), reversed.

EDITORIAL NOTE. The decision in this case is confined to claims under the Fatal Accidents Acts, 1846 to 1908; and it does not follow that this case is a guide when considering a similar question arising on a claim for damages for negligence apart from those Acts. The distinction is brought out in the judgments of COHEN, L.J., and SINGLETON, L.J., in *Payne v. Railway Executive* ([1951] 2 All E.R. 912, 913).

AS TO DEDUCTIONS FROM DAMAGES IN ACTIONS UNDER THE FATAL ACCIDENTS ACTS, 1846 to 1908, see HALSBURY, Hailsham Edn., Vol. 23, p. 698, para. 986.

Cases referred to:

- E (1) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest, Replacement, 223, 1191.
- (2) *Pym v. Great Northern Ry. Co.*, (1863), 4 B. & S. 396; 32 L.J.Q.B. 377; 8 L.T. 734; 122 E.R. 508; 36 Digest, Replacement, 208, 1097.
- (3) *Taff Vale Ry. Co. v. Jenkins*, [1913] A.C. 1; 82 L.J.K.B. 49; 107 L.T. 564; 36 Digest, Replacement, 213, 1124.
- F (4) *Johnson v. Hill*, [1945] 2 All E.R. 272; 173 L.T. 38; 2nd Digest Supp.
- (5) *Lory v. Great Western Ry. Co.*, [1942] 1 All E.R. 230; 2nd Digest Supp.
- (6) *Redpath v. Belfast & County Down Ry.*, [1947] N.I. 167; 2nd Digest Supp.
- (7) *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2), [1942] 1 All E.R. 657; [1942] A.C. 601; 111 L.J.K.B. 418; 167 L.T. 74; 2nd Digest Supp.
- (8) *Grand Trunk Ry. Co. of Canada v. Jennings*, (1888), 13 App. Cas. 800; 58 L.J.P.C.1; 59 L.T. 679; 36 Digest, Replacement, 221, 1179.

G APPEAL by the plaintiff and CROSS-APPEAL by the first defendant from an order of PARKER, J., dated Apr. 6, 1954, and reported ante, p. 123.

H On Aug. 10, 1953, the plaintiff's wife, Mrs. Mabel Annie Peacock, while a passenger on a miniature railway conducted by the first defendants and owned by the second defendants, received injuries from which she died. In 1940, the plaintiff had married the deceased, who had two children, one son and one daughter, by a previous marriage. The plaintiff was a tool supervisor and between 1940 and 1950 was earning a weekly wage of approximately £9 10s. which after deductions he paid to his wife and out of which she kept him, herself and the children. In or about 1945 or 1946 the plaintiff purchased a motor car and from then on gave his wife only £6, retaining the balance to run the car for himself and the family. In 1950, her children having grown up and left home, the wife bought a small grocery business, with living accommodation over

the shop where she and the plaintiff lived. From that time onwards the wife out of the proceeds of the shop (which amounted to about £6 10s. per week) paid for the upkeep of the home and the plaintiff no longer paid over any of his wages. By her will, the wife left the whole of her estate, which consisted mainly of the grocery business, to her children and no part of it to the plaintiff. The business was then sold, the whole estate was distributed and the children paid voluntarily to the plaintiff the sum of £575 which was said by the plaintiff in his evidence to amount to a third of the price realised by the sale of the wife's assets, and which was not paid in pursuance of any arrangement previously made between the family. In an action for damages under the Fatal Accidents Acts, 1846 to 1908, PARKER, J., held that the payment made by the children must be taken into account in assessing the damages to which the plaintiff was entitled.

The cross-appeal by the first defendant was dismissed and this report is confined to the decision of the court on the appeal by the plaintiff.

P. M. O'Connor for the plaintiff.

Berryman, Q.C., and *McGougan* for the defendants.

SOMERVELL, L.J., stated the facts and continued: I do not wish to add to the many descriptions which there have been of the nature of an action under Lord Campbell's Act so I will cite what SCRUTTON, L.J., said in *Baker v. Dalglish S.S. Co., Ltd.* (1) ([1922] 1 K.B. 371):

"The claim is a new right given by Lord Campbell's Act on new principles, not the transfer of any existing right of the dead man. The claimant is entitled to damages proportioned to the injury resulting to her from the death, and that injury must be pecuniary injury. She is not entitled to money compensation for mental suffering resulting from the death or for loss of the deceased's society. She is entitled to claim on the one hand any pecuniary benefit which it is reasonably probable she would have received if the deceased had remained alive: per ERLE, C.J., in *Pym v. Great Northern Ry. Co.* (2). It is not necessary that she should have a legal right to have received that benefit from the deceased or should have actually received any such benefit before the death: *Taff Vale Ry. Co. v. Jenkins* (3). It is enough that she had a reasonable expectation of pecuniary advantage in the future had the deceased survived, which pecuniary advantage may be a voluntary contribution from the deceased. On the other hand, as the question is what is her pecuniary loss by the death, any pecuniary advantage she has received from the death must be set off against her probable loss. This is clear if she receives such advantage as of legal right".

The learned lord justice then goes on to consider what we have to consider in this case, namely, the question as to the circumstances in which the court, in assessing compensation, should take into account an advantage which is not received as a legal right. In *Baker's* case (1), the plaintiff, the wife of the deceased, who was a chief petty officer on board a destroyer, was receiving a pension from the Crown. The question was whether that pension should be taken into account. The argument which was accepted by the learned trial judge, was that it ought not to be taken into account because there was no legal claim to it. No petition of right could have been brought to enforce the payment by reason of the terms of the Navy Pay and Pensions Order, 1920 (S.R. & O., 1920, No. 1021). I think it is relevant to read reg. 10 (1) of that order:

"Pensions to the widows, children, and dependants of deceased seamen or marines, for which provision is made in the following articles, shall not be claimed as a right, but shall be given as a reward of service, and no pension shall be granted or continued to a widow or dependant who, in the opinion of the Minister, is unworthy of a grant from public funds, and it shall be in the power of the Minister to terminate or suspend any pension that

may have been granted to such persons, or to provide for its administration under such conditions as he may determine."

But as YOUNGER, L.J., pointed out in his judgment, subject, of course, to the unworthiness of a grant from public funds referred to in the paragraph, there was every reason when the deceased died for the widow to expect to receive a pension, as other widows in the same circumstances. YOUNGER, L.J., said ([1922]

A 1 K.B. 380):

"... when the traditions of this country in relation to service pensions are remembered, it may be, I think, assumed that the fact that these payments are voluntary will, apart from any question of supervening personal disqualification, have practically no influence at all upon the question whether or not they will be continued."

B That decision, therefore, was dealing with a pension based on the provisions of that order. In that case the court to some extent based its decision as to quantum on an indication in the order (reg. 24 (b)) that the Minister of Pensions might, in the exercise of his powers, reduce the pension by the amount of damages awarded in an action. The question what was the Minister's procedure and custom as to that matter came before this court in *Johnson v. Hill* (4), but that

C case adds nothing on the issue with which we are concerned.

We were also referred to a decision of ASQUITH, J., in *Lory v. Great Western Ry. Co.* (5). What was in question there was a police pension and also a gratuitous payment from a charitable fund. There is little indication as to either the regulations governing the pension fund or the customary dealings by the police authorities with those who were in the same position as the plaintiff

D in that case. It may well be that the pension was analogous, so far as this issue is concerned, to the Crown pension in *Baker v. Dalgleish S.S. Co., Ltd.* (1). As to the payment from the charitable fund, there is little indication in the judgment or argument as to the nature of the fund and the terms governing it. I would like to reserve consideration of the question of payment from such funds until it arises because I think it might well depend on the actual terms of the fund and

E the uniformity of the administration of it.

During the course of argument various sentences in *Baker v. Dalgleish S.S. Co., Ltd.* (1) were referred to and, quite rightly, relied on; but, as I said then, we are bound by the decision and not by isolated sentences in the judgments, which in any case must be construed in relation to the context. BANKES, L.J., said ([1922] 1 K.B. 368):

F "I cannot myself see why, when assessing compensation under Lord Campbell's Act, any distinction should be drawn between an assessment of what is a reasonable expectation of benefit had the deceased person lived, and what is the reasonable expectation of benefit in consequence of the deceased person's death. Both must be taken into consideration in arriving at the real loss."

G With great respect, I do not find that a very helpful suggestion in approaching this problem. There is no difficulty in ascertaining the prima facie loss on the evidence as to what the dependant received from the deceased while he was alive. I agree, as SCRUTTON, L.J., said, that it may be necessary to take into account an item which has never in fact materialised during the life of the deceased, but primarily the loss is based on what the dependant was receiving.

H But when one has to consider the position after death and one is considering sums other than those which can be claimed as of legal right, one is in a different area, and one is not greatly assisted by considering the principles which may be applied in assessing the prima facie injury to the dependants. SCRUTTON, L.J., also said (*ibid.*, 372):

"... the same principle applies to voluntary benefits conferred in consequence of the death. Just as in assessing the loss by the death the

probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death."

I think that is a useful sentence in that in considering whether claims other than claims of legal right are to be brought in, whether payments have been made or not, it is important to consider the position as at the time of the death: was there at that time any probability or reasonable expectation of a benefit? Applying that test to the present case I think it is plain on the evidence that there was none. These children were evidently fond of their stepfather and they determined to make a present out of the assets realised but there was no expectation by him of a present when the deceased died.

There is another aspect of this matter which is very well stated in *Redpath v. Belfast & County Down Ry.* (6). That was not a case under the Fatal Accidents Acts, although one or two of the fatal accident decisions were referred to. There had been a railway accident which was caused by the negligence of the railway company's servants. A number of people had been killed or injured, and the public had subscribed to a fund which was used to help those who had been injured as well as the dependants of those who had been killed. The defendants sought to interrogate the plaintiff as to what payments if any he had received from the fund. The learned Lord Chief Justice of Northern Ireland held that that was an irrelevant matter and could not be brought into account. After referring to some of the fatal accident cases ANDREWS, L.C.J., said ([1947] N.I. 175):

"In these circumstances common sense and natural justice appear to me to rise in revolt against the proposition that the money so subscribed should be diverted from the objects whom the subscribers intended to benefit in order to be applied in reduction of the damages properly payable by the wrongdoer as compensation to the victims for their loss. Why, one may well ask, should the defendants' burden be lightened by the generosity of the public?"

I think one can say in the same way in this case, why should the burden on the defendants be lightened by the generosity of the stepchildren? I realise, of course, that a defendant may find his burden lightened for instance, by the fact that the deceased, usually a husband, has saved money which goes to his wife as a result of the death.

I think the clue to this problem is, first, to consider the facts of *Baker's* case (1), and without saying that that is a line beyond which no voluntary payment would be taken into account—I do not express that view at all, but I think it would be only in very unusual circumstances that a voluntary payment would be taken into account when there was no expectation of it at the time of the death. It seems to me that that indicates for itself that there is a nova causa interveniens and, therefore, the payment was not made in consequence or as a result of the death. I would say that this payment was not made as the result of the deceased's death. Of course, it would not have been made unless the wife had died, but I would say that it was made as the result of the stepchildren's consideration, and, perhaps, affection for their stepfather. Also, it is not accurate to describe it as part of the widow's estate. There is no evidence as to what other resources, if any, the stepchildren had. It was a third of the amount which they got as the result of the mother's will. For these reasons, I would allow the appeal.

BIRKETT, L.J.: I am of the same opinion. The principles on which damages are assessed under Lord Campbell's Act are now perfectly plain. The measure of the damage is the pecuniary loss suffered by the dependant as a

result of the death. In estimating that pecuniary loss it was said in this case that £575, which, admittedly, the plaintiff received, ought to be brought into account. I think some of the trouble in this case arises because of the manner in which that sum was introduced in evidence. Counsel for the plaintiff said that until his client was cross-examined in the court below he had no idea that there had been a payment of any kind. The evidence was as follows:

- A "Q.—Was there not some arrangement, some understanding, that some provision was to be made for you out of her estate? A.—Not to my knowledge. Q.—Have you received anything from either of the children? A.—Yes. Q.—What have you received from the children? A.—I am holding a third share of the estate that is owing to their generosity, though. Q.—How much does that amount to? A.—£575. Q.—It was your wife's wish, was it not, that that should be done? A.—Not to my knowledge. I did not know she had made a will."

His answer "I am holding a third share of the estate", I think possibly has led to some slight confusion. When the learned judge dealt with this matter in his judgment he put it in this way:

- C "But in addition there remains this fact. After the two children had come into the property and it was sold, all the estate was distributed and they paid over voluntarily to the husband £575, said to represent about a third of the estate."

- D So it is quite clear, I think, from the evidence that the plaintiff had no idea what was in the wife's will. When it turned out that he was not even mentioned in the wife's will, he certainly had no expectation that he would receive any part of what his wife left. It would appear further from the evidence that he did not receive it until the two stepchildren had had the money arising from the estate given to them by process of law. They had realised the estate, sold the property, and had the cash in hand. Then as my Lord put it, out of generosity or affection, they made a voluntary gift of £575, which is in fact, we are told, about one third of the estate.

- E It is said that the plaintiff must bring that payment into account because it lessens the pecuniary loss which he suffered. We have had a great many cases cited to us, including *Baker v. Dalgleish S.S. Co., Ltd.* (1) and *Lory v. Great Western Ry. Co.* (5). It is said that those cases illustrate the principle which ought to be followed in this case. For my own part, I am satisfied that this payment by the stepchildren to the plaintiff was a voluntary payment which ought not to be taken into account. It is quite clear from all the facts that he had no expectation that any such payment would be made, and it was not a payment—and this is where my mind is quite clear—which was made as a consequence of the wife's death.

- G In *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2) (7), LORD WRIGHT says ([1942] 1 All E.R. 662):

- H "Section 2 of the Act of 1846 provides that the action is to be for the benefit of the wife, or other member of the family, and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death. The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered (*Grand Trunk Ry. Co. of Canada v. Jennings* (8) (13 App. Cas. 804)). The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death."

Leading counsel for the first defendant suggested that the sum out of which the £575 came was released, as he put it, by the death of the wife and was in fact part of her estate. He said that the fact that the children out of good will or affection or generosity had paid this sum voluntarily to the plaintiff did not prevent it from being taken into account. There is no question but that if the wife had not been killed none of this would have arisen. In that sense, it is a sequence of the death of the wife because all these events followed on her death, but it does not follow that the payment in question is by reason of the death. It is a sequence which is by no means complete. This £575 paid by the step-children was their own money. A larger sum had been left by the will. The estate had been realised and it was their money for them to do with exactly as they wished. It so happened that they wished to pay £575 as a gift to the husband. I decide this case on the simple point that this payment in the circumstances of this case was not money paid by reason of the death. I agree with the judgment which my Lord has delivered.

ROMER, L.J. : I also agree.

Appeal allowed.

Solicitors: *R. I. Lewis & Co.* (for the plaintiff); *Wm. Easton & Co.* (for the defendants).
[Reported by **PHILIPPA PRICE**, *Barrister-at-Law.*]

**BUTTERWORTH v. KINGSWAY MOTORS, LTD.
HAYTON, THIRD PARTY. KENNEDY, FOURTH PARTY.
RUDOLPH, FIFTH PARTY.**

[LIVERPOOL ASSIZES (Pearson, J.), June 9, 10, 1954.]

Sale of Goods—Implied condition of vendor's right to sell—Breach—Total failure of consideration—Recovery of purchase price—Motor car sold by hirer in breach of hire-purchase agreement—Re-sold in good faith—Contract of sale rescinded by purchaser—Damages—Sale of Goods Act, 1893 (c. 71), s. 12 (1).

Sale of Goods—Title—Re-sale by a hirer entitled to an option to purchase the goods sold—Defective title of subsequent purchasers made good on hirer acquiring title.

Hire-Purchase—Sale by hirer before goods purchased—Re-sale by purchaser—Damages for breach of implied warranty of title.

By a hire-purchase agreement, dated Jan. 3, 1951, the owners of a motor car hired it to R. (referred to hereinafter as the hirer). The agreement provided, inter alia, for the payment by the hirer of a number of monthly instalments, and that, if those payments were duly made and all the terms of the agreement were observed, the hirer should then have the option of purchasing the vehicle for the sum of 10s. Until the purchase had been made, the vehicle was to remain the property of the owners and the hirer had no interest in it other than that of hirer under the agreement. If there was default in the punctual payment of the hire-rent or if the hirer failed to observe the terms of the agreement, the owners were entitled to put an end to the hiring immediately, and to retake possession of the vehicle. On Aug. 1, 1951, before all the instalments had been paid, the hirer, not realising that she was acting in an unlawful manner, purported to sell the car to the fourth party for £1,000. On Aug. 11 the fourth party, acting in good faith, purported to sell it to the third party for £1,015, and on the same day the third party, also in good faith, purported to sell it to the defendants for £1,030. On Aug. 30 the defendants sold the car to the plaintiff for £1,275, believing that they had the right to sell. The hirer continued to pay to the owners the monthly instalments due under the hire-purchase agreement until, in 1952, she learned that she had had no right to sell the car. She then informed the owners of the position. On July 15, 1952, the owners wrote to the plaintiff informing him that the car was their property and asking him to arrange for it to be returned into their possession. On July 17,

1952, his solicitors wrote to the defendants saying that the car was not theirs to sell, and in the circumstances the plaintiff would expect the return of the money paid. The defendants, through their solicitors, immediately replied expressing their surprise at the information that the car was not their property to sell, and asking for the name of the alleged owner and particulars of his claim. On or about July 25, 1952, the hirer completed payments under the agreement, and the owners accepted payment by her in discharge of their interests under the agreement. On Sept. 12, 1952, the plaintiff commenced an action against the defendants for the sum of £1,275 as money received by them to his use and payable by them to him on a consideration which had wholly failed. The defendants brought in the third party, claiming indemnity in respect of the plaintiff's claim; the third party brought in the fourth party, who brought in the hirer as a fifth party, preferring similar claims.

HELD: (i) the letter of July 17, 1952, from the plaintiff's solicitors to the defendants' solicitors constituted a rescission of the contract of sale, and on that date the plaintiff was entitled to rescind and to receive repayment of the purchase price as money paid on a consideration which had wholly failed in that the defendants had no title to the car which they purported to sell: *Rowland v. Divall* ([1923] 2 K.B. 500), applied; after July 17 the plaintiff was entitled to maintain, as he consistently did, the position that he had no claim to possession of the car but a right to repayment of the purchase price, and, therefore, he was entitled to recover the price from the defendants, notwithstanding that, at the date of the issue of the writ, he was still in undisturbed possession of the car and there was no outstanding adverse claim against him.

(ii) the hirer having completed payments to the owners in full on or about July 25, 1952, and having induced them to relinquish any claim which they had to the car, then acquired title to the car as between herself and the owners; the title thus acquired went to feed the previously defective titles of the subsequent purchasers and enured to their benefit, and, accordingly, on or about July 25 the ownership of the car vested in the defendants.

Dicta of VAUGHAN WILLIAMS, L.J., and BUCKLEY, L.J., in *Whitehorn Brothers v. Davison* ([1911] 1 K.B. 475, 481), applied.

(iii) The defendants were entitled to recover from the third party, as damages for breach of warranty, the sum of £475, which was the difference between the price which the defendants paid and the value of the car in July, 1952; the third and fourth parties were similarly entitled to recover the same sum as damages against the fourth party and the hirer respectively.

AS TO IMPLIED UNDERTAKINGS AS TO TITLE, see HALSBURY, Hailsham Edn., Vol. 29, p. 57, para. 70; and FOR CASES, see DIGEST, Vol. 39, pp. 430-432, Nos. 592-612.

AS TO ALIENATION BY A HIRER UNDER A HIRE-PURCHASE AGREEMENT, see HALSBURY, Hailsham Edn., Vol. 16, p. 523, para. 772.

Cases referred to:

- (1) *Rowland v. Divall*, [1923] 2 K.B. 500; 92 L.J.K.B. 1041; 129 L.T. 757; 39 Digest 431, 608.
- (2) *Whitehorn Brothers v. Davison*, [1911] 1 K.B. 463; 80 L.J.K.B. 425; 104 L.T. 234; 39 Digest 535, 1458.
- (3) *Blundell-Leigh v. Attenborough*, [1921] 3 K.B. 235; 90 L.J.K.B. 1005; 125 L.T. 356; 37 Digest 7, 25.
- (4) *Robin & Rambler Coaches, Ltd. v. Turner*, [1947] 2 All E.R. 284; 2nd Digest Supp.

ACTION for money paid by the plaintiff to the defendants on a consideration which had wholly failed and thus received by the defendants to the use of the plaintiff.

The claim was for the sum of £1,275, the purchase price of a motor car which the defendants had purported to sell to the plaintiff on or about Aug. 30, 1951, in the belief that they had the right to sell it. At the time of the sale the car was the property of Bowmaker, Ltd., and the subject-matter of a hire-purchase agreement between them, and Miss Rudolph, the fifth party. In breach of the terms of the agreement, the fifth party had sold the car to Mr. Kennedy, the fourth party. The car was then sold by the fourth party to Mr. Hayton, the third party, and by the third party to the defendants.

The defendants brought in the third party against whom they claimed, *inter alia*, indemnity in respect of their liability to the plaintiff. The third party brought in the fourth party, who brought in the fifth party, making similar claims.

Andrew Rankin for the plaintiff, Mr. Butterworth.

Atkinson, Q.C., and *Curus* for the defendants, Kingsway Motors, Ltd.

J. G. Burrell for the third party, Mr. Hayton.

Bingham for the fourth party, Mr. Leonard Kennedy.

G. J. Bean for the fifth party, Miss Rudolph.

PEARSON, J.: The subject-matter of this litigation is a Jowett Javelin motor car, registration number HGA4, which was first registered in November, 1949. We have no evidence what happened to it between November, 1949, and about the end of 1950. Miss Rudolph, the fifth party, became interested in it late in 1950. On Jan. 3, 1951, she took it from Messrs. Bowmaker, Ltd., on a hire-purchase agreement containing not unfamiliar provisions. By cl. 2 the hirer agreed:

"(a) On the signing hereof to pay to the owners the amount of the first payment set out in the schedule hereto in consideration of the option to purchase granted to the hirer and referred to in cl. 3 (a). (b) To pay punctually to the owners without previous demand the amount of the monthly payments set out in the schedule hereto so long as the hirer shall desire to continue the hiring."

By cl. 3 (a), which is important, the owners agreed:

"If the hirer shall duly make the said payments and strictly observe and perform all the terms and conditions on his part herein contained then the hirer shall thereupon have the option of purchasing the vehicle for the sum of 10s."

Clause 4 provided:

"If during the hiring the hirer shall: (a) make default in punctually paying any of the hire-rents provided by cl. 2 (b) . . . (d) fail to observe and perform any of the terms conditions and stipulations on his part herein contained, it shall be lawful for the owners . . . to put an end to the hiring immediately and retake possession of the vehicle . . ."

Clause 6 provided:

"Unless and until the whole of the sums due under cl. 2 (a) and cl. 2 (b) hereof shall have been paid and purchase been made under cl. 3 (a) hereof the vehicle shall remain the absolute property of the owners and the hirer shall not have any right or interest in the same other than that of hirer under this agreement."

Clause 9 provided:

"This agreement is personal to the hirer and the rights and/or obligations of the hirer shall not be assignable or chargeable by him."

Miss Rudolph paid some of the monthly payments due under the agreement, but she had not paid all of them, nor had she exercised the option to purchase by Aug. 1, 1951, when she sold or purported to sell the car to a motor dealer

named Mr. Leonard Kennedy, the fourth party. The price was £1,000, which was paid by him by means of a cash payment of £350 and the delivery of an A.C. shooting brake, which I find to have been taken at the figure of £650. That sale by Miss Rudolph to Mr. Kennedy was a wrongful sale because the car still belonged to Bowmaker, Ltd., and Miss Rudolph had no right to sell it. There was, therefore, a clear breach of the implied condition under the Sale of Goods Act, 1893, s. 12 (1). It may well be that Miss Rudolph did not then realise that she was acting in an unlawful manner, but it is clear that she was. On or about Aug. 11 Mr. Kennedy sold or purported to sell the car for £1,015 to Mr. Hayton, the third party. Mr. Hayton was a produce merchant and, so far as Mr. Kennedy knew, he required the car for his own use and not for re-sale. This second transaction was, again, a completely wrongful sale as the car still belonged to Bowmaker, Ltd., and Mr. Kennedy had, in fact, no right to sell it, so that, again, there was a breach of the same implied condition, but I find that he acted in completely good faith in believing he had a right to sell the car. On the same day, Aug. 11, Mr. Hayton sold or purported to sell the car for £1,030, to Kingsway Motors, Ltd., the defendants. They are motor dealers and Mr. Hayton knew that they were buying the car for re-sale. Here, again, the sale was a completely wrongful sale as the car still belonged to Bowmaker, Ltd., and Mr. Hayton had no right to sell it, so there was a breach of the same implied condition. Mr. Hayton also acted in completely good faith in believing that he had a right to sell the car. There was yet another transaction in this long series. After certain negotiations from about Aug. 15 onwards, the defendants, on or about Aug. 30, 1951, sold or purported to sell the car to Mr. Butterworth, the plaintiff, for a price of £1,275, which was paid by means of certain cash payments amounting to £550 and the delivery of a Standard car, which for this purpose was considered to be worth £725. There was, again, a completely wrongful sale as the car still belonged to Bowmaker, Ltd., and the defendants had no right to sell it, so there was a breach of the same implied condition. But the defendants, also, acted in perfectly good faith, believing that they had a right to sell.

It appears from the registration book that the plaintiff was registered as owner on Jan. 15, 1952. I suppose that the car had already been taxed up to the end of 1951 and that may explain why he did not become registered, whether he ought to have been or not, until January, 1952. From the time of its acquisition on or about Aug. 30, 1951, until some time in July, 1952, he made full use of the car, fully believing that it was his and that he had every right to use it. In the meantime Miss Rudolph continued to make monthly payments to Bowmaker, Ltd., under the hire-purchase agreement. In the end, however, she learned that she ought not to have sold the car as she had done, and she informed Bowmaker, Ltd., of the actual position. Her conduct in those two respects affords strong evidence that, although it was a wrongful sale, she was acting in good faith and not with any intention of deceit.

On July 15, 1952, Bowmaker, Ltd., wrote to the plaintiff in these terms:

"Re: Jowett Javelin—Regd. No. HGA4. We have reason to believe that the vehicle described above is at present in your possession and we wish to advise you that it is our property the subject of a hiring agreement into which we entered with a Miss G. Rudolph. Assuming our information to be correct, we have to ask you to be good enough to arrange at once for the vehicle to be returned into the possession of our Liverpool office, and we shall be obliged if you will confirm that you have given effect to our requirements. It occurs to us that you might perhaps like the opportunity to acquire title in the vehicle and quite without prejudice, we would be prepared to allow you to do so in consideration of an immediate payment of £175 14s. 2d. We look forward to hearing by return of post and we thank you in anticipation."

If the plaintiff had been willing to enter into some arrangement on the lines suggested by Bowmaker, Ltd., a great deal of trouble would have been saved because, no doubt, it would have been possible to arrange what ultimately happened in fact, that Miss Rudolph would repay the outstanding balance to Bowmaker, Ltd. The plaintiff would then have had what he had originally bargained for at the price which he originally agreed to pay, and did pay, and it would have saved a great deal of expense to everybody. On the other hand, he would have lost the chance which he had in 1952 of reclaiming the full 1951 price in return for giving up the car in July, 1952, by which time it had substantially depreciated in its realisable value by reason of a general fall in the market price of second-hand cars. I do not think, however, that those considerations ultimately affect the legal issue in the present case. I mention them to show that I have not left out of consideration possible arguments on the grounds of hardship. In my view, the plaintiff's position is somewhat lacking in merits.

On July 17, 1952, the plaintiff's solicitors wrote to the defendants:

"Dear Sirs, We have been consulted by Mr. H. Butterworth . . . who informs us that he purchased a Jowett Javelin car for £1,275 on Aug. 30 last. We are instructed that this motor car was not yours to sell, and in the circumstances our client will expect the return of the money paid."

That is a demand for the return of the money, which shows that the plaintiff is claiming the repayment of the money and not wishing to retain the car. That point becomes even clearer in later letters. On the same day, July 17, the plaintiff's solicitors wrote to Bowmaker, Ltd., saying:

". . . Will you please be good enough to let us have a copy of the hiring agreement, and the date when you allege the agreement was terminated."

On July 18 the defendants' solicitors replied to the plaintiff's solicitors saying:

". . . The allegation that the Jowett Javelin car was not the property of our clients to sell has come as a complete surprise. Our clients purchased the car from a motor dealer. We shall be obliged therefore if you will kindly advise us who is alleged to be the owner of the car in question and the basis of his or her claim."

On July 23 Bowmaker, Ltd., wrote to the plaintiff's solicitors:

"Re: Miss G. Rudolph, Agreement No. — Thank you for your letter of [July 17], from which we note that you have been consulted by Mr. Butterworth in connection with our letter of [July 15]. We shall, of course, be only too pleased to let you have a copy of this hiring agreement, but we have not had same prepared because since we wrote to Mr. Butterworth, we have received from our hirer a post-dated cheque which, if met, will be sufficient to discharge our interests and to enable us to release the vehicle to Mr. Butterworth. The cheque in question is dated [July 25], so we propose to write you again during the course of a day or two."

It was not proved in evidence but it is understood and accepted by all the learned counsel that that cheque was made out by Miss Rudolph and made payable to Bowmaker, Ltd. for the outstanding amount of the hire-purchase payments and, presumably, for the 10s. necessary to complete the purchase, and that the cheque was met on or about July 25, 1952. It is obvious that it had been met by Aug. 14, so the precise date does not matter very much, but I find that the exact date when it was met was July 25, 1952. The effect of that is that Miss Rudolph must be deemed to have exercised her option to purchase, and it follows that, as between her and Bowmaker, Ltd., the ownership passed from them to her. That is only as between those two parties. Bowmaker, Ltd. were willing to take that cheque, as they pointed out in their letter, in discharge

of their interests and as enabling them to release the vehicle. They said in their letter "to release the vehicle to Mr. Butterworth".

On Aug. 9, 1952, the plaintiff's solicitors again wrote to the defendants' solicitors:

A " . . . we have been able to ascertain the name of the owners of the vehicle at the time of the purported sale to our client. The car was owned by Messrs. Bowmaker, Ltd., and was on hire to a Miss Rudolph. We are now instructed to apply for the return of the purchase price, namely £1,275 and we should be obliged by your letting us have your instructions with regard to the return of the motor car."

On Aug. 14 Bowmaker, Ltd. wrote to the plaintiff's solicitors:

B " We regret the delay in advising you further in this matter, but we are pleased to say that the cheque to which we referred in our last communication has been duly met so that our interests in this case and in the Jowett Javelin HGA4 are completed."

That information was also transmitted by the defendants' solicitors to the plaintiff's solicitors by a letter dated Aug. 18.

C On Aug. 22 the plaintiff's solicitors wrote to the defendants' solicitors, referring back to their letter of July 17, and asking again for the return of the purchase price and for instructions regarding the return of the motor car. The defendants' solicitors replied on Aug. 25, saying that they had nothing to add to what they had said in their letter of Aug. 18. By a letter dated Oct. 11, 1952, the plaintiff's solicitors again asked the defendants' solicitors for instructions as to the disposal of the car. The plaintiff did not use the car after July 16, 1952. It has remained on his premises ever since that date and, unfortunately, no arrangement was made for it to be disposed of in July or August, 1952, or later in the same year, while its price was still comparatively high.

The proceedings began with a specially indorsed writ issued on Sept. 12, 1952. The claim was

E " for money received by the defendants to the use of the plaintiff and payable by the defendants to the plaintiff on a consideration which has wholly failed. The said money namely £1,275 was paid by the plaintiff to the defendants on Aug. 30, 1951, or thereabouts, as the consideration for the delivery by the defendants to the plaintiff of a Jowett Javelin motor car, registration number HGA4, and the consideration wholly failed by reason of the fact that the defendants were not the owners of the said motor car, and had no title to the said motor car. And the plaintiff claims the said sum of £1,275."

Some adverse comments have been made as to the exact wording of that statement of claim, but I do not think they are of much moment because I think that the statement of claim does make clear the substance of the plaintiff's claim: it was that the consideration had failed because the defendants had failed to sell the car to the plaintiff and, in the first instance at any rate, had no title to it whatever.

G The defence was delivered on Oct. 27, 1952. The material pleas are in para. 3 and para. 4:

H " 3. It is denied that the consideration wholly failed as alleged or at all, on the contrary the plaintiff is and has been in undisturbed possession of the said Jowett Javelin, and has a good title of the said Jowett Javelin. 4. If which is denied, the plaintiff has not a good title, then the plaintiff accepted the said Jowett Javelin, of which he is still in possession, and by reason of s. 11 (1) (c) of the Sale of Goods Act, 1893, any alleged breach of any alleged condition by the seller in the contract of sale, can only be treated as a warranty and not as a ground for rejecting the said contract."

Counsel for the defendants indicated that his argument against the plaintiff would, for the most part, be based on para. 3.

The defendants served a third-party notice on Mr. Hayton, claiming to be indemnified against the plaintiff's claim and costs of the action on the ground that there was an implied condition that Mr. Hayton had a good title to the motor car. There is a statement of claim in those proceedings and a defence. It is sufficient to say that, in substance, the defendants' claim against the third party is now, at any rate, for damages for breach of the implied condition that the third party had a good title. The claim is for damages because any alleged breach of the alleged condition has been reduced to a breach of warranty, either by the events which have happened or by the election of the defendants to deal with the matter on that basis. The main plea in the defence is that the title was perfected afterwards. There is a similar fourth-party notice, dated Nov. 26, 1952, by Mr. Hayton against Mr. Kennedy and a somewhat similar statement of claim and defence. Then there is a similar fifth-party notice, dated Jan. 6, 1953, by Mr. Kennedy against Miss Rudolph.

On those facts, the first question is as to the relation between the plaintiff and the defendants, and I think a very important question is whether the plaintiff, by his letter of July 17, 1952, duly and effectually rescinded the contract of sale between him and the defendants. I hold, first, that the letter of July 17, as a matter of construction, constituted a rescission of that contract of sale. When I say a rescission of the contract of sale, I am using the expression which was used by the Court of Appeal in *Rowland v. Divall* (1), and without prejudice to the question whether it could also be put in rather a different way: that there was a fundamental breach by the defendants and the plaintiff elected to treat that breach as a repudiation of that contract of sale. I do not think that, in the end, it makes any difference which way one looks at it. Secondly, on the authority of *Rowland v. Divall* (1), I hold that the plaintiff was entitled on July 17 to rescind that contract of sale. The possible contention for the defendants in the present case that such rescission was precluded by the plaintiff's use of the car for a substantial period and the deterioration in its condition, and/or depreciation in its market value during that period, is answered by the reasoning of BANKES, L.J., in the *Rowland* case (1). Another possible contention that such rescission was precluded by the plaintiff's acceptance of the motor car when it was delivered or after delivery, is answered by the reasoning of ATKIN, L.J., in that case.

The actual contention mainly relied on in the present case by counsel for the defendants as against the plaintiff was that there was not a total failure of the consideration. Counsel submitted that the question whether or not there was a total failure of the consideration was to be determined as at the date of the issue of the writ, and that, at the date of the issue of the writ, the plaintiff was still in undisturbed possession of the car and there was no outstanding adverse claim against him because Miss Rudolph had paid the outstanding instalments and the hire-purchase money, and Bowmaker, Ltd., were willing to accept such payment in full discharge of their interest in the car and to release the vehicle to the plaintiff. In my opinion, the answer to that contention is that on July 17 the plaintiff was entitled to, and did, rescind the contract of sale, and thereby he established, and, in a sense, crystallised, his right to receive repayment of the purchase price as money paid in consideration for the sale of the motor car. He could not consistently with that claim for repayment of the purchase price also claim to retain possession of the car. I think that at all times it was sufficiently clear that he was not adopting any attitude of seeking to retain possession of the car. He was holding the car at the disposal of the defendants. I further hold that, after he had written that letter, the plaintiff was entitled to, and did, maintain his position of having no claim to possession of the car but having a right to repayment of the purchase price. Having regard to that,

whatever the general merits of his position may be, I hold that the plaintiff is in law entitled to recover, and there will be judgment for £1,275 against the defendants.

A The decision which I have given on that question depends on the letter of
 B July 17, 1952. It was contended for the plaintiff that, even if that letter had
 C never been written, the position would still have been the same on the ground
 D that there was a total failure of consideration as between the two relevant
 E parties, the plaintiff and the defendants: that the extraneous act of Miss Rudolph
 F in paying the hire-purchase money to Bowmaker, Ltd., and the willingness of
 G Bowmaker, Ltd. to accept it in discharge of their interest and to release the
 vehicle to the plaintiff would not remedy the defect in the consideration moving
 from the defendants. It is not necessary for me to express an opinion on that
 point. I feel some doubts about it because it would seem an extraordinary
 position if the plaintiff, on the assumption that he had not previously defined
 his attitude of election on the subject, was seeking to say: "There has been a
 total failure of consideration in regard to purchase of this car, although the car
 is in my possession and I am entitled to retain it against the world." It does
 not seem to me to be a reasonable conclusion. I do not express any final opinion
 on it because I have come to my decision in favour of the plaintiff's claim on the
 basis of his solicitor's letter of July 17.

The next question is as to the present ownership of the car. The various
 purported sales all took place at times when Bowmaker, Ltd. were still the
 owners of the car, so that all the purported sellers in this rather long chain
 had no title to it at the times when the purported sales were made. But on or
 about July 25, 1952, Miss Rudolph acquired a good title from Bowmaker, Ltd.,
 or, at any rate, made a payment to Bowmaker, Ltd., which extinguished their
 title and induced them to relinquish any claim which they had to the car. I
 think that the right view is that Miss Rudolph acquired the title as between her
 and Bowmaker, Ltd., but I further hold on authority that the title so acquired
 went to feed the previously defective titles of the subsequent buyers and enured
 to their benefit. It is a rather curious position but I do so hold, mainly on the
 authority of *Whitchorn Brothers v. Davison* (2), a decision of the Court of Appeal.
 In his judgment VAUGHAN WILLIAMS, L.J., said ([1911] 1 K.B. 475):

"It is by reason of this event that I have come to the conclusion that the
 question of larceny by a trick becomes of no importance in this case. The
 title of Bruford to the necklace was, at any rate for the time being, perfected
 by that transaction, and would go to feed the title of the defendant, his
 pledgee, the result being that, if the defendant's title is not vitiated by bad
 faith on his part or notice, he has a good title . . ."

BUCKLEY, L.J., said (*ibid.*, 481):

"If Bruford had stolen [the necklace], he had that which is sometimes
 incorrectly called a void title, but which is really no title at all; Bruford
 could not then give the defendant a title."

G There is a passage in the judgment of KENNEDY, L.J. (*ibid.*, 486) which is to
 a similar effect. See also *Blundell-Leigh v. Attenborough* (3), in the Court of
 Appeal, per BANKES, L.J. ([1921] 3 K.B. 240) and per ATKIN, L.J. (*ibid.*, 242),
 and *Robin & Rambler Coaches, Ltd. v. Turner* (4). Accordingly, I hold that the
 sales by Miss Rudolph to Mr. Kennedy, by Mr. Kennedy to Mr. Hayton, and by
 H Mr. Hayton to the defendants were, in a sense, perfected on or about July 25,
 1952, and that, in consequence, the newly acquired title of Miss Rudolph passed
 all along the line and caused the ownership of the car to vest in the defendants
 on or about July 25. The plaintiff has been holding the car at the disposal of
 the true owner, whoever he may be, and since July 25, 1952, the defendants
 have been entitled to it.

The next set of questions is concerned with the rights of the defendants against
 Mr. Hayton, of Mr. Hayton against Mr. Kennedy, and of Mr. Kennedy against

Miss Rudolph. The defendants are entitled to claim damages against Mr. Hayton for breach of the condition as to good title to the car, but that breach of the condition is now reduced to a breach of warranty and damages can be claimed on that basis. In consequence of the breach of warranty, the defendants lost the purchase price of £1,275 but, on the other hand, they eventually acquired ownership of the car. For the value of the car which they so acquired, they must give credit in reduction of the *prima facie* sum of £1,275.

The next question is: At what date is the value of that car to be assessed? One possible argument for Mr. Hayton, the third party, would be that it was the duty of the defendants to mitigate the damage by taking all reasonable steps to dispose of the car and it would have been reasonable for the defendants at once, in July or August, 1952, to take the car and dispose of it at the price it would then fetch in order to avoid further depreciation. It may be that there was a duty to mitigate the damage in that way, but the argument to the contrary is formidable: namely, that the defendants at that time were faced with a difficult legal position and were entitled to maintain their attitude against the plaintiff that the car belonged to him, and not to them and that they were not liable. There is a possibility of a good deal of argument as to what the "reasonable" steps to mitigate the damage would be, but I think that this problem can be solved much more simply. What the defendants gained was the ownership and right to possession of that car and, when one comes to assess the value of what they gained, one should take it at the date when it was gained. Then one has to arrive as best one can at the proper value of the car in or about July, 1952. [His Lordship reviewed the evidence, and continued:] Making the best assessment I can, I assess the value of the car in July, 1952, at £800. Therefore, the net claim of the defendants against Mr. Hayton, all questions of the parties' costs being left over, is £475, i.e., the difference between the full claim of £1,275 and the £800 deducted for the value of the car. The defendants are entitled to recover that sum from the third party, Mr. Hayton.

The next step in the chain is the claim of Mr. Hayton against Mr. Kennedy, the fourth party. This is possibly complicated by the fact that, so far as Mr. Kennedy knew at the time of the contract of sale, Mr. Hayton was buying for his own use and not for re-sale. But Mr. Hayton paid £1,015 for the ownership of the car and he received, initially, no ownership or interest at all—at any rate, no ownership—so there was at that time a clear breach of contract. *Prima facie*, his claim would be for the whole sum of £1,015 because he paid £1,015 and received nothing at all in exchange. Subsequent events have reduced his claim. He has not suffered as much damage as that, but I think the fair view is that the subsequent events have to be taken as a whole, and the effect is that his net claim against the fourth party, Mr. Kennedy, is for £475, always leaving aside any question as to the parties' costs in this matter. Similarly, I think that the same result can be arrived at between Mr. Kennedy and Miss Rudolph. The previously mentioned complication does not exist here because Miss Rudolph knew that Mr. Kennedy was a motor dealer and was buying for re-sale. I do not think that that ultimately alters the result. Mr. Kennedy's claim against Miss Rudolph is £475, leaving aside the question of costs.

[After discussion regarding costs His Lordship gave judgment for the plaintiff against the defendants with costs and allowed the case to stand over as regards costs between other parties to give them time to consider the position.]

Judgment accordingly.

Solicitors: *Berkson & Berkson*, Birkenhead (for the plaintiff); *Rollo & Mills-Roberts*, Liverpool (for the defendants); *Brighouse, Jones & Co.*, Ormskirk (for the third party); *Leo, Kennedy & Glover*, Ormskirk (for the fourth party); *A. Halsall & Co.*, Birkenhead (for the fifth party).

[Reported by MISS M. D. CHORLTON, Barrister-at-Law.]

LEWIN v. ALLER (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), July 7, 8, 1954.]

Income Tax—Earned income relief—Computation—Deduction of payments of mortgage and building society and bank loan interest from income earned—Finance Act, 1925 (c. 36), s. 15 (1), as amended by Finance Act, 1948 (c. 49), s. 27 (2)—Income Tax Act, 1918 (c. 40), s. 17.

In computing the taxpayer's earned income allowance, under s. 15 (1) of the Finance Act, 1925, as amended by the Finance Act, 1948, s. 27 (2), in respect of the year ending Apr. 5, 1951, deduction was made from his earned income in respect of a net aggregate amount of charges on his income, and the allowance was computed in relation to the balance remaining after the deduction was made. The taxpayer's earned income was £1,516. His unearned income was £52, being the net annual value for sched. A of his residence, which he owned. Charges on his income amounted to a sum of £170, against which the £52 was set, leaving a net sum of £118. These charges consisted of mortgage interest (£85), building society interest (£56) and interest on bank loans (£29). The mortgage interest was paid by the taxpayer subject to his deducting tax; the building society interest and bank interest were paid without his deducting tax. The earned income allowance being, in the view of the Revenue, computable in relation to an earned income of £1,398 (i.e., £1,516 less £118), and that view being upheld by the High Court on Case Stated, the taxpayer appealed,

HELD: the income tax allowance in respect of earned income should be computed in relation to the figure reached after deducting from the actual earned income the net amount of the charges allowable against income.

Adams v. Musker (1930) (15 Tax Cas. 413), approved.

Appeal dismissed.

EDITORIAL NOTE. The enactments considered in this case are superseded as regards income tax for the year 1952-53 and subsequent years by the Income Tax Act, 1952. Section 211 of that Act replaces s. 15 of the Finance Act, 1925, and s. 221 replaces s. 17 of the Income Tax Act, 1918, which is referred to in the judgment of SIR RAYMOND EVERSLED, M.R. Earned income is defined in s. 525 of the Act of 1952.

The terms of s. 15 (1) of the Act of 1925 are set out, so far as they are relevant, in the judgment. Section 40 of the Finance Act, 1927, substituted relief by way of deduction from the income tax chargeable on an individual for the allowance of a deduction from the amount of earned income which was the form in which relief was provided by s. 15 of the Act of 1925. Section 40 of the Act of 1927 is also repealed by the Act of 1952.

AS TO COMPUTATION OF EARNED INCOME ALLOWANCE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 300, 301, paras. 599, 602; and FOR CASES, see DIGEST Supps.

FOR THE INCOME TAX ACT, 1918, s. 17, and THE FINANCE ACT, 1925, s. 15 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 17 and 261; and FOR THE INCOME TAX ACT, 1952, s. 211, s. 221, s. 525, see *ibid.*, Vol. 31, pp. 201, 211, 488.

Case referred to:

(1) *Adams v. Musker*, (1930), 15 Tax Cas. 413; Digest Supp.

APPEAL by the taxpayer against an order of WYNN-PARRY, J., dated Mar. 12, 1954, dismissing an appeal by way of Case Stated from a decision of the General Commissioners of Income Tax for Kingston and Elmbridge, Surrey.

The appellant taxpayer appealed against an objection to his claim for an allowance in respect of earned income for the year ending Apr. 5, 1951. He was a chartered accountant and a partner in a firm of chartered accountants in the

City of London. He contended that the deduction from earned income granted by s. 15 (1) of the Finance Act, 1925, as amended by s. 27 (2) of the Finance Act, 1948, should be £297, i.e., one-fifth of £1,483, comprising his earned income, £1,516, less £33 representing the balance of mortgage and loan interest after deducting unearned income (residence); without deducting from the £1,483 building society interest, £56, and bank interest, £29, total £85, which he had paid without deduction of tax. The Crown contended that the allowance in respect of earned income should be £280, i.e., one-fifth of £1,398, comprising the earned income £1,516 less the £33 and the £85 building society interest and bank interest. The commissioners held that the earned income relief to which the taxpayer was entitled was the balance after deducting the two payments of interest and dismissed the taxpayer's appeal, and WYNN-PARRY, J., dismissed his appeal against that decision. The taxpayer appealed to the Court of Appeal.

The taxpayer appeared in person.

Borneman, Q.C., and *M. Temple* for the Crown.

SIR RAYMOND EVERSHED, M.R.: The taxpayer is contending for a proposition which can be most clearly stated by reference to the figures which appear in the Case Stated. From what the taxpayer told us the figures may not be entirely correct, but, for the purpose of this judgment, I will assume that they are. During the tax year ending Apr. 5, 1951, the taxpayer's income was made up as follows: first, his share of the profits or earnings of the partnership firm of chartered accountants of which he is a member, £1,481; from that falls to be deducted his national insurance contribution, leaving £1,468. Two items are added, family allowance and training fee, Royal Naval Reserve, which together come to £48, and make a total of £1,516. Another item of £52 is added, representing the sched. A valuation of his residence, which he owns beneficially, thus bringing his total income (I am not using that formula in any precise sense) to £1,568.

During the year, however, the taxpayer was under obligations to pay sums by way of interest. The first item was £85 payable as mortgage and loan interest, I assume by virtue of some instrument of mortgage or charge, possibly secured on the house. Then comes £56 interest to a building society and, finally, interest which he paid to his bankers in respect of an overdraft, of £29. The total of those charges is £170. I will assume for the moment that those three items of charges are in all respects in *pari materia* and, on that assumption, the matter can be stated in this way. It is conceded that, in respect of those interest charges, the unearned income must first, so to speak, be brought into account for tax purposes, so that from the £170 is deducted £52 being the amount of the valuation of his house, thereby reducing the charges to £118. The question is whether the taxpayer is entitled to have what is compendiously called relief in respect of earned income under s. 15 (1) of the Finance Act, 1925, calculated by taking the appropriate fraction (one-fifth) of the whole of his earned income, £1,516 as it was in fact, or must first allow the balance of the charges, £118, to be deducted from his earned income and claim relief to the extent of one-fifth of the balance only? That point is simple to state, and if reference is made only to s. 15 (1), which confers the right to the relief, the taxpayer would appear to have a formidable case for arguing for the former of these two alternatives. Section 15 (1), as amended by the Finance Act, 1948, s. 27 (2), provides:

"An individual who makes in the manner prescribed by the Income Tax Acts a claim in that behalf and who makes a return in the prescribed form of his total income shall, for the purpose of ascertaining the amount of his assessable income for the purpose of income tax, be allowed a deduction from the amount of his earned income of a sum equal to one-fifth of the amount of that income . . .",

subject to an upper limit which is immaterial. The phrase "earned income"

has been defined*: it comprehends the whole of the sum which the taxpayer derives from his partnership business, plus his family allowance and Royal Naval Reserve training fee. If, therefore, s. 15 (1) stood alone and there were no other relevant provisions I could see no answer to the simple point that he is entitled, in terms of the statute, to deduct from his partnership earnings one-fifth of those earnings, i.e., one-fifth of £1,516. That was the view of ROWLATT, J., in *Adams v. Musker* (1).

Section 15 (1) is not, however, the only relevant statutory provision. Sub-section (3), which (I agree with the taxpayer) may fairly be called a mechanical provision, provides inter alia that the provisions of para. 17 of sched. V to the Income Tax Act, 1918, shall apply "for the purpose of claims under this section". In my judgment "claims under this section", though they also cover claims under sub-s. (2), must cover claims under sub-s. (1), i.e., claims for allowances in respect of earned income. Paragraph 17 of sched. V to the Income Tax Act, 1918, specifies certain declarations which an individual must make for the purposes of the income tax administration, including a

"Declaration of the amount of interest, annuities, or other annual payments to be made out of the property or profits or gains assessed on the claimant, distinguishing each source."

What is the relevance of such a declaration? In my judgment it is that the right set out apparently in unequivocal terms in s. 15 (1) is subject to the operation or application of s. 17 of the Income Tax Act, 1918.

I pause to make a short digression here into the history of the matter, partly out of respect for and fairness to Mr. Lewin's argument. I need go no further back into the history of the legislation than the Income Tax Act, 1918, though the taxpayer reminded us of its origin in the days of the Napoleonic wars. Section 14 (1) of that Act gave to the taxpayer relief in respect of earned income in a way which differed in principle from the method enshrined in s. 15 (1) of the Act of 1925. It provided that, where the income of the taxpayer did not exceed a certain figure, and any part of that income was earned income, the claimant should be entitled to relief from tax in such a way as would reduce the liability to the figure that would be arrived at if the tax on the earned income were not at the standard rate, but were at other rates. Those rates varied according to the sizes of the income earned. In the same fasciculus of sections s. 17 provided:

"A claimant shall not be entitled to exemption, abatement or relief in respect of any income the tax on which he is entitled to charge against any other person, or to deduct, retain, or satisfy out of any payment which he is liable to make to any other person."

For the words "exemption, abatement", the Finance Act, 1920, s. 32 and sched. III substituted "allowance or deduction", but nothing turns on that difference of language. There is a slight difference in the three items of charges which form part of the figure involved, in that the taxpayer deducted income tax from the mortgage and loan interest, £85, as he was entitled to do, and thereby, in effect, and in accordance with the general rules, accounted to the Revenue for the tax for which otherwise the mortgagee or recipient of the interest would have been liable. But he paid the building society interest and the bank interest in full, without deduction of tax. I thought he made it plain in the early part of his address that he did not seek to draw any distinction between the mortgage interest and the building society and banking interest. I was not sure whether later he desired to qualify that concession, but I am satisfied that no valid distinction can be drawn, and he clearly agreed that s. 17 applied to all

* See the Finance Act, 1925, s. 15 (5) and the Income Tax Act, 1918, s. 14 as amended.

three items. I proceed, therefore, on the basis that there is no such distinction, and that all three items fall within the words

"income the tax on which [the taxpayer] is entitled to charge against any other person, or to deduct, retain, or satisfy out of any payment which he is liable to make to any other person."

On the enactment of the Income Tax Act, 1918, I think it must be taken as clear that a person claiming the relief given by s. 14 (1) was subject to this qualifying condition, that by s. 17 he had to bring into account against himself, so to speak, such income as was within that section, which would have included the present three items of interest. But the method of giving relief in respect of earned income enshrined in s. 14 (1) was subsequently altered and now appears in s. 15 (1) of the Act of 1925. The difference is that, instead of paying tax at a lower rate on earned income, an arithmetical calculation is made under s. 15 (1); a deduction is made from the earned income, the reduced amount of which is then charged at the standard rate. As ROWLATT, J., observed, arithmetically speaking, in the ordinary case there is not much difference between paying tax at the full rate on four-fifths of a particular sum and paying at four-fifths of the ordinary rate on the whole sum. That change in the form of the relief was introduced in 1920 and is now found in the Act of 1925. It will be noticed that s. 17, which was formerly a neighbour of s. 14 in the Act of 1918, has never been repealed, and the reference in s. 15 (3) of the Act of 1925 to para. 17 of sched. V to the Income Tax Act, 1918, makes it quite plain that, so far from being repealed, s. 17 was clearly in the mind of Parliament as being a section with which and subject to which s. 15 (1) would have to be read, just as under the old procedure it qualified the relief given by s. 14 (1). If that conclusion is reached, it seems to me necessarily to follow that the effect of s. 17 is to require the point put forward by the taxpayer to be answered adversely to him, and that the amount of the deduction is the less sum according to the second of the two alternatives formulated [at p. 704 ante].

I have so far done little more than re-state the conclusion at which ROWLATT, J., arrived at in *Adams v. Musker* (1), in which the headnote reads (15 Tax Cas. 413):

"The appellant made, under deduction of income tax, certain annual payments which were charged upon his total income. His income consisted of a salary and unearned income taxed at the source. The charges exceeded the taxed income. He claimed that in the assessment of his salary for the year 1927-28 he was entitled to an earned income allowance of one-sixth of the whole amount of his salary. He was given an allowance of one-sixth of the amount of his salary remaining after deducting from it the amount by which the charges exceeded the taxed income."

Save for the circumstance that the unearned income (or part of it, at any rate) was taxed at source, that case is on all fours with the present case, and a reference to the figures given shows indeed that it was really a close parallel. ROWLATT, J., upheld the view of the general commissioners that the amount of the deduction permissible was the smaller sum arrived at by deducting from the total salary, i.e., the total earned income, the balance of the charges which had not been satisfied by a set-off against the unearned income. That decision has stood for almost a quarter of a century and the taxpayer has conceded that to prevail in the present case he must satisfy us that ROWLATT, J., wrongly decided it. I do not take that view. I think that ROWLATT, J., rightly decided the case and I am, therefore, not prepared to do other than to follow it.

After referring to the previous legislation, ROWLATT, J., says (*ibid.*, 417):

"In 1920, and in the Act which is now in force a different scheme is introduced. Instead of saying that earned income shall be taxed at a lesser rate, it says that earned income shall be taxed at the same rate, but you are

to take it as only being five-sixths of what it is, which is much the same thing as saying it is to be taxed at five-sixths of the normal rate. Then this rule is applied to that, and the only way you can apply it is by saying, in making the calculation you shall not bring into the calculation any income which has to be handed on to somebody else; in other words, you must take the net. That is as I read it. I do not think there is any other way of making s. 17 apply at all, except by reading it in that way. It is intended to apply, and always has been intended to apply in this way. I think it is quite clear."

The rule referred to is the rule in s. 17. I respectfully agree with that conclusion of ROWLATT, J., and that suffices to dispose of this case.

But there was an alternative way of meeting the taxpayer's claim by reference to s. 40 of the Finance Act, 1927, which, inter alia, substituted for supertax what is called surtax. Section 40 was in Part III of the Act, which dealt with amendments with respect to the method of charging additional income tax and so on. The Crown founded on sub-s. (3), a long and elaborate sub-section, the argument that, whatever else might have been the result of the earlier section, this made it clear that, for the purpose of calculating such a relief as is here in question, one must take the net amount of the earned income after reducing it by any charges of the character with which we are here concerned, such as the mortgage interest. It may be that that is another answer to the claim, and WYNN-PARRY, J., accepted that argument. I find the language of sub-s. (3) somewhat involved, however, and I think that there is something to be said for the taxpayer's view that it is directed to a different point. On the whole, therefore, I express no view, one way or the other, on its possible effect in this matter.

For these reasons I think the taxpayer fails and the appeal must be dismissed.

JENKINS, L.J.: I agree, and have nothing to add.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitor: *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

HALBAUER v. BRIGHTON CORPORATION.

[COURT OF APPEAL (Singleton, Denning and Morris, L.JJ.), July 7, 8, 12, 1954.]

*Negligence—Caravan—Theft—Liability of owner of site—Exemption clause—
"Person using the camping ground"—Bailment.*

*Bailment—Parking of caravan on camping site—Caravan not in use and
camping site closed.*

A corporation provided a camping ground for holiday-makers. The camp was open during the summer season, viz., from the first Sunday in March until the last Sunday in October, and during the remainder of the year caravans might be parked on the tarmac area, but could not be used by their owners. The charge for a site while the camp was open was 25s. a week, and at other times, 12s. 6d. a week. Camp regulations, made by the corporation and forming part of the contracts with the caravan owners, provided that during the summer the right to use the camp was a licence only. Regulation 8 contained an exemption clause in the following terms: "Liability. The corporation will accept no liability for injury to any person using the camping ground or for damage to or loss of the property of any such person". The plaintiff, the owner of a caravan, used the camp facilities during the summer season of 1951, and after the end of that season, she availed herself of the parking facilities provided by the corporation during the winter months. At her request, the caravan was removed to the tarmac area in accordance with the camp regulations. During the night of Mar. 11, 1952, when the summer season had started and the camp was open, the caravan was stolen from the tarmac. The plaintiff claimed damages for loss

of the caravan alleging that the loss was caused by the negligence of the servants of the corporation.

HELD: at the material time, the plaintiff was a person using the camping ground within reg. 8, and, as the theft occurred during the summer season when the camp was open, the corporation was not a bailee of the plaintiff's caravan and was not liable for its loss.

Semble, that during the winter period the corporation was a bailee of the caravan.

Appeal dismissed.

EDITORIAL NOTE. To constitute a bailment an actual or constructive transfer of possession to the bailee is necessary (see HALSBURY, Simonds Edn., Vol. 2, p. 94). This case shows that the owner of a caravan site will not normally be constituted a bailee of caravans on it while the site is open; but it may well be otherwise if caravans are entrusted to him for storage on the site, when the site is closed, e.g., during the winter. This aspect of the case may be compared with *Tinsley v. Dudley* ([1951] 1 All E.R. 252). The case also shows that a camp regulation purporting to exclude liability of the owner of the site may be so construed or may be regarded as merely declaratory of the law, e.g., as showing that the site owner is not a bailee, or may be regarded as limited to the period when the camp is open and as inapplicable when it is closed: see the judgments of SINGLETON, L.J., at p. 710 post, of DENNING, L.J., at p. 711, post, and of MORRIS, L.J., at p. 713 post. In this respect the case may be compared with *Williams v. Linnitt* ([1951] 1 All E.R. 278), where it was sought to exclude common law liability for loss by theft by putting up a notice in a car park that liability was excluded (see pp. 284, 288 of that report).

AS TO NATURE OF BAILMENT FOR VALUABLE CONSIDERATION, see HALSBURY, Simonds Edn., Vol. 2, pp. 114-120, paras. 224-232; and FOR CASES, see DIGEST, Vol. 3, pp. 72-75, Nos. 133-148.

AS TO THE CONSTRUCTION OF CLAUSES EXCLUDING LIABILITY FOR NEGLIGENCE, see HALSBURY, Simonds Edn., Vol. 8, p. 84, para. 144.

Cases referred to:

- (1) *Ashley v. Tolhurst*, [1937] 2 All E.R. 837; [1937] 2 K.B. 242; 106 L.J.K.B. 783; 156 L.T. 518; Digest Supp.
- (2) *Rutter v. Palmer*, [1922] 2 K.B. 87; 91 L.J.K.B. 657; 127 L.T. 419; Digest Supp.

APPEAL by the plaintiff from an order of McNAIR, J., at Lewes Assizes, dated Apr. 12, 1954. The plaintiff claimed damages for the loss of a caravan which she alleged was caused by the negligence of the servants or agents of Brighton Corporation. The caravan was parked on a camping ground provided by the corporation. The camp regulations, which formed part of the contract between the parties, provided in reg. 8 that the corporation would accept no liability for injury to any person using the camping ground or for damage to or loss of the property of any such person. McNAIR, J., dismissed the action on the ground that the corporation was protected from liability by reg. 8.

Graham, Q.C., and *A. J. D. McCowan* for the plaintiff.

Briant, Q.C., and *MacManus* for the corporation.

Cur. adv. vult.

July 12. The following judgments were read.

SINGLETON, L.J.: The defendants, the Brighton Corporation, have a camping ground which is described as "Sheepcote Valley camping ground for holiday-makers." For three or four years prior to March, 1952, the plaintiff, Mrs. Halbauer, had a caravan on the camping ground. She had a book in which the camp regulations appear, and there were copies of the regulations posted in several places within the camping ground. It must be taken that she was aware of the regulations and of their terms. On the night of Mar. 11, 1952, the caravan was stolen. On Mar. 12 the entertainments manager of the corporation wrote:

"Dear Sir, Arrears of storage charges for your caravan, which I am informed was removed from the municipal camping ground, Sheepcote Valley, on Mar. 11, 1952, amounted to £2 15s. Will you kindly remit this amount direct to the above office by return of post. A stamped addressed envelope is enclosed for the purpose."

A The plaintiff replied to the effect that she did not know anything about the removal of her caravan; that there must be some mistake. When evidence was given in regard to the matter, Mr. Halbauer, the husband, was asked what the warden had said about the loss of the caravan when he went to see him, and Mr. Halbauer replied:

B "He took me into his office and told me: 'I am very sorry, Mr. Halbauer, your caravan was stolen on Mar. 11, between 7 and 8, I think. It was beautiful moonshine.' I said: 'Did not you hear anything?' He said: 'No, I did not hear anything. We had the wireless on. Everything was inside and we did not hear a thing.'"

Mr. Halbauer asked the assistant if that was right, and the assistant, according to Mr. Halbauer, said:

C "I am sorry the caravan had gone, and there was a lady on the ground who saw it pulled out by a very powerful car with no light on, and we did not take any notice."

The plaintiff brought an action claiming damages for the loss of the caravan and its contents. The total loss was agreed at £343 17s. 6d. The corporation denied liability and relied on one of the camp regulations printed in the book.
D The claim was heard by McNAIR, J., at the assizes at Lewes on Apr. 12, 1954, and he gave judgment for the corporation, holding that they were protected by the terms of the regulations on which they relied. He did not find that there was negligence on the part of the corporation, though it may be said that his judgment is based on the assumption that there was.

E It is necessary that I should say something as to the nature of the camping ground which is described in the book, and which is shown on a plan. There is an area for the parking of caravans, each site bearing a number; there is an adjoining area for cars and tents, and there is a tarmac area on which there are stores, lavatories, etc. The book shows that the camp is open from the first Sunday in March until the last Sunday in October, and the charge on the caravan site is 5s. a night or 25s. a week. This was the charge paid by the plaintiff for the parking of her caravan during what may be called the summer season.
F On the same page of the book there are shown charges for kit storage, summer and winter, and: "Winter parking, caravans 12s. 6d. per week (payable in advance)". to which is added:

G "(Note: Caravans accepted for parking during the winter *must* be removed to the tarmac for the period)."

During the period from 1948 or 1949 until March, 1952, the plaintiff's caravan had been on the camping ground. Each winter it was placed on the tarmac area, and winter parking charges were paid from the last Sunday in October until the first Sunday in March.

H A letter in common form was sent out to caravan owners early in October which was in the nature of a reminder. The one a copy of which is before the court, is dated Oct. 11, 1951, and says:

"Dear Madam, Municipal camping ground. As you are aware, the municipal camping ground at Sheepcote Valley closes for the season on Sunday, Oct. 28, and I shall therefore be obliged if you will remove your caravan from the site before that date. If you are unable to find alternative accommodation, the caravan can be placed on the tarmac area for the winter, at a storage charge of 12s. 6d. per week, but during this period will

not be accessible for residential purposes. Yours faithfully, S. Avery,
Entertainments manager."

During October, 1951, the plaintiff and her husband packed up the things in the caravan, and, as they had not a car themselves, they gave the camp warden 5s. to remove the caravan on to the tarmac in accordance with the requirement. The caravan was on the tarmac until it was stolen on the night of Mar. 11, 1952.

The regulation or condition on which reliance is placed by the corporation is reg. 8, and it is in these terms:

"Liability. The corporation will accept no liability for injury to any person using the camping ground or for damage to or loss of the property of any such person."

It was not seriously contended that the regulation would not have protected the corporation if the caravan had been stolen during the summer when the plaintiff was using it. The submission on behalf of the plaintiff was that in the winter there was an entirely different position from that which existed in the summer; that there was a bailment of the caravan on the terms of the letter of Oct. 11, 1951, and that reg. 8 did not apply. It was further submitted that when the caravan was on the tarmac it was in the exclusive possession of the corporation; that the plaintiff could not use it for residential purposes, and she was not a person using the camping ground within the words of reg. 8. The defendants' case was that the regulation protected them in summer and in winter, and in whichever part of the camping ground the caravan was. They did not agree that there was a bailment. They relied on the fact that the regulations (reg. 15 and reg. 16) described that which was granted as a licence, and contended that there was nothing more than a licence.

Of course, there is a considerable difference between summer, when the caravan occupier is using the caravan, and thus in possession of it, and when entry to the camping site is open and unrestricted, and winter, when the place is closed and the gate locked. I agree with McNAIR, J., that the winter arrangement was that the corporation should store the caravan for the plaintiff; in other words, there was a bailment. Now, a bailee is only responsible for negligence, and thus, if reg. 8 applies to the contract of bailment, it would absolve the corporation from liability for the negligence of their servants. It is said on behalf of the plaintiff that the regulation does not apply to the winter parking, and that the plaintiff was not a person using the camping ground at the material time. I consider that this is too narrow and too technical a view. If it is right to say that the arrangements set forth in the book contemplate a different legal position as between summer and winter, it is equally right to say that the regulations are made to cover both, and that both parties to the contract must be assumed to have so intended. The plaintiff's caravan had been on the camping ground for more than three years, summer and winter. On the ordinary understanding she was using the camping ground for the parking of her caravan in summer and in winter. I do not think that the court ought to be swayed by refinements such as those put forward by counsel for the plaintiff, or else one would reach a stage of asking whether a caravan owner who left the camping ground for a week, or for a month, was using the site within reg. 8. If the regulation is given its ordinary meaning, and that which the parties understood it to bear, it is sufficient to protect the corporation from liability on the facts of this case, as the learned judge held. Furthermore, the first Sunday in March had passed before the caravan was stolen. It appears to me that, having regard to the arrangement between the parties and to their course of conduct, summer terms applied as from the first Sunday in March both as to the amount payable and otherwise whether the plaintiff moved the caravan back to the caravan site or not. I am in favour of dismissing the appeal.

DENNING, L.J.: During the summer months, the corporation gave to each camper a licence to use a caravan site for 25s. a week, which carried with it the right to use the facilities of the camp. The corporation did not let the site to him on a tenancy. They only licensed him to use it. They did not take possession of his caravan so as to become bailees of it. The camper remained in possession of it himself, and it was for him to take care for its safety. The corporation, as the camp authority, were, no doubt, under a duty to use reasonable care in their own sphere of operations. If their servants negligently ran into the caravan, they would be liable for the resulting damage. If they negligently allowed the camp to become filthy and insanitary, they would be liable for the resulting disease. But their responsibilities did not extend to locking up the caravans or chaining up the wheels so as to prevent their theft. That was the duty of the camper himself. The camp was open day and night throughout the summer, with campers and their friends coming in and out, with and without vehicles, without let or hindrance. In these circumstances, the corporation could not be expected to be responsible for loss or damage to property not caused by them, and they were not in law responsible for it. In my opinion, reg. 8 does no more than express the legal position as I have stated it. It is a warning to campers that they take care of their own property. As such it is unobjectionable. It would not protect the corporation from their own negligence, for example, in running into the caravan.

During the winter months the position was different. The camp was closed. The road gates were kept locked, and the caravans of customers were parked on the hard tarmac. The corporation described them as being "stored" and made a "storage charge" of 12s. 6d. a week. None of the camp facilities was available. During these months, I think the corporation were bailees of the caravans and responsible for their safe custody. If the corporation negligently left the gates unlocked so that a thief came and stole one of the caravans, they would be responsible. I do not think that reg. 8 would protect them, because that, I think, only applies to the summer months when the campers are using the camping ground. In any case, I do not think that it is sufficiently clear to exempt them from their common law responsibilities.

The loss here occurred, however, during the summer months when the camp was open. The owner of the caravan was entitled to put it on to a caravan site, but for her own convenience she left it on the tarmac for a week or two. That cannot, I think, increase the responsibilities of the corporation. All the facilities of the camp were available to her, if she cared to use them, and she was liable for the summer charges. Correspondingly, the corporation were only under the summer responsibilities. The owner must have known that, after the first Sunday in March, the camp was open day and night for people to come in and go out with and without vehicles. She could not expect the corporation to keep the gates locked on her account. She ought to have taken steps herself to safeguard the caravan, or she ought, at least, to have insured herself against loss. For these reasons I think the appeal should be dismissed.

MORRIS, L.J.: In order to determine the issues which arise it first becomes necessary to decide what was the contractual relationship between the plaintiff and the corporation; secondly, it is necessary to decide whether the camp regulations formed part of, or were incorporated in, any contract, and, if so, what is their meaning and effect? The Brighton Corporation provides at Sheepcote Valley a municipal camp for holiday-makers. The camp is closed each year from the last Sunday in October to the first Sunday in March of the following year. But the camp as a place and as a site remains in existence, and those who have caravans on sites in the camp during the period when the camp is open may find it a great convenience to park their caravans during the winter period. The corporation provide for this, and as their booklet shows, they make arrangements for winter parking. The stipulation is made that caravans accepted

for parking during the winter must be removed to the tarmac for the period. Whereas the charge for a caravan site while the camp is open is 25s. for a period of a week, the charge for winter parking is 12s. 6d. per week. The plaintiff was one who availed herself of these facilities. She became the owner of her caravan in 1948. In the summer of that year and also of 1949, 1950 and 1951, she had her caravan on a site in the camp and paid 25s. per week. During the winter period of 1948-49, while the camp was closed, she kept her caravan at a local garage, but during the corresponding periods during the winters of 1949-50 and 1950-51 she used the winter parking facilities. She had had a copy of the corporation booklet in 1948, and the booklet contained the camp regulations. The camp regulations were also exhibited in the camp. When the camp closed in October, 1951, she caused it again to be removed to the tarmac and left it for the winter. She paid the appropriate charges for "parking", the term referred to in the booklet, or for "storage", the term used in letters sent to her. These two words may be regarded for the purposes of the present case as synonymous.

During the time that the camp was open the plaintiff had by contract the right to occupy a caravan site on the terms set out in the booklet and subject to the camp regulations. Such right is referred to in the regulations as being a licence. During the time that the camp was closed the plaintiff had by contract the right to have her caravan on the tarmac for winter parking again on the terms set out in the booklet, and again subject to the camp regulations.

In *Ashby v. Tolhurst* (1), where the owner of a motor car left it on a private parking ground and made a payment to an attendant and received a ticket which recorded conditions as to cars being left at owner's risk, SIR WILFRID GREENE, M.R., in his judgment said ([1937] 2 All E.R. 840):

"The first thing to do is to examine the nature of the relationship between the parties, a matter upon which the character of the ground is, I think, not without importance, but the most important element is the document itself."

In the present case the expression "winter parking" is significant and expressive. It denotes, as was the fact, that caravans (and only caravans, for motor cars are not mentioned) may be left within the camp and in the part of the camp designated for the winter period, which means the period which in reference to the camp is regarded as winter. It seems to me that whatever word of legal description is employed, it is to the terms recorded in the booklet (where the camp regulations are set out) that attention must be paid. Though the majority of the camp regulations only have effective operation while the camp is open, they all remain as effective camp regulations, and such as can operate even while the camp is closed do not lack effectiveness merely because others depend on the camp being open.

One of the applicable regulations was, therefore, reg. 8. It becomes necessary to consider its words and to see how they relate to the plaintiff. The question arises whether she was at the time of the loss of her caravan a "person using the camping ground". In my judgment, she was. The location and area of the camping ground are shown in the booklet. During the summer when the plaintiff had her caravan on a caravan site she might, if she chose, allow a long period to pass during which she did not go to the camp at all. She would, nevertheless, be a "person using the camping ground" within the meaning which those words in their context bear. So during the period of winter parking she would be a person using the camping ground. She could not go and occupy her caravan for residential purposes, but she could go down to see it, and if she wished she could attend to bedding or furniture or other contents; or she might not pay any visit. But whether present or absent, she would be a person using the camping ground.

Next it is necessary to consider the construction of the words of reg. 8. In

Rutter v. Palmer (2), SCRUTTON, L.J., stated the rule or principle of approach as follows ([1922] 2 K.B. 92):

"In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him."

Applying these principles to the present case, it is to be observed that the claim made in the action is based on negligence alone. It is said that the defendants were negligent in that they did not take due and proper care of the caravan and of its contents. Regulation 8 provides that the corporation will accept no liability for the loss of the property of any person using the camping ground. But it is for such a loss that the present claim is brought. The words of the regulation may operate as an assertion or reminder that there is no liability in the corporation for the loss of any property for the reason that the corporation are not bailees, or they may record an exclusion of such liability for loss as there might be. If the corporation were bailees their potential liability would be for negligence, and so the words would be apt to exclude liability on any such ground.

It is to be observed, however, that the words of reg. 8 are not as wide and as comprehensive as are the words which are found in some of the decided cases. Would the words exempt the corporation if one of their servants on duty in the camp wrongfully assaulted a camper and caused him injury? Would the words exempt the corporation if one of their servants negligently drove a vehicle in the camp and caused personal injuries and damage to property? It is not necessary to decide these questions, but the fact that they can be raised lends support to the view that reg. 8 is indicative of, and declaratory of, the basis on which persons use the camp. If a caravan is occupying a site while the camp is open, there is clearly no bailment, and if a caravan is removed by some third person without the owner's authority there is no liability in the corporation. If, while the camp is closed, a caravan is on the tarmac for "winter parking", I incline to the view that the corporation do not become bailees of it. I doubt whether there would be delivery of possession to the corporation. Furthermore, the existence of reg. 8 may be a pointer leading to the view that there was no bailment. In *Ashby v. Tolhurst* (1), ROMER, L.J., said ([1937] 2 All E.R. 845):

"It is perfectly plain in this case that the car was not delivered to the defendants for safe custody. You cannot infer a contract by A to perform a certain act out of circumstances in which A has made it perfectly plain that he declines to be under any contractual liability to perform that act."

If, however, the corporation were bailees, then reg. 8 can, at least, operate to exclude liability for loss due to negligence which would be the potential liability of the corporation as bailees.

In the present case, the loss occurred during the time that the camp was open and the plaintiff became liable to pay the charge applicable to a caravan site; it was merely because of arrangements which suited the convenience of the plaintiff that the caravan had not been removed to a caravan site. Accordingly, even if the view is held that while the camp is open the corporation are differently placed than when the camp is closed, it would seem only right that regard should be had to the conditions referable to times when the camp is open. I consider, therefore, that the corporation were not liable, and that the appeal should be dismissed. *Appeal dismissed. Leave to appeal to the House of Lords refused.*

Solicitors: Woodham Smith, Borrudaile & Martin (for the plaintiff); Sharpe, Pritchard & Co., agents for W. O. Dodd, town clerk, Brighton (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ELMS v. FOSTER WHEELER, LTD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.JJ.), July 7, 8, 1954.]

Factory—Building operation—Operation in a power station—Installation and erection of generating plant—"Construction . . . of a building"—Joisting not securely covered over—Breach of statutory duty—Building (Safety, Health and Welfare) Regulations, 1948 (S.L., 1948, No. 1145), reg. 2 (1), reg. 30 (3).

The plaintiff was a workman employed by the defendants who were under contract to manufacture, deliver and erect four steam generating plants at a power station which was in the process of construction. The defendants had undertaken to instal in each section of a quadripartite structure, a steam generating plant, floors and galleries connected by stairways and chutes, and boilers and cooling chambers. The plaintiff, with other workmen, was engaged in erecting a chute by means of a pulley and in order to carry out this operation he was standing on an open network of crossed steel joisting. The chute fouled when the pulley became jammed overhead and the plaintiff was ordered to climb up and release the pulley. The plaintiff proceeded to climb up to a higher level of joisting by using the ridges, which ran along the side of the chute, as footholds and handholds. He released the pulley, but, while he was descending by the same method, he fell through the open joisting on to a floor below and suffered injuries. In a claim for damages for personal injuries, the plaintiff alleged that the defendants were in breach of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 30 (3), under which joisting is required to be securely covered over to the extent necessary to afford safe access to or foothold for the work. The operations to which those regulations apply are prescribed by reg. 2 thereof and they include, so far as is relevant to this case, the "construction . . . of a building".

HELD: (i) the work which the defendants undertook involved part of the operation of the construction of a building within reg. 2 (1) of the regulations of 1948, and, therefore, those regulations were applicable.

(ii) the defendants were in breach of reg. 30 (3) and, accordingly, the plaintiff was entitled to recover damages.

Appeal dismissed.

EDITORIAL NOTE. It was held in *Hutchison v. Cocksedge & Co., Ltd.* ([1952] 1 All E.R. 696), that in the circumstances of that case the work of providing and, it seems, erecting plant in a factory was not the "construction . . . of a building" within reg. 2 (1) of the Building (Safety, Health and Welfare) Regulations, 1948. In the present case the Court of Appeal reached the conclusion that the work of erecting plant at a power station was within reg. 2 (1), having regard to the nature of the power station which was being built and the construction of means of support for and access to the plant to be accommodated in it. The installation of plant thus involved participating in the construction of a building. BIRKETT, L.J., and ROMER, L.J., both emphasise that not every occasion when plant is installed will fall within the regulations, and of one such occasion *Hutchison v. Cocksedge & Co., Ltd.*, may still serve as an instance.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 2 (1) and reg. 30 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, pp. 210 and 224.

APPEAL by the defendants from an order of ORMEROD, J., dated May 6, 1954.

The plaintiff was a workman employed by the defendants who were under contract with the City of London Electric Lighting Co., Ltd., to manufacture, deliver and erect four generating plants at the Bankside Power Station which was in the process of construction. The object of the power station was to house the plant which the defendants were erecting in a quadripartite structure,

A each section containing one generating plant, a series of floors, and galleries connected by stairways and chutes, and boilers and cooling chambers. At the material time the plaintiff together with other workmen was engaged in erecting a chute by means of a pulley and chains and for that purpose was standing on an open network of crossed steel joisting. The chute, which had ridges about three inches wide running along its sides, fouled on one of the cross joists when the pulley became jammed overhead and the plaintiff was ordered by a charge-hand to climb up and release the pulley. In order to reach the pulley, the plaintiff climbed up to a higher level of joisting by using the ridges on the chute as hand-holds and footholds. He released the pulley and, when attempting to climb down by the same method, he fell through the open joisting some thirteen feet on to a concrete floor and suffered injuries. In a claim for damages for personal injuries the plaintiff alleged negligence at common law and breach of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 5 and reg. 30 (3). The defendants contended that the building regulations were inapplicable to the work on which they were engaged. ORMEROD, J., held that the defendants were in breach of reg. 30 (3) only of the regulations, which were applicable to the case.

B
C *Marven Everett, Q.C., and Tudor Evans* for the defendants.
Thompson, Q.C., and R. Geraint Rees for the plaintiff.

SOMERVELL, L.J., stated the facts and continued: Regulation 2 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, is as follows:

D "These regulations shall apply to the following operations where undertaken by way of trade or business or for the purpose of any industrial or commercial undertaking, or by or on behalf of the Crown or any municipal or other public authority, namely, the construction, structural alteration, repair or maintenance of a building (including re-pointing, re-decoration and external cleaning of the structure), the demolition of a building, and the preparation for, and laying the foundation of, an intended building whether or not the building is on or adjacent to the site of work of engineering construction within the meaning of the Factories Act, 1937, and to machinery or plant used in such operations; and Part VI of these regulations shall apply as respects persons employed in such operations as aforesaid: Provided that the following shall not be deemed to be buildings for the purposes of this regulation: docks, harbours, wharves, quays, piers, sea defence works, lighthouses at sea, river works, canals, dams, reservoirs, aqueducts, viaducts, bridges, tunnels, sewers, pipelines, filter beds, gas holders, or pole or lattice work structures designed solely for the support of machinery, plant or electric lines."

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G I have read the proviso in full because it formed the basis of an argument which has some but not always very great force, viz., that the excluded matters would be, or at any rate were thought to be, included in the words that preceded and it was, therefore, necessary expressly to exclude them. If that be a right approach to the construction of the regulation as a whole, it would indicate that "the construction . . . of a building" is used in a very wide sense. As against that argument, it is to be noted that the form is not, perhaps, usual. The form is that "the following shall not be deemed to be buildings" and not as one might have thought, "shall be deemed not to be buildings". There is, however, some slight force in that argument.

H Leading counsel for the defendants based his argument on a contrast between installation of plant and construction of a building. It was not based on any words in the regulation or in any Act of Parliament and I do not myself find it a helpful or satisfactory contrast, because I think that the installation of plant may involve the operation of the construction of a building. The learned judge put it in this way:

"I have to decide on the facts of this case whether it is right to say here

that the defendants were engaged on the construction of a building or whether they were merely putting something into a building which had been, or was in the process of being, constructed."

He decided, having seen the model of the plant which is before us and on the evidence, that the defendants were engaged in the construction of a building and the regulations, therefore, applied. I agree with that. I think that that was a correct conclusion on the facts of this case and gave to the words in the regulation their ordinary meaning. A

There was some discussion in argument whether this quadripartite structure should be regarded as a building itself or as a component part of the whole, which was the Bankside Power Station. I do not find it necessary to decide that because I do not think that it is material to the issue whether the building regulations apply or not. It is a question of words which I think has no relevance to the matter we have to decide. B

There remains the question whether the plaintiff has established a breach of the regulations. It was said, first, that there was no safe means of access under reg. 5. The learned judge rejected that and found a breach of reg. 30 (3) which reads as follows:

"Subject to para. (5) and para. (6) of this regulation when work is done on or immediately above open joisting through which a person is liable to fall a distance of more than six feet six inches, the joisting shall be securely covered over by temporary boards or other covering where and to the extent necessary to afford safe access to or foothold for the work, or other effective measures shall be taken to prevent persons from falling." C

I think it is clear that the plaintiff did fall through open joisting. The learned judge in considering reg. 5 found that there was a safe means of access to the place which the plaintiff had to reach in order to release this chute, namely, by getting on to another girder and then walking along where there had admittedly been some boards laid over the chequer work of joists and up a little staircase and along a floor. By that method he need have done none of the climbing which he in fact did. That might have indicated that that was the proper way for him to go, that he was doing something which he ought not to have done and taking a risk which he ought not to have taken by climbing up in the way I have described. But that is not the defendants' case. At the outset, counsel for the defendants said that it was not his case that the plaintiff was doing anything wrong in going the way he did. Indeed, all the evidence, with the possible exception of that of one witness, showed that this was a perfectly proper thing for this man to do, skilled as he was in moving about these structures. That being so, it seems to me that reg. 30 (3) applies. He was ordered to do work immediately above open joisting and it is not disputed that he fell a distance of more than six feet six inches. The open joisting was at the side of the chute and no doubt had it been covered with planks a small gap must have been left between the planks and the chute to enable it to be lifted up into position. The obvious inference is, however, that had there been planks, as in my opinion the regulation says there should have been, the accident would not have happened and the plaintiff would have fallen a comparatively short distance on to those planks. For these reasons I think that, on both points, the learned judge came to a right conclusion and I would dismiss the appeal. D E F G

BIRKETT, L.J.: I am entirely of the same opinion. The substantial point argued in the case was the first point taken by counsel for the defendants that the building regulations are inapplicable to the work which was being done by his clients at the Bankside Power Station. The argument was, that the work was merely the installation of plant and was in no sense the undertaking of the construction of a building. It is quite clear, as counsel for the plaintiff conceded, that there can be an operation which is in itself merely the installation of plant H

A and, therefore, the building regulations would not apply; but I think that it is important to keep in mind the point which was emphasised by ROMER, L.J., in the course of the argument, that we have to consider the actual case before the court. Many examples were used in the course of the argument to try to illustrate the meaning of the regulations, whether they would apply in this case or the other, and those illustrations ranged over a very wide field. I think that it is all-important in deciding these matters that the actual facts of the case before the court should be kept in mind. There is a passage in the learned judge's judgment which describes concisely the nature of the work:

B "In order to instal this plant it was necessary, of course, not only to put in boilers but also to erect a substantial amount of steel stanchions, steel girders and joists not only for the purpose of supporting the various items of plant which had to be put in, but also for the purpose of providing galleries, stairs and floors to make the various portions of the plant accessible when in due course the plant had to be worked."

C It is fairly clear, therefore, that this was not a simple case of installing plant. Counsel for the plaintiff argued that what the defendants were in fact doing constituted the construction of a building. I myself have come to the conclusion that the building regulations apply to the work in question, and that the learned judge in the court below took entirely the right view. I think the defendants were undertaking the construction of a building within the meaning of these regulations. Counsel for the defendants pressed on us that this view was extending the scope of the building regulations and that difficulties would arise in future. I am not satisfied, however, that those rather gloomy prognostications are justified by the facts as we know them. At all events, there is always power in the Minister to make appropriate regulations if any hardship should arise.

D As to the other point, a rather curious situation arises, but I am satisfied that the learned judge was right in saying that reg. 30 (3) applies to the facts of this case. In view of the fact that we are upholding the learned judge on reg. 30 (3) I do not think that it is necessary to consider reg. 5. I think that the governing fact is that the plaintiff in this case went to do the task which he was assigned by a route which everybody appeared to agree was a perfectly proper route to take. He was told by the charge-hand, who himself was an experienced steel erector, to go up to this particular place and to release tackle which had become jammed. To a layman, it seems a very hazardous thing to do, but apparently to a skilled steel erector it was all in the day's work. The charge-hand thought nothing of it. When the plaintiff was returning from that hazardous operation, his foot slipped and he fell a distance of some thirteen feet on to a concrete floor and sustained the injuries in respect of which he made his claim. It is quite clear that if the regulations apply, the provisions of reg. 30 (3) were broken in this case. Therefore, without any further word about reg. 5, it is enough to say that I agree with the finding of the learned judge with regard to reg. 30 (3) and I think the appeal should be dismissed.

H ROMER, L.J.: I also agree. I only want to say a few words on the one point which I think is principally troubling the defendants and that is whether or not the building regulations apply to this case. I agree with my brethren that it is quite impossible to say in a general way that the building regulations apply on the one hand or do not apply on the other hand to work which includes the installation of plant, because it must depend on the circumstances of each particular case whether such an operation attracts the regulations, or not. I think that in the present case the question which may be posed is whether at the time of the accident a building was being constructed and whether the defendants were contributing to the construction of that building. I say "contributing" because it is quite plain to my mind that the words in reg. 2 (1) "the construction . . . of a building" should be read "the construction of a building or any part

thereof". I think that is clear from the regulation as a whole and, in particular, from the parenthesis which immediately follows the word "building". The answer to the question which I have indicated depends on the construction of the regulation and the application of the regulation, when construed, to the facts of this case. The object of the power station, the structure which was erected, was to house the plant which the defendants introduced into it. In other words, it was a structure designed to accommodate the plant. The regulation excludes from the word "building" (whatever the word is intended to mean, because it is not defined) amongst other things

"pole or lattice work structures designed solely for the support of . . . plant . . ."

That exclusion shows that in the mind of the draftsman of the regulation structures of that description would or might fall within the meaning of "building" as used in the regulation, i.e., it shows that the draftsman was using the word "building" in a wide sense and in a sense which did not necessarily, from its context or otherwise, exclude that conception. If that be so it would seem, a fortiori, that he was using it in a sense that would include structures of a more solid kind designed for the same purpose. It would, accordingly, appear that if a structure of a kind such as the Bankside Power Station be built, it *prima facie* is, or is deemed to be, a building within the meaning of the regulations if it is designed to support plant. That it undoubtedly is, for not only does it accommodate the plant but it gives it both subjacent and lateral support. The operation of constructing the power station was, therefore, in my opinion, a building operation within reg. 2 (1).

The question then arises, did the work which the defendants undertook form part of that operation? The evidence showed, and I think the learned judge found, that what the defendants did was to make a contribution to the construction of the power station inasmuch as they were installing the essential apparatus which it was the object of the outer walls and roof to house and shelter and which was indeed united to those walls as well as to the foundations of the structure. It is to be noted further, as I understand the matter, that the erection of the undoubted structure itself, the outer walls and so on, was proceeding more or less contemporaneously with the installation of the plant itself. Further than that, the defendants were also making stairways, galleries and floors for purposes of access and supervision and so on such as one would expect to find in many factories. Accordingly, I have come to the conclusion at which the learned judge arrived, viz., first, that the purpose and result of the operation which was undertaken was the construction of a building and, secondly, that the defendants took part in that operation in the sense that they contributed to the structural work. What they undertook to do and did, therefore, was, in my judgment, an "operation" within the meaning of reg. 2 (1) and the building regulations accordingly apply. I again emphasise that the application of the building regulations which I think has been established depends on the facts of this particular case. As BIRKETT, L.J., said the defendants need not think that all kinds of disastrous consequences will necessarily arise merely because in this particular case we hold that the building regulations apply. In other cases they might not.

On the question of the breach of reg. 30 (3) I entirely agree with what my brethren have said and I have nothing to add.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: E. P. Rugg & Co. (for the defendants); W. H. Thompson (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

NOTE.LAMPERT AND ANOTHER v. EASTERN NATIONAL
OMNIBUS CO., LTD.

[QUEEN'S BENCH DIVISION (Hilbery, J.), March 16, 17, 18, 1954.]

A *Negligence—Damages—Injuries causing serious disfigurement—Loss of husband by estrangement as result of disfigurement.*

Husband and Wife—Action by husband and wife for injuries to wife—Estrangement of husband allegedly owing to wife's disfigurement.

Cases referred to:

- B (1) *Best v. Samuel Fox & Co., Ltd.*, [1952] 2 All E.R. 394; [1952] A.C. 716; 3rd Digest Supp.
- (2) *Lynch v. Knight*, (1861), 9 H.L. Cas. 577; 5 L.T. 291; 11 E.R. 854; 27 Digest, Replacement, 90, 680.
- (3) *Wright v. Cedzich*, [1930] V.L.R. 141; 43 C.L.R. 493; 3 A.L.J. 437; 36 A.L.R. 105; 27 Digest, Replacement, 91, 308.

ACTION for damages for negligence.

C The action was instituted by a husband and wife, Mr. and Mrs. Lampert, in respect of injuries sustained by the wife as a result of a collision between a motor car in which she was travelling, and which was owned by her, and a motor omnibus, the property of the defendants, Eastern National Omnibus Co., Ltd., and driven by their servant. At the time of the accident, which took place on Sept. 21, 1947, on the Great North Road between Baldock and Biggleswade, D Mr. Lampert was driving the car and Mrs. Lampert was sitting beside him. Mrs. Lampert was very severely injured and was permanently disfigured as a result of the accident. She spent six weeks in hospital and underwent a plastic operation. After she came out of hospital Mr. Lampert left her for a time saying that he could not bear to look at anyone looking as she did. Shortly afterwards he returned to her temporarily to obtain money from her to go to America. E In the hope that he would find employment there and send for her to join him, she provided him with £250. Having spent the money, he returned to England in March, 1949, and spent a few days at Mrs. Lampert's house while she stayed in the next house because of their estrangement. On Aug. 31, 1949 (after the original statement of claim in the action had been delivered), she obtained a maintenance order against him. He failed to pay anything under the order. F Since the date of the order he disappeared and Mrs. Lampert did not know where he was.

In addition to general damages, Mrs. Lampert (referred to hereinafter as the plaintiff) claimed a sum of £611, about which there was no dispute, in respect of special damage (hospital and doctors' fees, injury to the car, clothing and extras for food). She also claimed, *inter alia*, damages for the loss of her husband by G *estrangement in consequence of her disfigurement.*

The male plaintiff, Mr. Lampert, did not appear and was not represented.

Jukes and Purchas for the female plaintiff, Mrs. Celia Lampert.

Armstrong-Jones for the defendants.

H **HILBERY, J.**, found that the accident was due to the negligence of both drivers and that each was equally at fault. His LORDSHIP assessed the general damage which the plaintiff had suffered at £2,500, and the special damages at £611, making a total of £3,111; but he held that she was entitled to receive only half her damages because (i) she was affected by the husband's negligence, in that, being the owner of the car and having delegated the driving to him and being seated by him at the time when the accident occurred, she had the right to control his driving and the duty to do so if he was driving unlawfully and (ii) she was thus to be considered responsible herself for one half the damage which she had suffered.

In regard to the plaintiff's claim for the loss of her husband by estrangement, His Lordship said: The plaintiff claims that in consequence of the negligence which she alleges against the defendants she was disfigured, and that the result has been that her husband has left her. It is plain that a wife, under English law, has not, and never has had, a claim merely for loss of consortium, that is to say, in the form of action known as trespass on the case. But the plaintiff is not alleging, as a cause of action, the loss of consortium. She is alleging that she lost her husband, who deserted her as a result of her injury, and that that is part of the consequential damage which flowed from the tortious negligence of the defendants which caused her injury. That, I think, is a distinction which can rightly be drawn.

In *Best v. Samuel Fox & Co., Ltd.* (1), LORD GODDARD, after referring to *Lynch v. Knight* (2), said ([1952] 2 All E.R. 399):

"I think there is much to be said for the opinion of RICH, J., in *Wright v. Cedzich* (3) (43 C.L.R. 530), in which he closely analyses [*Lynch v. Knight* (2)] and comes to the conclusion that LORD CAMPBELL was not supporting the right of a wife to bring an action for loss of consortium, but was considering whether the estrangement of a husband from his wife with consequent distress and suffering of the latter due to the slander was not sufficient special damage to support the action."

Slander is a tort, and it would be actionable as a tort, by the married woman, if she could support it with proof of special damage*. RICH, J., in *Wright v. Cedzich* (3), was pointing out that the consequential damage might be the loss of the husband by estrangement brought about through the tortious act.

In the present case, if the facts showed that the plaintiff had really lost anything of value in losing her husband—if lose him she did because of the disfigurement which she suffered—it might well be that that would be an element in the damages which she could recover, because it would be in the line of consequential damage following from the tortious act done towards her. But in this case I cannot think that there is anything to be added to the damages on this particular head, because it is clear from the plaintiff's own evidence that she and her husband had been getting on very badly for a long time. He had turned out to be very different from the man whom she thought she was marrying at the time when she married him. She had thought that he was a commercial traveller and an honest worker. She found that he was not a commercial traveller, and that he was helping a bookmaker. He was resorting to racecourses and dog-racing, and gambling. She could not get him to correct his ways, and they quarrelled. They were estranged to a large extent before the accident happened. When she came out of hospital and he saw her pitifully disfigured, he made that an excuse for leaving her. He extracted £250 of her money to go off to America and then came back and deserted her, more, I think, because of his own failings in character than because of the disfigurement. I am not satisfied that her disfigurement was genuinely the reason for his deserting her. It would take a lot to persuade me that a man would desert his wife, if he had a spark of affection for her, merely because she had suffered a pitiful disfigurement, more especially if she had suffered it in an accident for which he had been partly responsible. I do not think that in the circumstances there is any sum to be added under that head.

Judgment for the female plaintiff against the defendants for half the damages. Judgment for the defendant against the male plaintiff for such costs as were severable in the action.

Solicitors: *Patersons, Snow & Co.* (for the female plaintiff); *A. D. Vandamm & Co.* (for the defendants). [Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

* See HALSBURY, Hailsham ed., vol. 20, p. 386, for the general principle here stated; but there are exceptions, not relevant for the purposes of the present case, namely, where the slander imputes unchastity to a woman (Slander of Women Act, 1891, s. 1) and where she is disparaged in respect of her profession (Defamation Act, 1952, s. 2).

R. v. BOYLE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Slade, JJ.),
July 19, 1954.]

*Criminal Law—Housebreaking—Obtaining entry by trick—Constructive breaking.
Criminal Law—Practice—Counts in indictment to be put separately to defendant
—Separate pleas to be taken on each count.*

A The appellant was charged on an indictment containing four counts, viz. (i) housebreaking with intent to steal and stealing in the house, (ii) forging a valuable security with intent to defraud, (iii) uttering a valuable security, and (iv) obtaining a motor car by virtue of a forged cheque. After all four counts were read to him, he was asked to plead to the whole indictment. He made one plea to the whole indictment. He pleaded Guilty and was sentenced to four years' imprisonment. On the charge of house-breaking it was proved that he had falsely represented himself as a servant of the British Broadcasting Corporation employed to locate disturbances caused on the wireless, and that, as a result of the trick, he gained admittance to a dwelling-house and stole a handbag therein. On appeal against conviction,

C HELD: as the appellant obtained admission to the house by means of an artifice or trick, there was a constructive breaking, and, as it was to be presumed on the facts that he went to the house with intent to commit a felony, he was rightly convicted of housebreaking.

D Per curiam: Where an accused is charged on an indictment containing more than one count (whether they are of a different nature or merely alternative), each count should be put to him separately and his plea should be taken separately on each count.

Appeal dismissed.

E AS TO "BREAKING" IN RELATION TO BURGLARY AND HOUSEBREAKING, see HALSBURY, Hailsham Edn., Vol. 9, p. 542, para. 923; and FOR CASES, see DIGEST, Vol. 15, p. 952, Nos. 10,566-10,576.

AS TO ARRAIGNMENT AND PLEADING TO AN INDICTMENT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 148 and 155, paras. 203 and 213.

APPEAL against conviction. The facts are sufficiently summarised in the headnote.

F E. Garth Moore for the appellant.

Durand for the Crown.

G LORD GODDARD, C.J., delivered the judgment of the court. The appellant pleaded Guilty at the Central Criminal Court to an indictment containing four counts, the first of which was for housebreaking with intent to steal and stealing in the house. The indictment was put to him as a whole and he pleaded to it as a whole.

H The facts with regard to the housebreaking were that the appellant rang the bell and, when the householder answered it, he told her that he was calling from the British Broadcasting Corporation to try to locate disturbances caused on the wireless, and in that belief she admitted him to the house. He was not sent by the B.B.C. at all; it was a trick to get into the house. Then, when she showed him her radio set, he asked for a glass of water, and, while she had gone to get it, he stole her handbag. The question is whether that amounts to house-breaking. In the opinion of the court it does. It is constructive breaking, and the law cannot be better stated than it is stated in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, 33rd ed., p. 669:

"A constructive breaking is where the offender, with intent to commit a felony, obtains admission by some artifice, trick, or threat, for the purpose of effecting it".

In other words, if the householder, knowing the true facts, would not have admitted the prisoner and he has obtained admission by means of a trick or a threat, that is, in law, a constructive breaking. Take the common case where a man represents himself as calling from the gas company or the electric light company. If he is a man from the gas company who comes in for the proper purpose of reading the meter and steals when he is in the house, that is not breaking and entering, but larceny in a dwelling-house, because he has not used a trick to get into the house. He has come in the ordinary course of his duty representing that he is (as he is, in fact) an employee of the gas company whose duty it is to read the meter. In the present case the court has no doubt that the appellant obtained entry by means of a trick; therefore, there was a constructive breaking, and, as it must be taken that he went to the house with a felonious intent and got in for the purpose of committing a theft, he was properly convicted of housebreaking.

The real reason why the court gave leave to appeal was that they might have an opportunity of expressing a view with respect to the practice which has obtained for many years at the Central Criminal Court. It may have obtained at certain sessions though I do not think that it obtains as a rule on the circuits. Where an indictment contains several counts it has often been the practice at some courts, and certainly at the Central Criminal Court, to put the whole indictment to the prisoner and to ask him to plead after the whole indictment has been read. In the present case there were four counts. The first count charged the housebreaking, the second count charged the appellant with forging a valuable security with intent to defraud, the third count charged him with uttering a valuable security, and the fourth count charged him with obtaining a motor car by virtue of a forged cheque. All those four counts were read to the appellant, he was then asked to plead to the whole indictment, and he pleaded Guilty.

The court desires to say that in their opinion the right practice is that each count in an indictment where there is more than one count should be put to the prisoner separately and he should be asked to plead to each separate count. It should be remembered that every count in an indictment is equivalent to a separate indictment; the prisoner can be tried on one or on all the counts. The verdicts have to be taken separately, and the right practice is that he should be asked to plead to each count as each count is read to him, and then there can be no doubt to which count he intends to plead. At the Central Criminal Court it has generally been the practice, if the prisoner is defended, to put the whole indictment at once, as counsel will have told him to which count he should plead guilty and to which he should plead not guilty, and, if he is not defended, to put the counts separately. In the opinion of this court the right practice, which ought to prevail in the future in all courts, is that each count should be put separately to the prisoner whether he is defended or not and he should be asked to plead to each count. What I have said is to be taken as applying, not only to counts which are of a different nature, but even where there are alternative counts. For instance, in counts for stealing and receiving it is better that the two counts should be put. The count for stealing should be put to the prisoner, and, if he pleads guilty to that, there is no need to put the count for receiving. But, if he pleads not guilty, then the count for receiving should be put as a separate count and a plea taken on it.

There is no other point that arises in this case, and, therefore, the appeal is dismissed.

Appeal dismissed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Solicitor, Metropolitan Police (for the Crown).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

VANDYK v. MINISTER OF PENSIONS AND NATIONAL INSURANCE.

[QUEEN'S BENCH DIVISION (Slade, J.), July 15, 16, 1954.]

National Insurance—"Employed person"—*Research assistant incapacitated by poliomyelitis*—*Cost of travelling to and from work exceeding remuneration*—*Whether "gainfully occupied in employment"*—*National Insurance Act, 1946 (c. 67), s. 1 (2) (a), (b).*

Since 1947 the appellant had been paralysed in his lower limbs and left arm as a result of contracting poliomyelitis. In January, 1951, he accepted a post as a full time research assistant with the London School of Economics at an annual salary of £300 plus £75 per annum special travelling allowance on account of his incapacity which prevented him using public transport. From that date the appellant employed a driver-attendant at a weekly wage of £7 5s. (amounting to £377 a year) and spent £3 15s. weekly (amounting to £195 a year) on petrol and oil for, and insurance, etc., of, his car to enable him to get to and from his work. The total annual cost of these payments was £572, and exceeded the £375 received by the appellant annually from the employment. The question whether the appellant was an employed or non-employed person for the purposes of the National Insurance Act, 1946, having been referred to the Minister of Pensions and National Insurance, he determined, after an inquiry had been held, that the appellant while working as a research assistant was "gainfully occupied in employment" within the meaning of those words in s. 1 (2) of the Act of 1946. On appeal,

HELD: the appellant was "gainfully occupied in employment" within the meaning of those words in s. 1 (2) of the National Insurance Act, 1946, even if his employment resulted in no commercial profit to himself; accordingly the appellant was within the class of insured persons described as "employed persons" for the purposes of the Act of 1946. In their context the words "gainfully occupied" meant nothing more than that something by way of remuneration should be received by the employee from his employer for the services contractually rendered under the contract of employment.

Appeal dismissed.

FOR THE NATIONAL INSURANCE ACT, 1946, s. 1 (2), s. 78 (1) (5), see HALSBURY'S STATUTES, Second Edn., Vol. 16, pp. 673, 762 and 764.

FOR THE NATIONAL INSURANCE (GENERAL BENEFIT) REGULATIONS, 1948, reg. 4 (as amended by S.I., 1949, No. 1984), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 15, p. 214.

Cases referred to:

- (1) *Re Arthur Average Assn. for British, Foreign & Colonial Ships*, (1875), 10 Ch. App. 542; sub nom. *Re Arthur Average Assn.*, 44 L.J.Ch. 569; 32 L.T. 713; on appeal, (1876), 3 Ch.D. 522; 45 L.J.Ch. 346; 34 L.T. 388; 10 Digest 885, 6018.
- (2) *Re Padstow Total Loss & Collision Assurance Assn.*, (1882), 20 Ch.D. 137; 51 L.J.Ch. 344; 45 L.T. 774; 10 Digest 981, 6775.
- (3) *Greenberg v. Cooperstein*, [1926] Ch. 657; 95 L.J.Ch. 466; 135 L.T. 663; Digest Supp.
- (4) *Shaw v. Benson*, (1883), 11 Q.B.D. 563; 52 L.J.Q.B. 575; 49 L.T. 651; 10 Digest 1213, 8583.

CASE STATED by the Minister of Pensions and National Insurance.

On Jan. 22, 1953, in accordance with reg. 23 of the National Insurance (Determination of Claims and Questions) Regulations, 1948 (S.I., 1948, No. 1144), the chief insurance officer on the direction of a deputy insurance commissioner referred for determination by the Minister the question whether the

appellant, Dr. Neville David Vandyk, was an employed or self-employed person for the purposes of the National Insurance Act, 1946. Later it became common ground that the appellant contended that he was not a self-employed but a non-employed person. The Minister in accordance with reg. 3 (3) of the regulations appointed Mr. W. H. D. Winder to hold an inquiry into the question and to report thereon. The inquiry was held on Mar. 24, 1953, when evidence was given by the appellant and others and the appellant also made a written submission. Mr. Winder duly made his report to the Minister who, having considered it, found the following facts to be proved or admitted. Since 1947 the appellant had been incapacitated in the lower limbs and left arm by poliomyelitis. In October, 1950, he was awarded the degree of doctor of philosophy in economics by the University of London as a result of his studies pursued since 1947. At some date before Oct. 23, 1950, the appellant had his motor car structurally adapted to enable him to get to and from his place of work. On Jan. 23, 1951, the appellant was appointed a full time research assistant by the London School of Economics at a salary of £300 per annum plus £75 per annum special travelling allowance on account of his incapacity, which prevented him using public transport to and from the school. This appointment took effect on Jan. 30, 1951, and from that date the appellant employed a driver-attendant at a weekly wage of £7 5s. and incurred an expenditure of £3 15s. or more per week in providing petrol and oil for, and repairs, insurance, etc., of, his car which he used for travelling to and from work, there being no alternative means of travel.

The Minister inferred from Mr. Winder's report that of the total expenditure only £250 per annum was reasonably attributable to the appellant having undertaken the work of a research assistant. Having considered the above facts the Minister decided as questions of law (a) that the appellant was not gainfully occupied in employment in Great Britain during a period of unpaid leave which the appellant had taken between Dec. 12, 1951, and Feb. 9, 1952, and (b) that the appellant while working as a research assistant at the school was gainfully occupied in employment in Great Britain and that he would none the less have been gainfully occupied in employment even if the expenses reasonably attributable to the appellant's having undertaken the work of a research assistant to his travelling to and from his place of work had exceeded his total remuneration of £375 per annum. The Minister further found that the contract between the appellant and the London School of Economics was a contract of service and that during the period of his employment the appellant was included in the class of employed persons for the purposes of the National Insurance Act, 1946. On May 30, 1953, at the appellant's request, the Minister furnished the appellant with the grounds of his decision and on July 15, the appellant by notice in writing required the Minister to state a Case setting forth the facts on which his decision was based and the decision thereon. The matter came before His LORDSHIP in accordance with the Rules of the Supreme Court, Ord. 55B. For the purpose of the appeal His LORDSHIP assumed that the whole of the appellant's expenditure on the car and its use, viz., £572 per annum, was reasonably and necessarily incurred for the purpose of getting to and from his work.

N. Lawson for the appellant.

J. P. Ashworth for the Minister.

SLADE, J., stated the facts and continued: The National Insurance Act, 1946, s. 1 (1) provides in substance that every person over school age and under pensionable age who is in Great Britain and who fulfils the prescribed conditions as to residence in Great Britain shall become insured under the Act and shall thereafter so continue during his life. Section 1 (2) classifies insured persons into three categories. The first category (a) is called "employed persons"; the second category (b) is called "self-employed persons"; the third category (c)

is called "non-employed persons". The Act says that "employed persons" are persons who are

" . . . gainfully occupied in employment in Great Britain, being employment under a contract of service."

A Leaving out the words "in Great Britain" for the moment although the employment must be in Great Britain, I can shorten that by stating that "employed persons" are "persons gainfully occupied in employment . . . under a contract of service." "Self-employed persons" are

" . . . persons gainfully occupied in employment . . . who are not employed persons",

B that is to say, who are employed but who do not fall within category (a) as being gainfully occupied in employment under a contract of service. (c) "Non-employed persons" means nothing more than persons who do not fall within category (a) or category (b).

C The question that I have to decide is whether in respect of the material period (that is, of course, omitting the period of leave) the Minister was right in law in holding that the appellant (who was clearly employed in Great Britain and who was clearly employed under a contract of service) was gainfully occupied in that employment under a contract of service, or whether he was wrong in so holding.

D Counsel for the appellant submits that the appellant cannot be said to have been gainfully occupied in employment under what is admittedly a contract of service because on the findings of fact by the Minister (omitting the inference which, as I have said, I will omit) it necessarily costs the appellant more money to earn the emoluments which he receives than the amount of the emoluments. As I have said, I assume that it does.

E The Minister says that "gainfully occupied in employment" has no reference to whether the occupation results in a profit, that is to say, whether it is a commercial or economic proposition; in substance, all that you have to do is to look at the contract of service and see whether it provides for gain to the servant.

F Counsel for the appellant says: On the contrary, "gainfully occupied" must imply that you strike a balance. You look at the emoluments payable under the contract of service; you look at the figure which must necessarily be expended in earning them. If the expenses fall short of the receipts by one penny, then I admit that for the period when the receipts so fall short the appellant is an "employed person". If, on the other hand, the expenses for any given period exceed by one penny the amount of the emoluments, he becomes a "non-employed person", but not, of course, a "self-employed person".

G I should make it clear that the word "non-employed" before "person" is only nomenclature. It is merely what is left after (a) and (b) have been subtracted from the sum total of insured persons, which, of course, includes nearly everyone resident in Great Britain who has passed school age but has not yet reached pensionable age. Therefore, the fact that an employed person may be a "non-employed person" cannot be allowed to detract from the value of counsel for the appellant's argument. Under "self-employed persons" fall persons who are "gainfully occupied"—precisely the same two words being used—"in employment" but who do not come within category (a), that is to say, who are not employed under a contract of service.

H Counsel for the appellant at first conceded that, for example, a barrister in his early days at the Bar who held himself out as being willing and anxious to practice would be a "self-employed person" within s. 1 (2) (b) notwithstanding the fact that the receipts from his practice in his early days fell short of the expense to which he was put in earning them.

I think that the words "gainfully occupied" mean the same in s. 1 (2) (b) as they mean in s. 1 (2) (a) of the Act, and, therefore, I should have thought

that those words in s. 1 (2) (a) would also have to be construed as being independent of what I may call the commercial result of the activities of the insured person.

It seems to me that there are many difficulties in accepting the construction contended for by counsel for the appellant and I will deal with those before I put my own construction. First, it is quite obvious that if "gainfully occupied in employment" means striking a balance between the receipts and the expenditure in order to see which of the two exceeds the other, the position (as counsel for the Minister put it in argument) might fluctuate *de die in diem*, that is to say, an insured person would be an "employed person" whenever the receipts exceeded the expenditure by the smallest amount, and would automatically cease to be an "employed person" whenever the expenditure exceeded the receipts. Secondly, it would postulate some means of ascertaining the standard or criterion to be applied in assessing the expenditure alleged to have been incurred. In the present case I am assuming it was all necessarily incurred, but is the test to be reasonableness or must it be not only reasonably but exclusively or necessarily incurred, or what other standard is to be applied?

I will now consider the definition of the word "earnings" in the Act. The interpretation section is s. 78 which provides by sub-s. (1):

" 'earnings' includes any remuneration or profit derived from a gainful occupation."

Section 78 (5) reads:

"For the purposes of this Act, the amount of a person's earnings for any period, and the rate of a person's remuneration, shall be calculated or estimated in such manner and on such basis as may be prescribed",

and the word "prescribed" is expressed to mean, unless the context otherwise requires, prescribed by regulations.

Regulations have been made under s. 78 (5). They are the National Insurance (General Benefit) Regulations, 1948 (S.L. 1948, No. 1278). Regulation 4 (1) is:

"For the purposes of sub-s. (5) of s. 78 of the Act . . . the following provisions shall apply . . ."

I do not propose to say more about the regulations than that they provide that the earnings (and in this case the earnings are material for the purpose of assessing the benefit to be enjoyed by the insured person) are to be the net earnings, but, in so far as the earnings consist of salary or wages, no account is to be taken of any sums the deduction of which from salary or wages is authorised by statute or the reasonable expenses, if any, incurred by the person in connection with the employment.

I am loth to draw any inference from regulations made in pursuance of a power contained in the statute to make regulations in relation to the construction of the statute itself because, in my view, the regulations cannot alter or vary the construction of the Act of Parliament. If they did they would be *ultra vires*, but in so far as I am allowed to refer or I can profitably refer to the matter (and I refer to it because it is put forward by counsel for the appellant as throwing some light on the meaning of the words "gainfully occupied") I think that the regulations tend to support the construction that the words "gainfully occupied" are quite independent of what I may call the commercial result of the contract of employment. As I have pointed out, "earnings" are defined in the Act as including

" . . . any remuneration or profit derived from a gainful occupation",

which requires you, first of all, to ascertain what constitutes "a gainful occupation", and then you see what "remuneration or profit" is derived from it. But the fact that when one turns to the regulations they provide for the earnings to be limited to "the net remuneration or profit", or what I may call the

striking of a balance, tends rather to suggest that the striking of a balance is no part of the fountain-head, that is to say, the gainful occupation from which the earnings are derived. If it were part of the fountain-head, presumably the balance would have been struck before the question of earnings arose. However, I do not in any way base my construction of the relevant words on that.

A What I have to do is to look at s. 1 (2) (a) and decide what, in the context of that sub-section, the words "gainfully occupied in employment" mean. First, one observes that the words are

"gainfully occupied in employment . . . under a contract of service."

B If the contract of service were in writing, one would expect to ascertain whether a person was or was not "gainfully occupied" under it by looking at the terms of the written contract. If it were an oral contract of service, once the oral terms had been determined the same principle would apply.

I see here that the appellant is employed at a salary of £300 a year plus a contribution of £75 per annum towards what I may call the expenses of travel. I ask myself, does the receipt of those emoluments constitute a gainful occupation? In my judgment it does.

C Counsel for the Minister said that the question which I ought to ask myself is not, is the employed person getting something out of it, but is he getting something for it, and that the words "gainfully occupied" are really in contradistinction to a contract of employment in an honorary and unpaid capacity. One then says, if that is the case, why use the words "gainfully occupied" at all, because the contract of employment usually has a consideration proceeding from the master to the servant and a consideration proceeding from the servant to the master? The consideration which moves from the master to the servant is, of course, in nearly every case some form of pecuniary emolument.

E I have considered that point. The words "gainfully occupied" also appear in s. 1 (2) (b), with regard to self-employed persons, where ex hypothesi there is no contract of employment. I think that in category (a) they mean nothing more than a person who receives something from his master as the fruit of his labour, that is to say, who receives from his master under the contract of employment something by way of remuneration for the services which he is contractually bound to render to the master.

F Similarly (although I am not deciding this because it does not come before me for decision, save that I have expressed the view that the words must mean the same in both (a) and (b)) I think that a "self-employed" person is a person who is gainfully occupied in employment otherwise than under a contract of service, that is to say, the question is not to be posed at any particular time has he in fact received some net profit from his activities as a self-employed person, but does he hold himself out as being anxious to become employed for purposes of gain.

G Now I come to the arguments which are well worth consideration, put forward in his written submission by the appellant himself. He says that, although there is no definition in the Act or the regulations of "gainfully occupied", "it must mean a person who is occupied in a way which would ordinarily be expected to produce a profit". Then he says:

H "In the case of an employed person—it must mean a person whose wage or salary less reasonable expenses would result in a profit to the employee."

I have been referred to a variety of cases, cases under the Companies Acts which forbid persons more than twenty in number from carrying on business in partnership for the purpose of gain, or words to that effect. I have been referred to cases under the Workmen's Compensation Acts where the operative word is "earnings". I have been referred to cases under the Income Tax Acts where the expression used is "profits or gains", and the appellant in his written

submission refers to two definitions of "gainfully occupied", the first of which illustrates the danger of relying on the construction of that phrase in other Acts of Parliament without carefully looking to see whether the phrase is defined in the Act. The appellant refers to the Personal Injuries (Emergency Provisions) Act, 1939, which by s. 8 (1) defines a "gainfully occupied person" (for the purposes of that Act) as

"... a person who is engaged in any trade, business, profession, office, employment or vocation and is wholly or substantially dependent thereon for a livelihood, or a person who, though temporarily unemployed, is normally so engaged and dependent."

It is quite clear that for the purposes of that Act the words "gainfully occupied" are in part dependent on whether the receipts from the occupation are wholly or substantially the means of the person's livelihood. Therefore, no assistance can possibly be gained from that Act.

The other authority to which the appellant refers is the decision of the umpire in a pensions case given on Apr. 2, 1947, where the words are defined. He says that that definition was quoted, approved and adopted by the commissioner in another decision in January, 1949, in an unemployment benefit case, and, in February, 1949, in a decision in a pensions case, the definition so adopted being that a gainful occupation is

"one in which a person is engaged with the desire, hope and intention of obtaining for himself directly and personally, remuneration or profit [I emphasise the word "or"] in return for his services and efforts."

If the words had been "remuneration and profit", there might have been some force in the argument. As it is, if I accepted that definition as being accurate for the purposes of this case, it would put the appellant completely out of court, because undoubtedly the appellant is

"engaged with the desire, hope and intention of obtaining for himself directly and personally"

the £300 remuneration payable under the contract of service.

The only authorities which have been cited to me which I find in any way helpful in determining the point that I have to determine are those which throw light on the construction of the two words "gainfully occupied" as importing the element of gain.

Counsel for the Minister referred me to three cases in that connection. The first is *Re Arthur Ascareo Assocn. for British, Foreign & Colonial Ships* (1), and in particular to a passage from the judgment of SIR GEORGE JESSEL, M.R. (10 Ch. App. 546n.). Then there is a slightly later case of *Re Paulston Total Loss & Collision Assurance Assocn.* (2), and in particular I refer to a passage in the judgment of SIR GEORGE JESSEL, M.R. (20 Ch.D. 144, 145), and a passage from the judgment of BRETT, L.J. (*ibid.*, 147, 148). Lastly, there is a more recent case of *Greenberg v. Cooperstein* (3). Counsel for the Minister referred me to a passage in the judgment of TOMLIN, J. ([1926] Ch. 663, 664). That was one of the cases under the Companies (Consolidation) Act, 1908 in which it was held that the association in question was rendered illegal by s. 1 (2) of the Act because the association which carried on the enterprise which was before the court was an unregistered association of more than twenty persons who were carrying on a business having for its object the acquisition of gain, "gain" being the operative word. TOMLIN, J., said (*ibid.*, 663):

"The question then is, whether it was carrying on any business, and if so, whether it was a business having for its object the acquisition of gain by the association or its individual members. It has, I think, been laid down that the 'acquisition of gain' does not necessarily mean the acquisition of a commercial profit. It is sufficient that the association carries on a business

for the purpose of obtaining payments, and it is not necessary that the business should result in a commercial profit at the end of the accounting period."

TOMLIN, J., was, I think, there referring to the two earlier cases of *Re Arthur Average Assn.* (1) and *Re Paulstow Total Loss & Collision Assurance Assn.* (2) to which I have already referred. After dealing with another point, a little later

A TOMLIN, J., quoted (*ibid.*, 664) the words of SIR WILLIAM BRETT, M.R., in *Shaw v. Benson* (4):

B "A society is not within s. 4 of the Companies Act, 1862, unless its business has for its object the 'acquisition of gain'. But the Thornhill Arms Society lends money at interest; therefore it is an association carrying on a 'business', having for its object the 'acquisition of gain'. Perhaps the association itself does not 'gain' any profit by the 'business', but the individual members do, and this seems to be sufficient to bring the society within the prohibition of this section."

In the case of *Re Arthur Average Assn.* (1) (10 Ch. App. 546n.) SIR GEORGE JESSEL, M.R., said:

C "Now, if you come to the meaning of the word 'gain', it means acquisition. It has no other meaning that I am aware of. Gain is something obtained or acquired. It is not limited to pecuniary gain. We should have to add the word 'pecuniary' so to limit it. And still less is it limited to commercial profits. The word used, it must be observed, is not 'gains', but 'gain', in the singular. Commercial profits, no doubt, are gain, but D I cannot find anything limiting gain simply to a commercial profit."

In other words, every profit is a gain but every gain is not necessarily a profit. It is like saying, every swallow is a bird but every bird is not a swallow.

E I have, I hope, considered every argument adduced by the appellant himself, and, as I have said, I have assumed in his favour that the whole of the expenditure to which he was put was reasonably and necessarily incurred. I have certainly considered every argument put to me by counsel for the appellant, who has adduced every argument which could be put forward on behalf of his client.

F I end as I began by stating that I have to construe the words "gainfully occupied" in the context in which they appear in s. 1 (2) (a) of the Act of 1946. I hold that the Minister was right in the conclusion to which he came, and that the appellant was an employed person within the meaning of s. 1 (2) (a) at each of the two material periods, that is to say, the period of his employment by the school, excluding the period during which he was abroad on unpaid leave.

G I should like to indorse what counsel for the Minister said in opening the respondent's case, that everyone must feel the utmost sympathy with the appellant, who I am satisfied (as, indeed, is found on the facts) entered this employment not primarily for the purpose of what he could get out of it but on the advice of his medical advisers to provide him with some suitable and fruitful occupation commensurate with his high achievements as a doctor of philosophy in economics and the holder of the degree of bachelor of commerce with honours in the University of London.

In the result, therefore, I find that the determination of the Minister was correct in law and the appeal is dismissed accordingly.

Appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the appellant);
Solicitor, Ministry of Pensions and National Insurance (for the Minister).

[Reported by MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

R. v. INDUSTRIAL DISPUTES TRIBUNAL AND OTHERS.
Ex parte EAST ANGLIAN TRUSTEE SAVINGS BANK.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Slade, JJ.), July 20, 1954.]

Master and Servant—Trade dispute—Trustee savings bank—Whether an “undertaking” or a “trade”—Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), art. 1.

Emergency Legislation—Over-riding effect—Possible inconsistency with special statutes immaterial—Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), art. 1—Emergency Powers (Defence) Act, 1939 (c. 62), s. 1 (4).

A dispute arose out of a claim, made by the members of the National Union of Bank Employees employed by the East Anglian Trustee Savings Bank and refused by the bank, for a minimum scale of salaries for male clerks to be introduced. The dispute having been reported to the Minister of Labour and National Service pursuant to the Industrial Disputes Order, 1951, and referred to the Industrial Disputes Tribunal, the bank applied for an order of prohibition against the tribunal's proceeding further in relation to the dispute,

HELD: a trustee savings bank formed under the Trustee Savings Banks Acts, 1863 to 1949, is an “undertaking” within the meaning of the words “trade or industry or . . . undertaking” in art. 1 of the Industrial Disputes Order, 1951; and further, per LORD GODDARD, C.J., banking is ordinarily a “trade”.

Per SLADE, J.: the Emergency Powers (Defence) Act, 1939, s. 1 (4), as explained by s. 1 (2) of the Emergency Powers (Defence) Act, 1940, precludes the consideration whether the special legislation then existing, principally the Trustee Savings Banks Act, 1863, was inconsistent with the application of the Industrial Disputes Order, 1951, to disputes in the undertakings of trustee savings banks.

EDITORIAL NOTE. The decision in this case rests on the meaning of the words trade, industry or undertaking in the Industrial Disputes Order, 1951; but the judgment of LORD GODDARD, C.J., refers also to the continuance of emergency legislation and the judgment of SLADE, J., refers both to its continuance and its effect on the Trustee Savings Banks Acts. For convenience in using these passages of the report it is noted here that the Supplies and Services (Transitional Powers) Act, 1945, is continued in force by S.I., 1953, No. 1767, until Dec. 10, 1954 (see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 23, pp. 12-14, where the continuance of this legislation is discussed). The Trustee Savings Banks Act, 1947, and the Savings Banks Act, 1949, passed after the date of the emergency legislation, are part of the legislation, collectively called the Trustee Savings Banks Acts, 1863 to 1949, governing such savings banks, but the provisions of the Acts of 1947 and 1949 are not material to the circumstances of this case.

FOR THE INDUSTRIAL DISPUTES ORDER, 1951, art. 1, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 7, p. 166.

Case referred to:

(1) *Re Bottomgate Industrial Co-operative Society*, (1891), 65 L.T. 712; 56 J.P. 216; 28 Digest 117, 5.

MOTION by a trustee savings bank, the East Anglian Trustee Savings Bank, for an order of prohibition to prohibit the Industrial Disputes Tribunal and the members of the National Union of Bank Employees in the employment of the bank from further proceeding in the arbitration or settlement of an alleged dispute between the union members and the applicants, which was referred to the tribunal by the Minister of Labour and National Service under art. 8 (1) of the Industrial Disputes Order, 1951.

The dispute arose out of a claim made by the union members for the introduction of a minimum scale of salaries for male clerks recommended by the general council of the union, which the applicants refused to put into effect.

A It was contended on behalf of the applicants that the Industrial Disputes Tribunal had no jurisdiction in reference to the dispute because the jurisdiction conferred on it by reg. 58AA of the Defence (General) Regulations, 1939, and the Industrial Disputes Order, 1951, extended only to disputes in a trade or industry as defined in the regulation and order, or section of trade or industry, and not in a business of the kind carried on by the applicants.

Beney, Q.C., and *Faulks* for the applicants, the East Anglian Trustee Savings Bank.

B *The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.)*, and *W. Gumbel* for the Minister of Labour and National Service.

Pain for the National Union of Bank Employees.

LORD GODDARD, C.J.: Counsel for the applicants moves for an order of prohibition directed to the Industrial Disputes Tribunal and the members of the National Union of Bank Employees

C “from further proceeding in the arbitration or settlement of an alleged dispute between the members of the National Union of Bank Employees and the East Anglian Trustee Savings Bank referred to the Industrial Disputes Tribunal by the Minister of Labour and National Service under a reference in writing dated Mar. 3, 1954.”

D Under that reference, a wage dispute was referred by the Minister to the Industrial Disputes Tribunal.

E There is in force the Industrial Disputes Order, 1951, which is the descendant of the Conditions of Employment and National Arbitration Orders, 1940 to 1950, made under reg. 58AA of the Defence (General) Regulations, 1939, which were made originally under s. 1 of the Emergency Powers (Defence) Act, 1939. Many of those regulations, including reg. 58AA, have been kept in force by various Acts, including the Supplies and Services (Transitional Powers) Act, 1945, which is now annually kept in force by means of an Address, and under that regulation the Minister had power to make this order and set up the Industrial Disputes Tribunal. By art. 1 of that order:

F “Where a dispute exists in a trade or industry or section of trade or industry or in an undertaking and that dispute is reported to the Minister in accordance with this order by—(i) an organisation of employers, on behalf of employers who are parties to the dispute; (ii) an employer, where the dispute is between that employer and workers in the employment of that employer; or (iii) a trade union, on behalf of workers who are parties to the dispute . . .”

G then the Minister can refer the matter to the Industrial Disputes Tribunal, who hear it and make such order as they think fit, and that order can be made, and generally is made, a term of the contract between the employers and the workmen.

H When leave to move for this order was asked for, and the statement of the grounds was put forward, I think it was perfectly clear that the only ground on which we were asked to give leave, and the only ground on which we did give leave, was whether the East Anglian Trustee Savings Bank, which is a bank formed under the Trustee Savings Banks Acts*, was a trade, industry or undertaking. I have not the least doubt that it is certainly an undertaking. “Undertaking” is a word having the widest connotation. It seems to me that it is deliberately used in this order. I have also no doubt that, ordinarily speaking, banking is a trade. I think the ordinary banker, whose business everyone is acquainted with, is carrying on a trade and always has been carrying on a trade

* The Acts presently in force are the Trustee Savings Banks Acts, 1863 to 1949.

since banking was set up by the Lombards and the Goldsmiths in the City of London. The old bankers never referred to their clients; that was left to hatter-makers and dress-makers. A banker in the proper way refers to his customer because he is carrying on the trade of a banker. So far as that is concerned, when we gave leave I did not think there was much doubt, but I thought it was worth having argument because it might be said that these trustee savings banks, which are in the nature of savings banks and are mere akin to the Post Office Savings Bank, might be on a different footing, but, even if they were on a different footing as to trade, they would, in my opinion, nevertheless be an undertaking. I cannot see how it can be said that they are not an undertaking. The trustees undertake the business of receiving these moneys on deposit, but any doubt on that point, so far as this court is concerned, is put at rest by the decision of this court in *Re Bottomley Industrial Co-operative Society* (1), where an industrial society registered under the Industrial and Provident Societies Act, 1862, was said to be carrying on the business of banking. A company which is registered under the Industrial and Provident Societies Acts, and not registered under the Trustee Savings Banks Acts, cannot carry on the business of banking because the Industrial and Provident Societies Act, 1893, s. 19 (1), prohibits societies registered under those Acts from carrying on the business of banking. This society did receive money on deposit in very much the same way as a trustee savings bank receives money on deposit, and pays it out in accordance with its rules to its customers. The judgment of the court was delivered by SMITH, J., who said that that was carrying on banking. Although the trustee savings bank does more than the Post Office Savings Bank, it does not carry on the business of banking in the same way as one of the big five banks, in the sense of issuing cheque books to their customers and performing various services for them, but they, nevertheless, carry on the business of banking. The learned judge said (65 L.T. 714):

"... the business embarked on by the society when it took loans on deposit was in reality a banking business prohibited by the statute. It is not necessary, in our judgment, in order to constitute a banking business prohibited by the statute, that the society should carry on every part of a business carried on by some bankers; it is sufficient to bring the business within the prohibition, if the society carried on what is a principal part of the business of a banker, viz., receiving money on deposit, allowing the same to be drawn against as and when the depositor desires, and paying interest on the amounts standing on deposit."

In my opinion, therefore, although it is unnecessary to say more, as I am quite satisfied that this was an undertaking, the business conducted by the applicants was, none the less, a trade. Therefore, it seems to me that, as there is admittedly a dispute in the sense that the bank clerks, or their trade union on their behalf, are claiming that they should have an increase in wages, there is no doubt a dispute in the trade or industry or undertaking, and, therefore, prima facie, the Minister could refer the matter to the tribunal.

At a somewhat late stage another point emerged. It was said: "Yes, that is all very well, but these particular banks are governed by statute, and it could never have been intended, if you look at the structure of the statutes which govern these banks, that a body like the Industrial Disputes Tribunal should be able to dictate or lay down standards of wages." I think the foundation of that argument is this, that it is provided in s. 2 of the Trustee Savings Banks Act, 1863, that an institution, to be entitled to the privileges and benefits of the Act, must be

"... in the nature of a bank to receive deposits of money for the benefit of the persons depositing the same, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of such

deposit and the produce thereof to the depositors, their executors or administrators (deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution), but deriving no benefit whatsoever from any such deposit or the produce thereof

A In other words, it is not to be a profit-making business, and the bank, instead of being able to make a profit out of the business, can only make the necessary expenses attending the management of such an institution. Obviously, one necessary expense must be to pay the bank clerks. Section 6 provides:

B "No savings bank . . . shall have the benefit of this Act unless in the rules and regulations for the management thereof it shall be especially provided,—1. that no person or persons being treasurer, trustee, or manager of such savings bank, or having any control in the management thereof, shall derive any benefit from any deposit made in such savings bank, save only and except such salaries and allowances or other necessary expenses as shall according to such rules and regulations be provided for the charges of managing such savings bank, and for remuneration to officers employed in the management thereof, exclusive of the treasurer or treasurers, trustee or trustees, manager or managers, or other persons having direction in the management of such savings bank, who shall not directly or indirectly have any salary, allowance, profit, or benefit whatsoever therefrom beyond their actual expenses for the purposes of such savings bank."

D Thus, the management is to be voluntary. Section 3 shows that rules have to be made to carry out the intention of the Act, but, of course, clerks have to be paid, and, accordingly, we find in r. 12 of the applicants' rules that every paid officer shall give his whole time to the service of the bank, and so forth, and:

"He shall hold office during the pleasure of the committee on such terms as regards salary, duties, holidays, and other conditions as they may from time to time specify with power to vary the same . . ."

E That rule seems to me to be passed in order to comply with s. 6 of the Act, which says that the rules shall make this provision. The committee, just like any other employer, then state the terms on which they are prepared to remunerate the bank clerks, and it is because the bank clerks are not satisfied with the remuneration which the applicants are paying that they have applied for a reference to the Industrial Disputes Tribunal, and, for myself, I cannot see any answer to it.

F But it is suggested that, because the necessary expenses of the bank which have to be paid out of the growing produce of the deposits can be controlled by the Commissioners for the National Debt, that that would give the Commissioners for the National Debt power to say that the increased wages which might be ordered by the Industrial Disputes Tribunal were not a necessary expense and that, therefore, would be, in effect, setting up a sort of conflict between the

G Industrial Disputes Tribunal and the Commissioners for the National Debt. It is perfectly true that the Commissioners for the National Debt, by reason of s. 3 of the Savings Banks Act, 1891, can call for a full return from the bank of their expenses, and, if they come to the conclusion that an expense is not necessary, they can disallow it. Obviously, wages must be a necessary expense, and it seems to me that, if the Industrial Disputes Tribunal, who, we must assume, act properly, order an increase, it would be impossible for the Commissioners for the National Debt to say that the increased wages were not a necessary expense, because the bank can only get employees by paying those increased wages.

H For these reasons, I can see no reason whatever for saying that the Industrial Disputes Tribunal have not power to hear this reference. I think the only point really is whether or not the applicants are carrying on a trade, industry or undertaking and, for the reasons I have given, I have no doubt about it. If I thought that the sections in the subsequent Acts, which deal with the powers of

the Commissioners for the National Debt, put any real obstacle in the way of the matter being referred to the Industrial Disputes Tribunal, it might have been necessary to consider carefully whether s. 1 (4) of the Emergency Powers (Defence) Act, 1939, is still in force. I believe myself that it is, but I do not think it is necessary to call that sub-section in aid, and, for the reasons I have mentioned, in my opinion, this application should be refused.

CASSELS, J.: I agree with what my Lord has just said. The applicants are an undertaking within the meaning of art. 1 of the Industrial Disputes Order, 1951. There is a trade dispute. A mode of settlement is by arbitration before the Industrial Disputes Tribunal. The applicants invite this court to prohibit that tribunal from further proceeding, and I am satisfied that they are not entitled to.

SLADE, J.: I agree that no order of prohibition should issue in this case, but I prefer to base my judgment on other grounds. In the first place, I am satisfied that the activities of the applicants do constitute the carrying on of an undertaking within the meaning of art. 1 of the Industrial Disputes Order, 1951. Ordinarily, that would be an end of the matter, because the Minister of Labour and National Service is not only permitted but is required under art. 8 (1) in the appropriate circumstances to refer any dispute in such a case to the Industrial Disputes Tribunal. But sometimes general legislation is not permitted in law to derogate from special legislation, and the East Anglian Trustee Savings Bank is a bank which is certified under the provisions of the Trustee Savings Banks Acts, 1863 to 1949, and is controlled by that legislation. In the circumstances, however, it becomes unnecessary to consider whether there was anything in that special legislation, namely, from 1863 to 1949, which is inconsistent with the powers conferred on the Minister by the general legislation from which the Industrial Disputes Order, 1951, derives its force.

That order has effect by virtue of the Supplies and Services (Transitional Powers) Act, 1945, by s. 5 (2) of which it is provided:

"If the principal Acts expire while this Act is in force—(a) the provisions of those Acts, except the provisions specified in sched. II to this Act, shall, notwithstanding their expiry for all other purposes, continue to apply (so far as applicable) while this Act is in force to any Defence Regulation having effect by virtue of this Act, any order or other instrument made under any such regulation and any scheme of control contained in or authorised by any such regulation."

The principal Acts are defined by s. 10 (2) to mean the Emergency Powers (Defence) Acts, 1939 to 1945. The Emergency Powers (Defence) Act, 1939, did expire while the Act of 1945 was in force, and, therefore, s. 5 (2) became operative. As I have said, the Act of 1945 is still in force, and the Industrial Disputes Order, 1951, is made under the Defence (General) Regulations, 1939, reg. 58A which has effect by virtue of that Act. I, therefore, turn to the Act of 1939 which, among other of the principal Acts, it is indicated shall, notwithstanding its expiry for all other purposes continue to apply to, *inter alia*, the Industrial Disputes Order, 1951, and by s. 1 (4) of the Act of 1939 it is enacted:

"A Defence Regulation, and any order, rule or bye-law duly made in pursuance of such a regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

That is explained by s. 1 (2) of the Emergency Powers (Defence) Act, 1940, to refer to any enactment passed before 1939 which, of course, would include the principal Act, i.e., the Trustee Savings Banks Act, 1863. In the result, therefore,

it seems to me that I am precluded from considering whether there is anything in the special legislation which is inconsistent with the general legislation under which the Industrial Disputes Order, 1951, derives its force. Had it been necessary for me to consider the special legislation, I should have wanted to be satisfied that it was consistent with the safeguards provided by the savings banks legislation for protecting the interests of the depositors that some outside body, such as the Industrial Disputes Tribunal, should have power to substitute themselves for the body to which, as I understand, the task has been entrusted under the Act of 1863 of deciding what constitutes necessary expenses to be incurred in the management of the activities of the savings banks. In the circumstances I have mentioned it becomes unnecessary further to consider that point. In the result, therefore, and for that reason, I agree that no order for prohibition should be made in this case.

Application dismissed.

Solicitors: *Butt & Bowyer*, agents for *Daynes, Keefe & Co.*, Norwich (for the applicants, the East Anglian Trustee Savings Bank); *Solicitor, Ministry of Labour and National Service* (for the Minister of Labour and National Service); *Blatchfords* (for the National Union of Bank Employees).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

NOTE.

BASTED v. COZENS & SUTCLIFFE LTD., AND ANOTHER.

[QUEEN'S BENCH DIVISION (Devlin, J.), July 9, 1954.]

Costs—Joint tortfeasors—Offer before trial by one defendant to contribute fifty per cent. of damages and costs—Notional payment into court—Liability for costs after payment in—R.S.C., Ord. 30, r. 2 (2) (j).

FOR THE RULES OF THE SUPREME COURT, Ord. 30, r. 2 (2) (j), see the ANNUAL PRACTICE, 1954, p. 485.

AS TO CONTRIBUTION BETWEEN JOINT TORTFEASORS, see HALSBURY, *Hailsham Edn.*, Vol. 32, p. 190, para. 284.

In an action by the plaintiff against both defendants for negligence by reason of which the plaintiff sustained personal injuries HIS LORDSHIP found both defendants equally liable and made an order that each defendant should pay half the damages and half the plaintiff's costs. Both defendants denied liability, and the first defendants claimed contribution from the second defendants in respect of any liability which might be established against the first defendants. On June 4, 1954, the second defendants had made to the first defendants a written offer of contribution to the extent of fifty per cent., and on June 11, 1954, a direction was made that this written offer should be treated for the purpose of the first defendants' claim for contribution from the second defendants as a notice of payment into court pursuant to Ord. 30, r. 2 (2) (j). After judgment, counsel for the second defendants invited HIS LORDSHIP to make an order that both defendants should be liable for fifty per cent. of the plaintiff's costs up to June 4, the date of the notional payment into court, and thereafter that the first defendants should pay any further costs that the second defendants might have to pay to the plaintiff and also that they should pay the second defendants' costs in contesting the action.

During the trial no argument was addressed to HIS LORDSHIP as to the proper proportion of contribution.

Croom-Johnson and *L. Joseph* for the plaintiff.

Nelson, Q.C., and *Caulfield* for the first defendants.

Nield, Q.C., and *Olson* for the second defendants.

DEVLIN, J.: I think that I can give full effect to the rule [R.S.C., Ord. 30, r. 2 (2) (j)] in this case in the way in which I imagine it ought to be given effect to. The offer that the second defendants made is to be treated as if it were equivalent to a payment into court. That means, I think, that any person who unsuccessfully disputes whether the payment into court or the offer was sufficient should pay all the costs which have been incurred as a result of the continuance of such dispute. The rule may be very effective in a case where there are, for example, separate proceedings for contribution. The rule may be effective where a large part, or some appreciable part, of a single trial is taken up by a dispute whether the proper proportions, if there is any liability, are fifty per cent. or are not fifty per cent.; but in this case there has been no dispute of that sort at all. Neither party at any time during the trial has even so much as addressed me on what the proper proportion of contribution should be. They were content to leave it, as, no doubt, it must be left, to the view that I took of the facts of the case. Accordingly, in the circumstances of this case no costs have been thrown away at all as the result of the first defendants having failed to agree the apportionment at fifty per cent., and they cannot be made liable under this rule for costs which the second defendants have incurred in continuing (wrongly as it turned out) to resist that they were liable at all.

Accordingly, the order for apportionment of the costs will be that which I have already stated (i.e., liability for damages and the plaintiff's costs to be shared equally).

Order accordingly.

Solicitors: *W. H. Thompson* (for the plaintiff); *Carpenters* (for the first defendants); *G. J. D. Tull* (for the second defendants).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

HARVELL v. FOSTER AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), June 17, July 16, 1954.]

Administration of Estates—Administration bond—Liability of sureties on bond after estate wound-up.

By his will, dated Oct. 24, 1947, the testator left the whole of his estate to the plaintiff, and appointed her sole executrix of his will. On Feb. 8, 1948, when the plaintiff was an infant, the testator died. In April, 1948, the plaintiff married, and in May, 1949, an application was made for the issue to her husband, as her guardian, of a grant of letters of administration with the will annexed *durante minore aetate*. An administration bond was entered into by the husband, and by the defendants, the solicitors for the plaintiff, as sureties for him for the due administration of the estate. On June 13, 1949, letters of administration were granted to the husband. In July and August, 1949, the defendants, having realised the assets of the estate and paid the debts, funeral and administration expenses, handed over to the husband the residue of the estate amounting to £999 13s. 9d. together with the full account as between themselves and him as administrator. On Aug. 5, 1949, the husband paid £300 to the plaintiff, misappropriated the remainder of the net residue to his own use, and then disappeared. On Mar. 26, 1950, the plaintiff attained the age of twenty-one years. In January, 1952, the administration bond was assigned to the plaintiff by an order of the Probate, Divorce and Admiralty Division, and she claimed the balance of the estate from the defendants, with interest from Mar. 26, 1950, on the ground that her husband was in breach of the condition of the administration bond.

Held: the function of the administrator as such did not cease merely because there had been delivered into his hands the net residue of the estate

after payment of all duty, debts, costs and expenses, and, on his failure on Mar. 26, 1950, on the plaintiff's attaining her majority, to account to the plaintiff for the testator's estate and to pay her the full amount due, the administrator had failed "well and truly to administer according to law" within the true meaning of the bond, and, therefore, the defendants were liable as his sureties.

A *Archbishop of Canterbury v. Robertson* (1833) (1 Cr. & M. 690) and *Dobbs v. Brain* ([1892] 2 Q.B. 207), applied.

Dictum of SARGANT, J., in *Re Ponder* ([1921] 2 Ch. 62), criticised.

Decision of LORD GODDARD, C.J. ([1954] 1 All E.R. 851), reversed.

AS TO REMEDIES ON AN ADMINISTRATION BOND, see HALSBURY, Hailsham Edn., Vol. 14, pp. 281, 282, paras. 498-500; and FOR CASES, see DIGEST, Vol. 23, pp. 225-228, Nos. 2721-2762.

B Cases referred to:

(1) *Re Ponder*, [1921] 2 Ch. 59; 90 L.J.Ch. 426; 125 L.T. 568; 23 Digest 26, 2.

(2) *Eaton v. Daines*, [1894] W.N. 32; 23 Digest 51, 294.

(3) *Canterbury (Archbp.) v. Robertson*, (1833), 1 Cr. & M. 690 (149 E.R. 576); 2 Dowl. 78; 3 L.J.Ex. 101; 23 Digest 226, 2736.

C (4) *Broune v. Canterbury (Archbp.)*, (1683), 1 Lut. 882; 125 E.R. 480; 23 Digest 225, 2727.

(5) *Dobbs v. Brain*, [1892] 2 Q.B. 207; 61 L.J.Q.B. 749; 67 L.T. 371; 57 J.P. 22; 23 Digest 226, 2738.

(6) *Re Pitt*, (1928), 44 T.L.R. 371; 43 Digest 696, 1339.

D APPEAL by the plaintiff from an order of LORD GODDARD, C.J., dated Mar. 12, 1954, and reported [1954] 1 All E.R. 851.

In an action on an administration bond against the defendants, sureties of the bond, the plaintiff claimed that her husband, the administrator during her minority of an estate to which she was beneficially entitled, misappropriated part of the net residue, and that the defendants were liable for the breach of the obligation of the administrator under the terms of the bond. LORD GODDARD, C.J., dismissed the action on the ground that as soon as the estate had been cleared, and the residue was in the husband's hands, the administration was at an end and he ceased to be an administrator and held the residue in the capacity of a trustee for the plaintiff until she attained the age of twenty-one years, that the bond could not be held to be a bond to secure the performance of the husband's duty as a trustee, and that, therefore, the action failed.

F *Harold Christie, Q.C.*, and *C. E. Rockford* for the plaintiff.
S. Pascoe Hayward, Q.C., and *J. Monckton* for the defendants.

Cur. adv. vult.

G July 16. SIR RAYMOND EVERSLED, M.R., read the following judgment of the court. This is an appeal by the plaintiff, Anne Elizabeth Harvell, from a judgment of LORD GODDARD, C.J., dated Mar. 12, 1954, dismissing an action brought by her against the two defendants, Robert Tonge Foster and Alfred John Michael Maidlow Davis (partners in the firm of Chanter, Burrington & Foster, solicitors of Barnstaple) on an administration bond in which the defendants had joined as sureties, such bond having been given in respect of a grant to the plaintiff's husband of representation to the estate of her late father. The question in the case is whether, in the circumstances stated below, the admitted default of the plaintiff's husband constituted a breach of the condition of the bond so as to entitle the plaintiff to judgment against the defendants as sureties.

H By his will dated Oct. 24, 1947, the plaintiff's father, William John Askew (hereinafter referred to as "the testator") gave all his real and personal estate wheresoever and whatsoever to the plaintiff (then Anne Elizabeth Askew, spinster) absolutely and appointed her sole executrix of such will. The testator

died on Feb. 8, 1948. The plaintiff was at that time an infant just under nineteen years of age, having been born on Mar. 26, 1929. She was living with the testator at his house known as Leys Cottage, Church Hill, East Down, in the county of Devon. On Apr. 22, 1948, the plaintiff married one Den Eric Harvell, who is hereinafter referred to as "the husband". The plaintiff, by reason of her infancy, could not obtain a grant of probate of the testator's will and, under the advice of Messrs. Chanter, Burrington & Foster, application was made in the Principal Probate Registry of the issue to the husband of a grant of administration to the estate of the testator with the will annexed during the minority of the plaintiff.

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 160 (1), provides:

"Probate or administration shall not be granted to more than four persons in respect of the same property, and administration shall, if there is a minority or if a life interest arises under the will or intestacy, be granted either to a trust corporation, with or without an individual, or to not less than two individuals: Provided that the court in granting administration may act on such prima facie evidence, furnished by the applicant or any other person, as to whether or not there is a minority or life interest, as may be prescribed by probate rules and orders."

Section 165 of the same Act provides:

"(1) Where an infant is sole executor of a will, administration with the will annexed shall be granted to his guardian, or to such other person as the court thinks fit, until the infant attains the age of twenty-one years, and on his attaining that age, and not before, probate of the will may be granted to him. (2) Where a testator by his will appoints an infant to be an executor, the appointment shall not operate to transfer any interest in the property of the deceased to the infant or to constitute him a personal representative for any purpose unless and until probate is granted to him under this section."

Section 167 of the same Act provides (so far as material and as amended by the Administration of Justice Act, 1928, s. 19 (1) and sched. I):

"(1) Every person to whom a grant of administration is made shall give a bond (in this section referred to as 'an administration bond') to the senior registrar of the Probate Division by the name of 'the principal probate registrar', and, subject to the provisions of this section, if the principal probate registrar, or, where the grant was made in a district registry, the district probate registrar, so requires, with one or more sureties conditioned for duly collecting, getting in, and administering the real and personal estate of the deceased. (2) The principal probate registrar for the time being shall have power to enforce any administration bond or to assign it in accordance with the provisions of this section to some other person. (3) An administration bond shall be in such form as may be directed by probate rules and orders. (4) Where it appears to the satisfaction of the court or a judge that the condition of an administration bond has been broken, the court or judge may, on an application in that behalf, order that the bond shall be assigned to such person as may be specified in the order, and the person to whom the bond [is] ordered to be assigned shall be entitled by virtue of the order to sue thereon in his own name as if it had been originally given to him instead of to the principal probate registrar, and to recover thereon as trustee for all persons interested the full amount recoverable in respect of the breach of the condition thereof."

It would seem that the provisions in s. 160 (1) of the Act to the effect that, where there is a minority, administration shall be granted to a trust corporation with or without an individual or to not less than two individuals, is not regarded as applicable to the case of a grant during the minority of an infant sole executor

pursuant to s. 165, even though the infant is also beneficially interested. At all events, in the present case the application for a grant to the husband alone was acceded to, with the unfortunate consequences to which we will shortly refer. In compliance with s. 167 (1) the husband, as the intended administrator, and the two defendants as sureties, gave to the principal probate registrar a joint and several administration bond dated May 26, 1949, in the form prescribed by the non-contentious Probate Rules, and this having been done the grant to the husband was made on June 13, 1949.

The administration bond so given by the husband and the two defendants was in the sum of £2,698 (that being the prescribed penalty of double the gross value of the testator's estate as sworn for the purposes of the grant, namely, £1,348 13s. 7d.), and it was conditioned as follows:

- "The condition of this obligation is such that if the above named Don Eric Harvell the duly elected curator or guardian of Anne Elizabeth Harvell the sole executrix and sole residuary legatee or devisee under the will of William John Askew, deceased, of Leys Cottage, Church Hill, East Down, aforesaid salesman who died on Feb. 8, 1948, and the intended administrator (with the will) of all the estate which by law devolves on and vests in the person representative of the said deceased for the use and benefit of the said Anne Elizabeth Harvell and until she shall attain the age of twenty-one years do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of the said estate which has or shall come to the hands, possession or knowledge of the said intended administrator, and the same so made do exhibit or cause to be exhibited, into the Principal Probate Registry of the said division, whenever required by law so to do, and the said estate do well and truly administer according to law and further do make or cause to be made a just and true account of the administration of the said estate whenever required by law so to do, then this obligation to be void and of none effect, or else to remain in full force and virtue."

The grant to the husband was in the usual form for a grant with will annexed during the minority of a sole infant executor and was expressed to be granted to him as

"the lawful husband of and the guardian duly elected by the said minor [the plaintiff] for the use and benefit of the said minor until she shall attain the age of twenty-one years."

The main asset of the testator's estate consisted of his house, Leys Cottage, which was valued for the purposes of the grant at £1,300. This, with personalty sworn at £48 13s. 7d., made up the gross value of £1,348 13s. 7d., as against which there were a mortgage on the house of £166 9s. 9d. and funeral expenses and debts amounting to £31 10s. 9d., leaving a net estate, as sworn for the purposes of the grant, of £1,150 13s. 1d.

- After the grant to the husband had been made, he and the plaintiff left Leys Cottage and went to live with his mother at 24, Westmoor Road, Enfield, Middlesex. Messrs. Chanter, Burrington & Foster, as agents for the husband, sold Leys Cottage, got in the small outstanding items of personal estate, paid the mortgage and other debts and the funeral and administration expenses, and retained their own costs. The net residuary estate resulting from these operations amounted to £999 13s. 9d. Messrs. Chanter, Burrington & Foster duly paid this sum to the husband, as to £950 by a cheque generally on account sent to the husband at Enfield in a letter dated July 11, 1949, and acknowledged by him on the following day, and as to the balance of £49 13s. 9d. by a cheque sent to the husband at Enfield together with their account in a letter dated Aug. 24, 1949, and acknowledged by him on Aug. 27, 1949. It appears that between July 11 and Aug. 24, 1949, Messrs. Chanter, Burrington & Foster had got in an asset which remained outstanding on the former date in the shape of a sum of £28 4s. due from the Co-operative Insurance Society.

According to the uncontradicted evidence of the plaintiff, the course of events after the husband received the cheque for £950 was as follows : The cheque was cashed and the husband put the money in a drawer in the bedroom. Within the next few days he spent £350 of it in the purchase of a lorry. The plaintiff said that she agreed to this transaction at the time and that the van was, so the husband told her, registered in their joint names. Later the parties quarrelled, and, on Aug. 5, the husband demanded that the plaintiff should take £300 of the remaining £650, making over the van and the balance of the estate to him, and leave his mother's house where they were living. He prevailed on her to sign some form of consent to this division of the estate, gave her the £300 and made sure of her leaving by driving her to the station and putting her on the train for London. The plaintiff has not seen or heard from the husband since they parted on this occasion. He has left Enfield and his present whereabouts are unknown. By November, 1949, she had come to realise that the husband had tricked her out of her money and consulted Messrs. Chanter, Burrington & Foster, whose efforts on her behalf produced no result, apart from a letter dated Dec. 30, 1949, from the husband in reply to a letter addressed to him at 24, Westmoor Road, Enfield. This letter from the husband was headed "c/o 24, Westmoor Road, Enfield, Middlesex" (the solicitors' letter having apparently been forwarded to him by his mother at an address which he did not choose to disclose) and was in these terms:

"Dear Sir, Reference your letter dated Dec. 21 that I have just received. When my wife left me she took with her £300 in cash and left behind a large bill amounting to £80. This I have paid. During our stay at Leys Cottage, I spent about £280 of my own money in building material, also putting in a year's hard work trying to make an old cottage into a fit house for us. I also paid a lot of my late father-in-law's debts from my own money. The horses, harness and cart also belonged to me. After the cottage had been put in order, my wife wanted it sold, and even went so far as to take poisons, so that I had to call in Barnstaple police, in her endeavour to make me sell it. I think I realise now what my wife intended to do but you upset her plans when you sent the cheque in my name. She demanded the money at once and kept on demanding for days, and caused so much trouble in my mother's house I gave her £300 in cash. She left me one hour later taking our son and her belongings saying I could go to hell and she had got something at least. The rest of the money I have invested in a home for our son, whom I shall endeavour to claim from my wife in the near future. At the moment I am sending her an allowance each week. Yours faithfully, D. Harvell."

This seems to have been the last communication received from the husband by anyone concerned in the case and, in short, the husband, and with him the lorry and the balance of cash remaining after the payment to the plaintiff of the £300, have disappeared. His final letter is significant in that, so far from acknowledging the plaintiff's right to the net residue of the estate, it manifests an intention on his part to convert to his own use the whole of such residue over and above the £300 and attempts to justify his conduct in doing so. We should perhaps add that, according to the plaintiff's evidence, the weekly allowance referred to at the end of the letter appears to have been part of a disability pension to which the husband was entitled and we infer that it must have been paid to the plaintiff under a standing arrangement which did not involve any communication between them.

Ultimately, the plaintiff, having attained the age of twenty-one years on Mar. 26, 1950, took other advice, under which an order for the assignment of the bond to her was obtained on Jan. 25, 1952, and the writ in the present action was issued on Apr. 8, 1952. By her statement of claim, the plaintiff, after stating the circumstances in which the grant of administration was made to the husband,

and the defendants' joinder in the administration bond, described as "subject to the condition *inter alia* that if" the husband

"should well and truly administer the said estate according to law the said bond should be void"

went on to allege (in para. 5) that the husband

A "did not well and truly administer the estate according to law but misappropriated £699 13s. 9d. part of the assets of the said estate and failed to account therefor to the plaintiff",

B with particulars of this allegation to the short effect that, after getting in the assets and paying the debts and funeral and testamentary expenses shown in the solicitors' account dated Aug. 24, 1949, above referred to, there remained in the hands of the husband as administrator a balance of £999 13s. 9d.; that on or about Aug. 5, 1949, he paid to the plaintiff £300; but that save as aforesaid he failed to account to her for such balance or any part thereof. The statement of claim went on to refer to the order of Jan. 25, 1952, for the assignment of the bond to the plaintiff and to claim that the plaintiff was entitled to recover from the defendants, as trustee for all persons interested in the said estate, the said sum of £699 13s. 9d., with a prayer for payment to her accordingly of the said sum of C £699 13s. 9d. with interest thereon from Mar. 26, 1950, until payment or judgment.

In response to a request by the defendants, further particulars of para. 5 of the statement of claim were given to the effect that (a) the husband

D "misappropriated the sum of £699 13s. 9d. by failing to hand it over to the plaintiff on her attaining the age of twenty-one years and by retaining it thereafter and absenting himself from her and failing to disclose his whereabouts to her with the result that she was unable to recover the money and with the intention of depriving her of the same";

and (b) the husband

E "failed to account for the said sum by failing to render any account thereof to the plaintiff on her attaining the age of twenty-one years and by absenting himself from her and failing to disclose his whereabouts to her with the intention of depriving her of the said money."

F The defendants, being naturally concerned to repel any imputation on their professional honour, delivered a defence which described in some detail the part they had taken in the administration of the estate as solicitors advising and acting for the plaintiff and the husband. There is no doubt that from first to last they acted with perfect good faith. They personally saw to the administration of the estate down to the ascertainment of the clear residue and were at pains to explain to the husband before they paid it over to him that he as administrator must hold it in trust for the plaintiff until she attained the age of twenty-one years. Nevertheless, by joining as sureties in the administration bond, they made themselves responsible for the due administration of the estate by the husband, and if, on the true construction of the bond and in the events above G stated, the husband's default constituted a failure on his part well and truly to administer the estate according to law within the meaning of the condition, they must be held liable for it. The facts are not now in dispute and, apart from a plea H of laches and acquiescence on the part of the plaintiff which was rightly not persisted in, the only answer to the plaintiff's claim raised by the defence consists of a submission in para. 7, which prevailed before LORD GODDARD, C.J., to the effect that the husband's action in misappropriating the balance of the estate constituted a breach of the trusts of the testator's will and not a devastavit of his estate and that the plaintiff's true course of action was an action against the husband for breach of trust. This submission, as it appears in the defence, is not happily phrased. There were, of course, no trusts of the testator's will, which

contained a direct gift of the entire residue to the plaintiff, and the only impediment to the immediate payment to her of the clear residue so soon as it was ascertained consisted in her infancy. The defendants' argument may be more clearly and accurately expressed in the following four propositions: (i) the condition of an administration bond in the form here in question relates and relates only to administration, i.e., to the due performance by the administrator of his duties as an administrator; (ii) an administrator who has got in the estate and paid all the funeral and testamentary expenses and debts, and legacies if any, is *functus officio* as administrator quoad the resultant clear residue of the estate and thenceforth holds such residue in trust for the person or persons beneficially interested under the relevant will or intestacy, and is answerable for it not as administrator of the estate but as a trustee; (iii) therefore, if an administrator, after he has become a trustee in accordance with proposition (ii), misapplies or converts to his own use the assets so held in trust by him, it follows from proposition (i) that neither he nor his sureties are liable under the bond, for his default is not a breach of his duty as administrator, which has been fully performed, but a breach of his duty as trustee of the residue for the person or persons beneficially entitled, to which the condition of the bond has no application; (iv) it follows from the foregoing that on the facts of this case the defendants are absolved, for the £999 13s. 9d. paid over by Messrs. Chanter, Burrington & Foster to the husband represented the clear residue of the estate, which, from the moment of its receipt by him, was held by the husband not as administrator but as trustee, and when he converted it to his own use he did so in the latter, and not the former, capacity.

LORD GODDARD, C.J., accepted this argument. He came to the conclusion that the estate had been well and truly administered according to law within the meaning of the condition of the bond at the moment when all debts and expenses had been paid or discharged (for there were here no legacies), the moment when, as counsel for the defendants phrased it in argument, "the estate had been cleared", the moment, that is to say, when the administrator had in his hands the sum of money to which, as universal legatee under the will, the plaintiff was absolutely entitled. It is to be observed that if this view is right, then, if the interval is ignored between the payment of the £950 on account and the final payment of £49 13s. 9d. (and the defendants have, rightly as we think, claimed that on the plaintiff's case, as pleaded, it should be ignored) the risk undertaken by the sureties was negligible and the protection afforded by their suretyship to the plaintiff was nugatory; for the "clearing" of the estate was done by them, on the administrator's behalf, and the "administration" (in the limited sense given to that expression by counsel for the defendants) was concluded, at the same instant that the proceeds of the "administration" were paid over to the administrator.

There is, moreover, to our minds, a manifest incongruity in the assertion that an administrator during minority has well and truly administered the estate according to law for the use and benefit of the infant when what he has in fact done is to receive the net residue from agents acting on his behalf in the administration, to convert the greater part, or, for that matter, the whole, of such residue to his own use and to abscond without accounting. But LORD GODDARD, C.J., regarded the question as, in effect, determined by the judgment of SARGANT, J., in *Re Pomler* (1), as deciding that once the debts and expenses and any legacies had been discharged or satisfied and the clear residue of the estate ascertained, then an administrator became, as such, *functus officio*, and must be treated as holding such residue, not as administrator, but as a trustee. LORD GODDARD, C.J., cited (1954) 1 All E.R. 854 the following passage from the judgment of SARGANT, J. (1921) 2 Ch. 62):

"But *Eaton v. Daines* (2), a decision of KEKEWICH, J., shows clearly that when an estate has been wound-up, and the trust property is in the

hands of an executor freed from the administration of the estate, the office is then changed from that of executor to that of a trustee . . .”;

and he proceeded to conclude that ([1954] 1 All E.R. 854):

“ . . . the reference to *Eaton v. Daines* (2) and the cases cited therein seems . . . to make it clear that the administrator holds the residue after the debts and legacies are paid in the capacity of trustee and not of administrator.”

- A We have come to a different conclusion. In our opinion, on the failure on Mar. 26, 1950 (when the plaintiff attained the age of twenty-one years) of her husband to account for the proceeds of realisation of her father's estate, having in fact (save as to £300) misappropriated it to his own use, the latter was shown not to have well and truly administered the estate according to law within the true meaning and intent of the bond. On the more general question, it is unnecessary in the present case for us to attempt any formulation of the circumstances in which a personal representative may be said to cease to act as such and to assume the office and function of a trustee; but, if SARGANT, J., in *Re Ponder* (1) is to be taken to have decided that, once a personal representative, by clearing the estate, has discharged all his functions other than those of a trustee for the persons beneficially interested in the net residue, and has thus become a trustee for those persons, he must be taken, merely by virtue of such clearance, to have discharged himself from all his obligations as personal representative because the capacities of personal representative and trustee are mutually exclusive, then we think the proposition too widely stated. We shall return later in this judgment to *Re Ponder* (1) itself and the cases therein cited.
- B
- C At this point it is sufficient to note that the definition of “trustee” in the Trustee Act, 1925, s. 68 (17), includes a personal representative, that the Administration of Estates Act, 1925 (the title of which is not without significance), includes in Part III (headed “Administration of Assets”), s. 33 (1) of which provides that the estate of an intestate is vested in the personal representative “upon trust” for sale, calling in and conversion, s. 39 (1) which gives personal representatives various powers of management
- D
- E “for purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives”,
- and s. 42 which empowers personal representatives where an infant is absolutely entitled (inter alia) to the residuary estate of the deceased to appoint a trust corporation or two or more individuals (whether or not including themselves or one or more of themselves) to be trustee or trustees thereof for the infant, and thereby discharge themselves from all further liability in respect of the property in question, and to add that Part IV of the same Act, being the part devoted to the devolution of the estates of persons dying intestate and headed “Distribution of residuary estate”, is expressed throughout in terms of trusts.
- F
- G We return to the construction of the bond itself and note, first, the description at the beginning of the condition of the bond of the plaintiff's husband as
- “the intended administrator . . . of all the estate which by law devolves on and vests in the personal representative of the said deceased for the use and benefit of the [plaintiff] until she shall attain the age of twenty-one years”;
- H and, secondly, that the letters of administration granted to the husband were expressly limited to be for the use and benefit of the plaintiff and until she should attain the age of twenty-one years. Further, it is to be noted that the vital words “do well and truly administer”, etc., are immediately followed by the words
- “and further make or cause to be made a just and true account of the administration of the said estate whenever required by law so to do.”

Even if the vital formula were not apt, according to its natural sense and meaning (as we think it is), to render the bondsmen liable in the present case as on a breach of the condition "well and truly to administer", the following words, which we have cited and which are part of the relevant context, seem to us to make insensible such a limitation of liability as the defendants seek: for the obligation to make a true account of the "administration" must persist at least up to the end of the period of the grant.

In our judgment, moreover, the result which commends itself to us follows from the decision in *Archbishop of Canterbury v. Robertson* (3). The facts (apart from the terms of the bond) in that case seem to us on all fours with those of the present, for in the former, as in the present, the administrator misappropriated to himself part only, though not the whole, of the estate. It is true that the terms of the bond in the cited case differed from those of the present and contained a separate condition, on the face of it peculiarly applicable to the facts of the case. But the plaintiff also relied, as a separate head of claim, on breach of the obligation in the bond "well and truly to administer the goods of the intestate according to law" words, for practical purposes, identical with those in the present case: and the Court of Exchequer held that such words, according to their natural meaning, extended so as to make the sureties liable, and also laid it down that the intent of such an obligation in an administration bond was not limited so as to be for the better security of creditors only, but was meant to enure for the benefit of those who would take as next of kin. We cite two passages from the judgment of the court delivered by LORD LYNDHURST, C.B. The first is as follows (1 Cr. & M. 708):

"Now, looking at the language of the bond, nothing can be more distinct and precise than these terms of the condition. They are, that he shall well and truly administer, according to law, the effects which shall come to his hands, and all other the effects of the intestate that shall come to the hands of any person or persons for him to be administered. It would seem difficult to entertain any doubt upon the natural construction of these words, and nothing would be a more direct infringement of the terms of the condition than the application of the effects of the intestate to his own use, and the converting them to his own purposes, so that they should be entirely lost to the estate of the intestate."

Then, later, LORD LYNDHURST refers to an earlier case, *Brown v. Archbishop of Canterbury* (4), and says of it (*ibid.*, 710):

"That decision, as I understand it, amounted to this—that the object of the Act was not to provide a remedy for creditors, for they already had by law a remedy for the recovery of their debts; and therefore, that the breach so assigned was not within the intent and meaning of the Act of Parliament—within the meaning of the legislature at the time they passed that law"—a principle which the court held equally applicable to the construction of the bond then in suit.

Dobbs v. Brain (5), in which *Archbishop of Canterbury v. Robertson* (3) was cited, is, in our judgment, to the same effect. It is true that in that case the default of the administrator had been in paying a small legacy of £50 to a person not entitled to receive it or to give a receipt for it, and it may, no doubt, be said that at a time when the administrator purported to pay the £50 legacy the estate could not have been "cleared" in the sense that the residue had been finally ascertained. But we have been unable to see any sensible or logical distinction for this purpose between misapplying a legacy or misapplying a share of residue, or any sensible or logical ground for the view that the bondsmen's liability will depend on whether any legacy (however small, and presumably whether presently payable or not) remains unsatisfied.

We return to *Re Ponder* (1), by which LORD GODDARD, C.J., regarded the case as governed. As the learned judge observed, the point decided by the case was

whether the widow to whom letters of administration had been granted to the estate of an intestate could, in the circumstances, invoke the terms of the Trustee Act, 1893, s. 25; that is, on the footing that she had become a trustee of the three separate funds into which she had divided and set apart the residue of the proceeds of the estate for the respective benefit of persons or classes of persons entitled as heir at law and under the statutes of distribution, could call on the court to appoint additional trustees to act with her in respect of the appropriated funds. As counsel for the plaintiff observed, the conclusion was certainly one of convenience; and, on the facts of the case, we do not say that SARGANT, J., was not entitled to treat the applicant as having in fact and in truth constituted herself a trustee (within the terms of the Trustee Act, 1893) of the three funds. But it does not necessarily follow that she had, therefore, altogether cast off her duties and capacity as administratrix. To take an obvious illustration, if at some later date (that is, after SARGANT, J.'s decision) it had been necessary to join, in an action for the administration of some other estate, a representative of the estate of the intestate Ponder, the widow would have been rightly joined, and entitled to appear, alone, as administratrix. The truth, no doubt, is, as junior counsel for the defendants submitted, that in the ordinary case a personal representative, once appointed, retains for all time that character, though he may, and at some stage presumably will, have exhausted all his duties or functions as such. On that point we pause only to repeat that the present is not an "ordinary" case, for the husband, by the terms of his appointment as administrator, ceased altogether to have that character on Mar. 26, 1950.

The novel point raised in *Re Ponder* (1) and decided by SARGANT, J., was that one appointed administrator of an intestate's estate could in due course of time assume the character and functions of a trustee in the same way as one appointed by will executor and trustee (as was the case in *Eaton v. Daines* (2)) so as to be able to invoke the statutory powers of appointing new or additional trustees. *Re Ponder* (1) appears to have been since followed on one occasion—in *Re Pitt* (6). Whether or not it was rightly decided on its own facts it is unnecessary for us to determine. But, as we have earlier indicated, we are unable to accept the view, which SARGANT, J.'s language read without qualification would seem to support, that because a personal representative who has cleared the estate becomes a trustee of the net residue for the persons beneficially interested, the clearing of the estate necessarily and automatically discharges him from his obligations as personal representative and in particular from the obligation of any bond he may have entered into for the due administration of the estate. We would add that, in our view, the duty of an administrator as such must at least extend to paying the funeral and testamentary expenses and debts and legacies (if any) and where, as here, immediate distribution is impossible owing to the infancy of the person beneficially entitled, retaining the net residue in trust for the infant. At least until the administrator can show that he has done this, it cannot, in our judgment, be said of him that he has duly administered the estate according to law. The husband in the present case did not retain the net residue in trust for the infant plaintiff, but on the contrary converted the greater part of it (i.e., all except the £300) to his own use, and, moreover, sought in his letter of Dec. 30, 1949, to justify his conduct by claims of right which, as he has not condescended to come forward and prove them, cannot now be regarded, but which were wholly inconsistent with any recognition or acknowledgment on his part that the assets in his hands represented a clear residue held by him in trust for the plaintiff. In any event, as counsel for the plaintiff contended, the Administration of Estates Act, 1925, s. 42, to which we have already referred, now makes provision for the case of an infant who is absolutely entitled to a legacy or residue or some share therein under a will or intestacy, there being (in the case of a will) no appointment of trustees on the infant's behalf; and enables the personal representative to appoint a trust corporation or two or

more individuals as trustees for such infant and, on such appointment and vesting of the property in the trustees so appointed, to be discharged from further liability in respect thereof. That provision (which incidentally meets the difficulty pointed out by Lord Goddard, C.J., as to the protracted liability of bondsmen in the case of a very young infant beneficiary) seems to us to carry a necessary implication to the effect that until a personal representative having in his hands assets to which an infant is absolutely entitled either avails himself of the prescribed method of obtaining his discharge from further liability (scilicet as personal representative) in respect of these assets, or accounts for and pays them over to the infant on his or her attaining the age of twenty-one years, he remains liable for them in his capacity as personal representative. This, in our judgment, makes it still more difficult, and, indeed, impossible, for the defendants to assert that the husband's obligations as administrator, and consequently their own liability under the bond, ceased automatically on his receiving the net residue, although the procedure laid down by s. 42 for relieving the husband from further liability as administrator was not complied with. Accordingly, we would allow this appeal.

Appeal allowed; judgment for the plaintiff for £699 13s. 9d. with interest at four per cent. from Mar. 26, 1950, until payment.

Solicitors: *Bailey, Breeze & Wyles* (for the plaintiff); *White & Leonard*, agents for *Chanter, Burrington & Foster*, Barnstaple (for the defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

Re BANQUE DES MARCHANDS DE MOSCOU (KROUPETSCHESKY).

[CHANCERY DIVISION (Roxburgh, J.), June 29, 30, July 1, 2, 5, 6, 7, 8, 9, 13, 14, 1954.]

Company—Winding-up—Foreign bank—Bank dissolved by foreign decree—Situs of debt—Claim by creditor against English assets—Debt recoverable in England.

In December, 1917, a Russian bank, which carried on business in Russia and had no branch in England, had a current account, which was in credit, with the M. bank in London. On Dec. 15, 1917, the Russian bank was nationalised by a decree of the Soviet government. On Dec. 16, 1917, two documents were signed, purporting to be orders from the Russian bank to the M. bank in London directing the M. bank to pay to the order of O., a Russian, £10,000, in the one case, and £2,000, in the other. The Russian bank was dissolved under Russian decree in or about January, 1918, and any liability of the bank to O. under Russian law was extinguished. On May 30, 1932, after the dissolution of the Russian bank, a winding-up order in respect of it was made in England under the Companies Act, 1929, s. 338. On Sept. 21, 1932, O., being then domiciled in France, lodged a proof in the winding up in respect of an alleged debt of £12,000, being the aggregate of the two sums of £10,000 and £2,000. No application for leave to serve a writ out of the jurisdiction for the purpose of recovering either of the two sums was made. O. died and, assets having come into the hands of the liquidator and the liquidator having rejected the proof on Nov. 12, 1952, O.'s widow and administratrix applied to the court by summons dated Dec. 3, 1952, to reverse the liquidator's decision.

Held: that the debts of £10,000 and £2,000 were locally situate in Russia where the Russian bank had resided, and that, even if the debts could have been recovered in England or by action instituted in England, that fact would not have made them locally situate in England; and that, accordingly, the debts were subject to the nationalisation and other decrees of the Soviet government, and the proof was rightly rejected.

Re Banque des Marchands de Moscou (Koupetschesky) ([1952] 1 All E.R. 1269) and dictum of MAUGHAM, J., in *Re Russian Bank for Foreign Trade* ([1933] Ch. 766), applied.

Dicta of ROMER, L.J., in *Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou* (Dec. 14, 1931) (unreported as regards these dicta), followed.

AS TO DEBTS PROVABLE IN A WINDING-UP, see HALSBURY, Simonds Edn., Vol. 6, p. 653, para. 1288.

FOR THE COMPANIES ACT, 1948, s. 316, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 697.

Cases referred to:

- (1) *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1923] 2 K.B. 630; 92 L.J.K.B. 1053; 129 L.T. 706; *reversd.* H.L., [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; Digest Supp.
- (2) *Russian & English Bank & Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.*, [1936] 1 All E.R. 505; [1936] A.C. 405; 105 L.J.Ch. 174; 154 L.T. 602; Digest Supp.
- (3) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; Digest Supp.
- (4) *Paley (Princess Olga) v. Weisz*, [1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; Digest Supp.
- (5) *Re Banque des Marchands de Moscou (Koupetschesky)*, [1952] 1 All E.R. 1269; 3rd Digest Supp.
- (6) *Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou*, (1931-32), 107 L.J.K.B. 386; 158 L.T. 364; Digest Supp.
- (7) *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101; 93 L.J.Ch. 449; 131 L.T. 438; Digest Supp.
- (8) *A.-G. v. Bouwens*, (1838), 4 M. & W. 171; 7 L.J.Ex. 297; 150 E.R. 1390; 6 Digest 446, 2866.

ADJOURNED SUMMONS by the widow and administratrix of Alexei Konstantinovitch Ouchkoff, deceased, a person claiming as a creditor to prove in the winding-up of the Banque des Marchands de Moscou, for an order that the decision of the liquidator rejecting his proof be reversed.

The facts are summarised in the headnote. The date given in the headnote as that on which the bank was dissolved is taken from *Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* ([1956] 2 All E.R. 549), where SIR RAYMOND EVERSHED, M.R., said that it was conceded that the bank was dissolved in Russia at some date about and not later than January, 1918.

Raymond Jennings, Q.C., and *G. R. F. Morris* for the applicant.
Lindon, Q.C., and *Raymond Walton* for the liquidator.

ROXBURGH, J.: Banque des Marchands de Moscou (Koupetschesky) (hereinafter called "the Russian bank") was incorporated in 1866 under the laws of the Russian Empire to carry on, as in fact it did, banking business in Moscow and elsewhere, but it never had any branch in England. In December, 1917, however, it had a current account with the Midland Bank, Ltd., in London, which was in credit. On May 30, 1932, EVE, J., on the footing that the Russian bank had by then been dissolved, which fact is not here in dispute, made an order to wind-up the bank under the Companies Act, 1929, s. 338, and the liquidator has since got in substantial assets. On Sept. 21, 1932, Alexei K. Ouchkoff, a Russian domiciled in France, lodged a proof in the liquidation. He has since died, and his widow, as his personal representative, has presented his claim to this court. She, also, is a Russian domiciled in France.

The claim rests on three documents which came into existence in the circumstances stated by Madame Ouchkoff in her affidavit:

"After my marriage to the claimant we lived in Moscow, but prior to

Dec. 16, 1917, we had decided to escape from Russia and eventually did in fact succeed in doing so. Following our escape the claimant never returned to Russia to the best of my knowledge and belief and he never had any intention of doing so. At all times from the date when we both escaped it was his intention and mine to acquire a domicile of choice in France. The claimant, with my concurrence, intended to exchange his assets in Russia for assets abroad. With this object in view, the claimant to my knowledge obtained from the [Russian] bank the two letter orders dated Dec. 16, 1917, and the letter dated Dec. 17, 1917. It is within my personal knowledge that the claimant delivered a large quantity of gold to the [Russian] bank at about the same time, and that the claimant had a large account to his credit at the bank. It was at all material times the intention of the claimant and as I verily believe of the bank that the debts created and/or evidenced by the said letter orders and letter should be paid in England."

None of the documents is in what is commonly called cheque form. The first document, in English, is headed "The Russian Bank, Moscow, Dec. 16, 1917", and then, in figures, "£10,000". Then there are the words: "The City of Midland Bank, London". I think that they were meant to be "The City and Midland Bank" which was not the correct title, I believe, even at that date, but nothing turns on that. The document went on to say:

"Pay to order of Mr. A. K. Ouchkoff the sum of £10,000 debiting our account with you, Moscow Merchants Bank, Ltd."

Then there are two signatures. It is not necessary for the purposes of this case, as I see it, to decide in what capacity those signatures were affixed to the document. The second document is of the same date, is addressed likewise to "The City and Midland Bank, Ltd., London", and the figure in this one is £2,000. It reads:

"Pay to order of Mr. A. K. Ouchkoff the sum of £2,000 debiting our account with you. Yours truly, Moscow Merchants Bank."

Then, again, there are the two signatures. At the bottom of each of these two documents is the name of Mr. Ouchkoff, presumably as addressee.

The third document, which is in Russian, has been translated for me as follows:

"The board of the Moscow Merchants Bank hereby certifies that out of the foreign funds belonging to the bank which are deposited abroad £2,000 belongs to Alexei Konstantinovich Ouchkoff. Instructions to pay this amount to him or to his order will be made by the bank immediately on resumption of normal communications between the bank and its foreign correspondents. For the chairman . . ."

There then follows a signature, and there are two signatures after "directors". The date is given as "Dec. 17, 1917, Moscow". This document is not set up by the applicant now as evidence of a third debt but she relies on it as a voucher to support her claims under the first and second documents. As it refers, however, to "foreign funds", and not to funds in England, still less to funds at the Midland Bank, it seems to me that it can have no effect as a charge on or appropriation of any of the Russian bank's English assets and, therefore, as far as I can see, adds nothing to the first two documents, and I propose to say no more about it.

My first conclusion is that the whole transaction was illegal in its inception as being a transaction carried out in Russia in breach of the two Russian currency laws then in force. Both of them are laws which were made during the régime of the Provisional Government, a fact which is not without importance in connection with this matter. The first is Article 734 and is called:

"On the prohibition of money transfers abroad. An Act of the Provisional Government."

The second is:

" Ordinances announced to the Ruling Senate by the Minister of Finance concerning the approval of a statute for the Settlement Department attached to the Special Office for Credit Matters."

The first was signed on June 5, 1917, and the second seems to have been approved on July 23, 1917, but the precise date is not material.

A I have listened attentively to the evidence of Dr. Dobrin and Dr. Fischmann on this point, and having done so I accept on this point the evidence of Dr. Dobrin and I reject that of Dr. Fischmann. It so happens that Professor Bernatzky, who was formerly professor of political economy in the University of Petrograd and in the Petrograd Polytechnicum, has written a book on RUSSIAN PUBLIC FINANCE DURING THE WAR. Professor Bernatzky was Minister of Finance (and this is, to my mind, the important point) in the Russian Provisional Government, which promulgated these two edicts having the force of law. I do not think that he had any legal qualifications—none are mentioned on the title page of the book—but the subject-matter of the book is perhaps just as much within the purview of a Minister of Finance as of any lawyer. In this book he says:

C " An effective system of control by the government of all transactions in foreign exchange was thus introduced in Russia only on the eve of the outbreak of civil war and of the complete collapse of her political organisation."

D The civil war had broken out before the documents relied on by the claimant had been executed, and if those two edicts were to be given the limited operation which Dr. Fischmann, for no sufficient reason, claimed for them, and if, therefore (as Dr. Fischmann contends), the transaction which is the subject-matter of this claim was not prohibited by them, then the system of control could not possibly have been described by anybody who knew anything about it as " effective ". I think I am entitled to assume that the Minister of Finance in the Provisional Government which enacted those two edicts did know a good deal about it, probably a great deal more than any court in England ever will.

E However, assuming that I am wrong on this point, there seems to be another insuperable difficulty for the claimant. By the operation of certain law-making edicts in Russia, and, in particular, a Decree of the Nationalisation of Banking, passed on Dec. 14, 1917, and Article 997, which is described as

F " Instructions approved by the People's Commissary of Finance on Dec. 10, 1918, on the method of nationalisation of private banks ",

both of which edicts are printed in a note to *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse* (1) ([1923] 2 K.B. 674, 677), the nationalisation of the Russian bank took effect as from Dec. 14, 1917. Both the Russian legal experts agreed that Article 997 had the force of law in Russia, and I hold on the evidence that it did. There must, therefore, be doubt whether G the documents, all dated after Dec. 14, 1917, can ever have imposed any liability on the Russian bank, but assuming that they did, that liability was extinguished under Russian law when the Russian bank was finally dissolved in Russia, if it had not been extinguished before. This was long before the commencement of the winding-up in England.

H What, then, is the position regarding the present claim? I will assume, without deciding, that at the date of the documents the bank was under some antecedent liability to Ouchkoff, the claimant, and that, but for the dissolution of the bank, he could have sued the bank on the cheques on the footing that they had been presented, or that presentation had been excused, and that they had been dishonoured, or for so much of the antecedent debt as was evidenced thereby. These are large assumptions, but, even so, the position now, in my judgment, admits of little doubt. As LORD ATKIN pointed out in *Russian & English Bank*

de Florencia Montefiore Gardalla v. Baring Bros. & Co., Ltd. (2) ([1936] 1 All E.R. 518):

... it is a necessary implication, that the dissolved foreign company is to be wound-up as though it had not been dissolved and therefore continued in existence."

At first sight, this would seem to suggest that all debts without distinction of race would be provable, because the Companies Act, 1929, s. 261, which is in the same terms as s. 316 of the Companies Act, 1948, provides:

"In every winding-up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made . . .",

and that section appears to be applicable to the winding-up of a dissolved foreign company. But LORD ATKIN was careful to avoid committing himself to this line of reasoning, because he said ([1936] 1 All E.R. 519):

"But if the corporation does trade here, acquires assets here, and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable it may be wound-up here so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purpose of the winding-up it shall be deemed not to have been dissolved."

Counsel for the applicant, who steered his vessel with a high degree of seamanship, did not quite dare to explore that channel.

In *Re Russian Bank for Foreign Trade* (3) MAUGHAM, J., dealing with a petition to wind up a dissolved foreign company, had already devised a means of escape from such an application of s. 261 of the Companies Act, 1929. After all, what are being administered in this country are, not all the assets of the Russian bank, but assets on which the liquidator can lay his hands, and which, broadly speaking, are English assets; and, therefore, it would be surprising if debts which, could be, broadly speaking, described as English debts, should find themselves up against the competition of Russian debts in respect of assets which were solely English assets and, of necessity, excluded the Russian assets. MAUGHAM, J., in carefully chosen words, dealt with this problem in *Re Russian Bank for Foreign Trade* (3), where he said ([1933] Ch. 766):

"There is, however, a real question in dispute, and that is whether the debt to the petitioner was or was not locally situate in Russia at the date of the decrees of 1917 and 1918 above referred to. If it was locally situate in Russia, it seems to me that as the effect of the legislation the debt is no longer due by the bank as a corporation, and that the only claim of the petitioner is against the Soviet State. By the decree of December, 1917, the assets and liabilities of the bank within Soviet territory were taken over by the People's Bank, and this in my opinion involves the destruction of the original debt and a kind of statutory novation (in some sense, perhaps, only a theoretical one) whereby the State Bank became liable to discharge it. This legislation must be taken to be effective as regards property situate in the territory of the Soviet Republic (see *Princess Paley Olga v. Weisz* (4)), in which it was held that the English courts will not inquire into the legality of acts done by a recognised foreign government against or in relation to its own subjects in respect of property situate in its own territory. It seems to me to be clear that the same principle must apply, whether the property consists of chattels or of a debt regarded in this country as having a local situation. If, then, it were to be established that the debt of the petitioner

was represented by a credit to him in the Archangel branch of the bank [which was alleged in that case] I should be of opinion that that debt had ceased to exist. The petitioner, however, had sworn that if the Archangel branch was credited with the proceeds of the goods sold by the London branch on his instructions it was done without his authority. The effect of the correspondence in relation to the matter is not conclusive, and the evidence does not enable me to express a final opinion on the claim of the petitioner to be a creditor for a debt recoverable in London. If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalisation decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable."

B After citing certain authorities, MAUGHAM, J., continued ([1933] Ch. 767):

"The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic."

C This reasoning provides an escape from s. 261 of the Act of 1929. If a debt was locally situate in Russia at the material date, then the dissolution of the Russian bank removed it altogether from the category of debts and liabilities provable, because it was not a debt at all at the time when the proof was sought to be admitted. But, if the debt was not locally situate in Russia, then the decrees have no extra-territorial operation and, accordingly, whatever may have happened in Russia, the debt remains provable in an English liquidation.

D This reasoning was in its inception embodied in what must, I think, be treated as a dictum, but it has since been accepted and treated as a proper foundation for a judgment by VAISEY, J., in *Re Banque des Marchands de Moscou (Koupetschsky)* (5), a case relating to this same bank. After citing the whole or most of the passage which I have cited, VAISEY, J., said ([1952] 1 All E.R. 1273):

E "I agree that those statements are obiter, but they seem to me to be founded on accurate principles, and they seem to me to govern the present case."

F Counsel for the applicant--and I appreciate the compliment to my courage implied in this argument--invited me to desert MAUGHAM, J., and VAISEY, J., and to strike out a new path for myself. It might have been difficult for me to do so even if I had felt that I should like to do so, but I must confess that the alternative proposition of counsel for the applicant makes no appeal to me. He asked me to propound as law that, if a creditor can show that it was the agreement and intention of the parties that he was to be paid out of the assets in England, he should be paid out of the English assets, but not otherwise. But, in my judgment, no escape from s. 261 of the Act of 1929, or the corresponding section of the Companies Act, 1948 [s. 316], lies by this route, and, therefore, that proposition, for which no authority is available, does not commend itself to me on grounds of logic.

G Counsel for the applicant felt unable, or almost unable, to contend that the debt in this case was not situate in Russia in view of two passages in *Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou* (6), which H dealt with this same bank. The judgment of the Court of Appeal in that case has not been reported in full, but I have been supplied with a transcript. It became necessary for the purposes of that appeal to discuss the situation of a debt. In the course of his judgment, GREER, L.J., said:

"At the date when the Treaty of Peace Order in Council came into operation, namely, Jan. 10, 1920 [which was the material date in that appeal], the defendants had no place of business in, and were therefore not

resident in the United Kingdom, and I think it is established by the decision of this court in *New York Life Insurance Co. v. Public Trustee* (7), that the debt had no situs in this country."

It had occurred to me during the argument that perhaps it might be enough if the claimant could show that the case was one in which leave to serve the Russian bank out of the jurisdiction might have been granted—it will be observed that no action could have been brought in England without such leave, because the bank had no branch in England and could not have been served here—but ROMER, L.J., who dealt with the situs of debts in great detail, considered and rejected that argument in the *Deutsche Bank* case (6). I may say at once that I agree with what ROMER, L.J., said*, which was as follows:

"As has often been pointed out, a chose in action has not in strictness any locality. But where, as in the present case, a simple contract debt has to be treated as having some locality, it is deemed by English law to be situated in the place where the debtor resides. The reason for assigning this locality to a simple contract debt was that the place where the debtor resides was in nearly every case the place where it was recoverable. Even in earlier times, it might, of course, occasionally have happened that judgment could be obtained against a debtor in a country where he did not reside. But it was probably thought desirable for the sake of uniformity to adopt in all cases the test of residence rather than the test of recoverability. However, whatever the reason may have been, the rule was laid down, as I have stated it, in *A.G. v. Bourens* (8), and was recognised by this court as still being the rule in *New York Life Insurance Co. v. Public Trustee* (7) ([1924] 2 Ch. 107, 115, 120). The difficulty in that case was that a corporation, unlike an individual, can be residing in two places at one and the same time, a possibility not within the contemplation of the authors of the rule, and it became necessary to consider which of the two residences of the insurance company, London or New York, was to be taken as determining the locality of the debt due from it. As the debt in question was, in terms of the contract creating it, payable in this country, and in addition was recoverable here, its locality was held to be English. In the present case the debt is payable in this country, but the defendant bank was not residing here on Jan. 10, 1920. It was in May of the same year, but that will not help the plaintiffs. The debt was also recoverable here on Jan. 10, 1920, had the plaintiffs been successful in obtaining leave to serve the defendant bank out of the jurisdiction. But I know of no authority for the proposition that a simple contract debt is situate in this country, at a time when the debtor is not resident here, merely because he can be sued by putting into operation the provisions of R.S.C., Ord. 11. It would be strange if it were so. For it is always in the discretion of the court in cases coming within the rule, to give or refuse leave for service out of the jurisdiction, a discretion depending upon the balance of convenience. A debt due from a debtor resident out of the jurisdiction cannot therefore be deemed to be in this country until an application has been made for service of the writ out of the jurisdiction and that application has been acceded to. If leave were

* In the *Deutsche Bank* case (6) ROMER, L.J., was considering a further point, on which the case is not reported in the reports cited, namely, whether the debt was subjected to the charge imposed by s. 1 (xvi) of the Treaty of Peace Order, 1919 (S.R. & O., 1919, No. 1517). If that were so, the debt would have become vested in the Crown and time would not have run against the plaintiffs in that case under the statute of limitation. ROMER, L.J., said: "Now the question whether the debt became subjected to the charge depends on whether on Jan. 10, 1920, it was within His Majesty's dominions." He then continued with the words quoted above and concluded that the debt did not become subject to the charge. The quotation set out above thus covers the whole of the relevant part of his judgment on this point.

obtained, the question would then arise whether the order granting leave brought the debt into this country for the first time, or established its presence here as from some earlier date. In the present case the plaintiffs obtained leave from McCARDIE, J., to serve the writ out of the jurisdiction in 1930. Was the effect of that order to establish the English locality of the debt as existing in January, 1920, or only in 1930? But I need not attempt to answer this question, for in my judgment the fact that a simple contract debt can be recovered here from a debtor out of the jurisdiction does not establish an English locality for the debt, any more than it puts an end to the debtor's absence beyond the seas for the purpose of the statute of limitation."

The Russian bank, in my judgment, resided only in Russia, the situs of the alleged debt was in Russia, and the consequence is that it was destroyed at the moment of the dissolution of the Russian bank in Russia if not before. Having formed a clear view on this point, it is unnecessary to consider the innumerable other points which otherwise would arise. The proof is rejected in whole.

Application dismissed.

Solicitors: *Holland & Co.* (for the applicant); *Slaughter & May* (for the liquidator).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

SHARKEY (INSPECTOR OF TAXES) *v.* WERNHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), July 5, 6, 7, 1954.]

Income Tax—Profits—Transfer of horses from stud farm to racing stable in same ownership—Credit figure in farm accounts—Cost of breeding or market value—Income Tax Act, 1918 (c. 40), sched. D, Case I.

The taxpayer's wife carried on a stud farm, the profits of which were assessable to income tax under the Income Tax Act, 1918, sched. D, Case I. She also trained horses and ran them at race meetings as a recreation, in respect of which no liability for tax arose. In 1948 she transferred five horses from the stud farm to her racing stables. In her farm account she showed the cost of breeding the horses as a debit and she claimed that the same figure should be credited in respect of the transfer for income tax purposes.

HELD: although the racehorse activities of the taxpayer's wife, which were one whole, had to be treated for income tax purposes as divided artificially into two things, viz., the stud farm and the racing, the value to be attributed to the horses for the purposes of ascertaining the stud farm profits ought to be a real figure and not a notional figure; accordingly, the cost of breeding the horses and not their market value on an imaginary sale should be credited in the stud farm accounts.

Briton Ferry Steel Co., Ltd. v. Barry ([1939] 4 All E.R. 541), and *Laycock v. Freeman, Hardy & Willis, Ltd.* ([1938] 4 All E.R. 609), followed.

Inland Revenue Comrs. v. Wm. Ransom & Son, Ltd. ([1918] 2 K.B. 709), considered.

Watson Bros. v. Hornby ([1942] 2 All E.R. 506), overruled.

Decision of VAISEY, J. ([1953] 2 All E.R. 791), reversed.

FOR THE INCOME TAX ACT, 1918, sched. D, Case I, THE FINANCE ACT, 1941, s. 10, and THE FINANCE ACT, 1948, s. 31, see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 153, 514 and 831; and FOR THE CORRESPONDING PROVISION OF THE INCOME TAX ACT, 1952, viz., s. 123, s. 124, see *ibid.*, Vol. 31, pp. 116, 121.

Cases referred to:

(1) *Watson Bros. v. Hornby*, [1942] 2 All E.R. 506; 168 L.T. 109; 24 Tax Cas. 506; 2nd Digest Supp.

- (2) *Lagcock v. Freeman, Hardy & Willis, Ltd.*, [1938] 4 All E.R. 609; [1939] 2 K.B. 1; 108 L.J.K.B. 270; 160 L.T. 41; 22 Tax Cas. 288; Digest Supp.
- (3) *British Ferry Steel Co., Ltd. v. Barry*, [1939] 4 All E.R. 541; [1940] 1 K.B. 463; 109 L.J.K.B. 250; 162 L.T. 202; 23 Tax Cas. 414; 2nd Digest Supp.
- (4) *Island Revenue Commrs. v. Ransom (Wm.) & Son, Ltd.*, [1918] 2 K.B. 709; 88 L.J.K.B. 342; 119 L.T. 369; 12 Tax Cas. 21; Digest Supp.
- (5) *Dublin Corpn. v. M'Adam (Surveyor of Taxes)*, (1887), 2 Tax Cas. 387; A 28 Digest 21, l.
- (6) *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 56 J.P. 709; 3 Tax Cas. 185; 28 Digest 59, 302.
- (7) *Glenboig Union Fireclay Co., Ltd. v. Island Revenue*, 1922 S.C. (H.L.) 112; 12 Tax Cas. 427; Digest Supp.

APPEAL by the taxpayer against an order of VAISEY, J., dated July 24, 1953, and reported [1953] 2 All E.R. 791, dismissing an appeal by way of Case Stated from the Special Commissioners of Income Tax.

The taxpayer appealed against an assessment to income tax made on him in respect of the profits of the stud farm of his wife, Lady Zia Wernher. In the year ending on Dec. 31, 1948, Lady Wernher transferred five horses from her stud farm to her racing stables, which she carried on as a recreational activity and not as a trade. The cost of breeding the horses had been debited in the stud farm accounts, and it was common ground that some figure had to be brought into the accounts as a receipt in respect of the transfer for income tax purposes. The taxpayer contended that the cost of breeding should be so credited and not the market value as contended by the Crown, and the commissioners upheld this contention and allowed his appeal. VAISEY, J., allowed the Crown's appeal against this decision and the taxpayer appealed to the Court of Appeal.

Graham-Dixon, Q.C., Senter, Q.C., and P. M. B. Rowland for the taxpayer.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills for the Crown.

SIR RAYMOND EVERSHED, M.R.: The question in this case relates to the liability of the taxpayer, Sir Harold Wernher, for income tax for 1949-50 in respect of an enterprise carried on by his wife—Lady Zia Wernher—namely, a stud farm. The matter does not depend on a finding of fact by the Special Commissioners, but is a question of law, that is to say—in the accounts of the farm for the year in question, which are assumed to be the basis of assessment, what figure should be set against certain colts and fillies transferred or moved during the year out of and away from the stud farm for Lady Zia's own racing purposes? Should it be the cost of the animals up to the date of their movement, or their market value, i.e., the sum which they would have fetched if sold in the ordinary course on the date of transfer? The Special Commissioners were of opinion that the former was the proper figure. VAISEY, J., regarding himself as bound by the decision in *Watson Bros. v. Hornby* (1), concluded for the latter view.

At the stud farm known as Someries, Lady Zia carried on the enterprise of breeding racehorses, maintaining a number of stallions and brood mares, from which she raised young stock, some of which she sold. In one or two instances she gave the animals to her daughter; in other cases—and this is the most significant fact for present purposes—the young colts and fillies were transferred from the stud farm to be trained and used by Lady Zia for racing. In the year in question five such colts and fillies were so transferred.

For the purposes of this case, certain concessions were made on the part of the taxpayer and the Crown. (i) It was agreed that the enterprise of the Someries stud farm was husbandry, and, therefore, fell, by virtue of the joint effect of s. 10 of the Finance Act, 1941, s. 28 of the Finance Act, 1942, and s. 31 of the

Finance Act, 1948, to be taxed under Case I of sched. D. Paragraph 1 of sched. D reads:

"Tax under this schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation . . ."

Paragraph 2 reads:

A "Tax under this schedule shall be charged under the following cases respectively; that is to say—Case I—Tax in respect of any trade not contained in any other schedule."

B (ii) It was agreed that Lady Zia's racing enterprises were purely recreational and, therefore, that she was not taxable in respect of any profits or gains which she might make thereout. (iii) It was agreed that the five colts and fillies moved or transferred from the farm must be treated as having left the farm as completely and effectually for all purposes as if they had been sold outright or as if, indeed, they had died or had been destroyed. I emphasise the third point of concession because I must not be taken, in the course of this judgment, to be indicating any opinion on what the position might be for tax purposes if any of these animals had been or were thereafter sold or transferred or moved back to the farm. It will be seen that Lady Zia, at all relevant dates, was pursuing two distinct activities, both concerned with racehorses, (i) the taxable business of the stud farm and, (ii) the non-taxable activity of racing horses. The question to be decided concerns the movement of an item of property or stock from the scope of one activity to the scope of another.

D The accounts consist of a balance sheet, capital account, profit and loss account, and horse account. On the left-hand side of the horse account appear, by name, the various animals—stallions, brood mares and young stock—which, at the beginning of the year covered by the accounts, formed the stock of the stud farm. The first item is the stallion, Precipitation, against which appears the figure of £40,000, representing (I take it) its value at the beginning of the year. Under the heading "Yearlings" appear, among others, the five colts and fillies with which we are concerned. I take one to illustrate them all. A chestnut colt, by Hyperion out of Doubleton, appears at the opening of the account with the figure of £572 12s. against it. That figure represents, as I understand, the cost to Lady Zia of that colt up to Jan. 1, 1948. At the end of the account on the left-hand side is a reference to certain other animals bred during the year, which appear with no figure against them because they were non-existent at the opening of the year. On the right-hand side appear the animals in existence and forming the stock at the close of the accounting period. The account opens again with the stallion, Precipitation, which, I take it, at this date was ageing, because its value is shown there at the reduced sum of £30,000. Going down the page to the animals with which we are concerned, which appear under the heading "Animals transferred to training", the chestnut colt I have mentioned, by Hyperion out of Doubleton, appears with the figure of £692 against it, the difference between that and the former figure representing the added cost or expenditure on the animal from Jan. 1 up to the period of its movement from the stud farm. In order to illustrate the nature of the amount involved in this dispute, there also appears in the account, set against this young animal, a further figure of £3,900, that being, for the purposes of this argument, the figure which should appear against the colt if its market value were appropriate to be there inserted.

H On the accounts as they stood, the total of the figures on the right-hand side—i.e., the value of the stock at the close of the period—was less than that of the corresponding figures at the beginning of the period by £16,373. That balance figure is then brought into the profit and loss account. The profit and loss account really consists of two parts. The first part, on the left-hand side, consists of the

various items of expenditure in the ordinary course—wages, forage, horse-keep, veterinary charges and so forth, including rates, telephone and the usual expenses of any enterprise. On the right-hand side, the main item consists of service fees, and in addition to the breeding of horses on the farm, the stallions—and particularly the stallion Precipitation—were made use of by serving mares belonging to other owners, for which services fees were received. In the year in question Precipitation earned £15,540 in this way. So far, the service fees and other receipts exceed the wages, upkeep and so forth, by £4,851. The adverse balance on horse account and other items are then brought in, however—“reserve for taxation” and so on—so that, in the end, for the year in question an adverse balance is shown of £10,423, transferred to capital account. Again, if for the cost figures on the right-hand side of the horse account had been substituted the market value, the adverse balances on the horse account and on the profit and loss account would have been reduced by approximately £7,000.

The five colts and fillies were part of the farm stock at the beginning of the period covered by the account. They had been bred, not bought. It was a principal object of the farm so to breed them. They had been brought into the horse account at figures representing their cost up to the beginning of the accounting period. As they had been moved out of the stock before the end of the accounting year, some corresponding figure, admittedly, has to be placed on the right-hand side of the appropriate account. What figure? Should it be the cost figure up to the date of removal or the market value?

The argument of the Crown is that, since the stud farm is a business, and a business largely or substantially carried on for the purpose of providing Lady Zia with racehorses, in order to form a realistic view of the result of that business the relevant figure should be the true value of the stock produced and disposed of, i.e., the market value. Counsel denies that he is seeking to introduce any imaginary sale. It is, he says, a matter of properly valuing the animals, and their proper and true value is their market value. On the other hand, counsel for the taxpayer contends that, whatever might have been the true value of these young horses for one purpose or another, the true value was never realised as a matter of business, any more than it would have been realised if the animals had been given away by Lady Zia to her daughter or to some third party. At all relevant dates before and after the removal from the farm the animals remained Lady Zia's own horses, with which she could do exactly what she liked. To take one of the many examples cited, a professional grower of roses could plant one of his own roses for his own enjoyment in his own garden. The taxpayer says that to take the market value for this purpose in those circumstances is inevitably to suppose that which never occurred, and to create a non-existent item of receipt solely for the purpose of taxation. If this matter were *res integra*, I think that as a matter of common sense there would be much to be said for the view of counsel for the Crown that, since for the purpose of this horse account one is seeking to put a value on these animals, the value is that which they are in fact worth. But this matter is not *res integra* and after consideration of the authorities which expound the general principle applicable, my view is that we should decide this matter for the taxpayer.

Vaisey, J., took the view that he was bound by the decision in *Watson Bros. v. Hornby* (1). He said ([1953] 2 All E.R. 792):

“My decision in this case is based on the fact that it is, in my judgment, indistinguishable in principle from an earlier decision, that of MACNAGHTEN, J., in *Watson Bros. v. Hornby* (1). Counsel for the taxpayer now admits this, but contends that that case ought not to be followed on the grounds (i) that it was plainly wrong, and (ii) that it was irreconcilable with the decisions of the Court of Appeal in *Laycock v. Freeman, Hardy & Willis, Ltd.* (2) and *Briton Ferry Steel Co., Ltd. v. Barry* (3). I am not altogether satisfied on either point, but taking the second one first it seems to me that the statements

in the two latter cases on which counsel relies (to which I will refer in a moment) ought not necessarily to be treated as axiomatic, but rather as being of general though not universal application. Those two cases both dealt with the question of succession to discontinued businesses, and there is no doubt that the judgments in each case were based on the general principle that it is not legitimate to charge a man with the notional profits of a notional sale made or assumed to be made by himself to himself."

A The learned judge then referred to the *Briton Ferry* case (3) and to the *Watson Bros. v. Hornby* case (1). He rejects the alleged distinction between the present case and that of *Watson Bros. v. Hornby* (1) and concludes (*ibid.*, 793):

B "The justification for departing in *Watson Bros. v. Hornby* (1) from the general principle that a man cannot trade with himself, buy from himself, sell to himself, and make notional profits out of himself, was obviously that the Income Tax Act, 1918, itself had, by splitting the personality of the taxpayer, and putting the two parts of him into different schedules, made such a notional dichotomy inevitable. If that is the explanation, I cannot see why a similar consequence should not follow from the splitting of Lady Zia's activities between farming, which is taxable, and racing, which is not. I am by no means convinced that *Watson Bros. v. Hornby* (1) was
C wrongly decided, and I think that it is my duty to follow it."

I agree with VAISEY, J., that this case is really indistinguishable from *Watson Bros. v. Hornby* (1), and it is, therefore, necessary for us to express a view whether it was rightly decided, in accordance with the principle expounded in the Court of Appeal cases referred to by VAISEY, J., particularly the *Briton Ferry* case (3).
D In *Watson Bros. v. Hornby* (1) the taxpayer was carrying on two enterprises, one of which fell to be taxed under sched. B and another under sched. D. The sched. B enterprise was that of a poultry farm and the sched. D enterprise that of a hatchery. Some nine hundred thousand chicks were hatched during a year, but the trade was such that the cost of hatching them for the most part greatly exceeded their market value. The market value of a day-old chick was 4d.,
E and the cost of its production was 7d. As regards chicks which the taxpayer chose to transfer from his hatchery to his own farm for brood purposes, the question was, must he credit himself in the accounts of his hatchery business with the market value of 4d. or the cost figure of 7d. per chick? To make the parallel with the present case clear, it is as though the day-old chicks transferred from the hatchery were the fillies and colts transferred from the stud farm. The Crown
F contended that the proper sum to represent the chicks transferred to the farm was the cost figure of 7d. per chick and not the market value of 4d., on the ground that the hatchery and the farm were two activities of the same person, who could not trade with himself or make a loss by transferring from one department to another. The credit of 4d. was, in effect a writing-off of the unrealised loss of 3d. per chick, which could be arrived at only by treating the taxpayer
G as trading with himself and by writing off a loss not actually incurred, and the correct valuation was 7d., the admitted cost of production. If the Crown's argument was correct, the putting of 7d. into the right-hand side of the hatchery account very substantially decreased the loss of the hatchery business or increased its profits, as the case might be. But the taxpayer succeeded, the learned judge holding that the sum to be placed in the account as representing the value
H of each chick transferred was its market value of 4d. MACNAGHTEN, J., said ([1942] 2 All E.R. 507):

"The question now before the court is: What is the price at which the chicks should be deemed to have been bought by the farm from the hatchery? The appellants are the proprietors of both the hatchery and the farm and it is said that a person cannot trade with himself. That, no doubt, is quite true; but for the present purpose it is, I think, necessary to regard

the hatchery and the farm as separate entities. Where one person buys goods from another but the contract of sale does not specify the price to be paid, the contract is, nevertheless, valid and enforceable. The law provides that the purchaser must pay a reasonable price."

And, as the learned judge pointed out, the reasonable price is now determined by applying the Sale of Goods Act, 1893. There seems to be a certain unreality in introducing the Sale of Goods Act in a matter concerning the notional sale by a man to himself, and counsel for the Crown has made it plain that he is not saying that there was a notional sale. The question, however, is whether, on his analysis, he can avoid it. Whatever may be the argument here, it is not in doubt that MACNAGHTEN, J., did decide *Watson Bros. v. Hornby* (1) on the footing that he must treat the taxpayer as having sold from himself, as a hatchery owner, to himself, as a farmer.

In that case, as in the present one, there were two enterprises or activities. It is true that both enterprises were liable to be taxed, though under different schedules, but, as counsel for the Crown himself accepted, it is not relevant or conclusive that the enterprises should be taxable. In that case, as in this, the question was: At what figure should an item of property belonging to the owner of both enterprises be entered in the accounts, when it is transferred from one to the other?

So far as the report shows, the two Court of Appeal cases (*Laycock v. Freeman, Hardy & Willis, Ltd.* (2) and *Briton Ferry Steel Co., Ltd. v. Barry* (3)) were not cited to MACNAGHTEN, J., though the argument of the Crown would plainly have been substantially supported by at least a citation of the latter. Counsel for the Crown, however, now says that the argument they put forward in *Watson Bros. v. Hornby* (1) is no longer accepted as correct, and their case now necessarily involves a denial of the correctness of their earlier argument.

Inland Revenue Comrs. v. Wm. Ransom & Son., Ltd. (4) in some respects shows a close analogy to the present one. The taxpayer carried on the activities of a herb grower and a manufacturer of chemicals from the herbs. He had been taxed in respect of these activities without distinguishing between them, i.e., on the footing that they all formed part of a single business enterprise. He claimed successfully that the two parts of his enterprise should be treated as distinct. His point was that the herb growing activities, being a kind of husbandry, did not attract excess profits duty. As an incident to the decision of the case, memoranda were produced in which had been recorded the market values or prices of the herbs transferred from the herb-growing part of the taxpayer's enterprises to the factory. It was suggested before us, therefore, that the facts in *Ransom's* case (4) supported the view that the market value—or, in other words, the true value in a commercial sense—was the right value for accounting purposes to enter assets transferred from one activity of a taxpayer to another. In my judgment, the case is no authority for that view, because the question of the right amount was never in issue or debated. Indeed, SANKEY, J., said (12 Tax Cas. 27):

"Upon the other side of the account there is set out the stocks in hand on Dec. 31 together with three other items, the first of which is the produce which is sold to the factory amounting to £276; the second is produce sold generally to the public . . ."

That shows that the matter can never have been really debated or considered, because there never was any sale from the farm to the chemical factory, and counsel for the Crown does not here contend that there was any sale of these colts and fillies by Lady Zia to herself.

Counsel for the taxpayer relied on several passages from the judgment of SIR WILFRID GREENE, M.R., in *Laycock v. Freeman, Hardy & Willis, Ltd.* (2), as expounding the general principle on which he founds his argument, viz., that one is taxed on profits that are actual and not imaginary. I agree on the whole with counsel for the Crown that this case, although containing expressions

A of general utility, is not conclusive or decisive in the present instance. The taxpayers were retailers of boots and shoes. Up to a date in 1935 they had wholly owned and controlled separate entities which manufactured large numbers of boots and shoes, sold by them later in their shops. So long as the manufacturing businesses were separate entities, even though they were controlled by the retail company, the transfer of boots and shoes from the manufacturing business to the retail business inevitably took the form of a sale, notwithstanding the fact that the prices might well be controlled by the retail buyer. In 1935 the whole business of the company was reorganised. The manufacturing businesses were put into liquidation and the retail business acquired the assets and the undertaking of the manufacturers, so that, thenceforward, they were not two entities but one single enterprise of the manufacture and sale to the public of boots and shoes. The case concerned the succession to what was described as the manufacturing business, and the court held that the taxpayers were a single entity, which both manufactured and sold shoes; that the activity of manufacture was not of itself a profit-making business; and, therefore, that there was no ground for suggesting that some notional figure must be ascribed to the manufacturing activities, as though they had formed a separate business selling to the retail house.

B On the other hand, I have come to the conclusion that, in the *Briton Ferry* case (3), the principles to be applied here were stated in a form which inevitably applies to and covers the present case. In a sense the *Briton Ferry* case (3) was the converse of the *Freeman, Hardy & Willis* case (2) because in the *Briton Ferry* case (3) the taxpayers who had at one time sold their manufactured products, steel bars, to subsidiary companies which made tinplate, put the tinplate companies into liquidation, acquired their businesses, and made the tinplate manufacturing business a branch of their own undertaking. For the sake of simplicity I will assume that there was but one tinplate business. After the amalgamation and reconstruction, therefore, the taxpayers carried on two enterprises or activities. One was the manufacture of steel bars from raw materials, and the other was the manufacture of tinplate from the steel bars, which for such purpose became the primary product. It is true that the case was concerned with succession for income tax purposes, but the question debated was, at what figure, for the purposes of the tinplate business, ought the manufactured raw material of steel bars to be brought into account? The analogy, therefore, is close. If the business of steel bars is treated as the stud farm, then the steel bars become the colts and the fillies. The racing enterprise does not happen itself to be taxable, but, as I understand counsel for the Crown, that fact is not relevant. If the question is at what figure for the purposes of the racing activity ought the colts and fillies—i.e., the steel bars—to be brought into account, then, inevitably, that same figure must be the figure at which those same colts and fillies—i.e., the same steel bars—should be shown as having left the stud farm—i.e., the steel bar manufacturing business.

C The passage which seems to me to state the principle involved and to require us to conclude this case in the taxpayer's favour is in the judgment of SIR WILFRID GREENE, M.R. ([1939] 4 All E.R. 550):

H "The problem, therefore, is to arrive at the taxpayer's profit in accordance with the section, and anything in the shape of a notional sale must be rejected, if that would involve ascribing to the taxpayer a profit which he has never earned . . . The solution, in my judgment, is along different lines. It seems to me that the businesses acquired may properly, for the purposes of the subrule, be treated, and should be treated, as beginning at the steel bar stage—namely, the stage when those branches of the business procure for themselves a steel bar. Obviously, in order to arrive at profits of those branches of the business on that basis, some figure must be brought into account to represent the cost of the steel bar. If that figure is based on an imaginary sale price at a profit, it is an unreal figure. If, on the other hand,

it is brought in at the actual cost of producing that steel bar, it is a real figure, and, if we treat—as we are bound by the rule to do—the two parts of what is in truth one business as though they were held apart, the only way in which, in my judgment, that direction can logically be carried out is the way that I have indicated of bringing in the raw material—namely, the steel bar—at the actual cost of production.”

The present is a case, as it seems to me, in which we are bound (to use the language of the Master of the Rolls) to treat as consisting of two parts what is in fact one thing, i.e., we are bound to treat as divided into two Lady Zia Wernher's activities in connection with racehorses, part one being the stud farm and part two being her racing activities. It seems to me to be irrelevant that the *Briton Ferry* case (3) concerned what I would call the entry figure for the moved item when it arrived in the second part of the total of the activities. The same figure must equally have been applied to the removal figure of the same item, when it went from the first part of the total activities. That being so, if there were substituted for steel bars the words, “colts and fillies,” it seems to me that the language of the *Briton Ferry* case (3) must apply in this case. That case states a principle which I think it is our duty to apply, viz., that, for the purpose in hand, there being an artificial division imposed by Parliament on the total of the activities of a single individual, we must bring or insert into the horse account a real figure and not an unreal figure. It follows that, in my judgment, the principle stated and the reasoning underlying the judgment of SIR WILFRID GREENE, M.R., in the *Briton Ferry* case (3) are inconsistent with the conclusion in the *Watson Bros. v. Hornby* case (1), and, therefore, inconsistent with the conclusion of VAISEY, J., which followed that case. Several other cases were cited and instances given in the course of argument, but I do not think it is necessary to refer to them. I think they add nothing to the reasons which I have stated. I think this appeal must be allowed.

JENKINS, L.J.: I agree. Lady Zia Wernher carries on a stud farm. That is an activity which is classed as husbandry for income tax purposes and, as the law now stands, husbandry is taxable under Case I of sched. D as a trade and not, as formerly, on an annual value basis under sched. B. Lady Zia also indulges in the sport of racing and for that purpose she carries on a racing stable where horses are trained and entered for races. It is common ground that this is an activity in respect of any profits of which no tax is exigible. Lady Zia sells some of the produce of her stud farm from time to time, and she also uses her stallions for the purpose of serving, for fees, mares brought in by other owners, but it is clear that the main purpose for which she conducts her stud farm is to supply suitable horses to her racing stable.

In the year ending Dec. 31, 1948, Lady Zia transferred or moved five yearling horses to her racing stable. It is common ground that, inasmuch as these horses have been withdrawn from the stock-in-trade of the stud farm business, according to proper principles of accountancy it is necessary to credit the accounts of that business with some figure in respect of the stock so withdrawn. The matter in dispute is what figure is appropriate. Counsel for the taxpayer claims that the proper figure is the cost of breeding these horses—the cost being the figure at which they were carried in the books of the stud farm business down to the date of their withdrawal. On the other hand, the Crown contend that the proper figure is a figure representing the market value of the five horses at the time of their withdrawal. That would be a figure substantially in excess of the cost, the cost figure being £1,800 or thereabouts, whereas the market value figure was about £10,600.

In contending for the figure of cost, counsel for the taxpayer goes back to first principles. He begins his argument by referring to the relevant charging provisions in para. 1 of sched. D to the Income Tax Act, 1918, under which the tax extends to “profits or gains arising or accruing . . . from any trade . . .”

He says that those words mean profits and gains really and truly arising or accruing from the trade, and refer to actual realised profits and nothing else. He claims that, according to the first principles of income tax law, no man is bound to make a profit in his trade. He can trade or not, as he pleases, and sell his stock-in-trade or not, as he pleases, and he is not to be charged on any hypothetical basis for profits which he might have made had he been so minded, or profits which he has elected to forgo. Applying these general principles to the present case, counsel says that there is no more ground here for crediting the stud farm business with the market value of the five horses withdrawn than there would be for charging Lady Zia with the market value of horses which she might choose to withdraw from the stud farm business and dispose of by way of gift. He submits that no profit enters into the case, unless and until the horses are sold; there is no actual realised profit, there is merely the possibility of sale at a profit at some future date, and that possibility cannot attract tax.

In support of his argument, counsel referred us to several general statements in the authorities, in particular *Dublin Corpn. v. M'Adam (Surveyor of Taxes)* (5), which he cited for the proposition stated by PALLES, C.B. (2 Tax Cas. 397), that a man cannot trade with himself. He also referred us to *Gresham Life Assurance Society v. Styles* (6) for the statement of LORD HALSBURY, L.C., that ([1892] A.C. 315):

"The thing to be taxed is the amount of profits and gains. The word 'profits' I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand. But when once an individual or a company has in that proper sense ascertained what are the profits of his business or his trade, the destination of those profits, or the charge which has been made on those profits by previous agreement or otherwise, is perfectly immaterial."

Again, for the general principle, counsel for the taxpayer referred us to *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue* (7), for an observation by the Lord President (LORD CLYDE), the matter under discussion being the quality of a sum received by a fireclay company in respect of the sterilisation of a seam of fireclay for the purpose of ensuring support to a railway. LORD CLYDE said (12 Tax Cas. 449):

"But, even so, it is a consideration or substitute, not for profits earned or capable of being earned, but for profits irretrievably lost and incapable of being ever earned. The taxing Acts deal with profits made, not with profits lost—with actual, not with hypothetical profits—and it is by the words of the taxing Acts that we are bound."

Counsel for the taxpayer also relied on the cases to which my Lord has referred of *Laycock v. Freeman, Hardy & Willis, Ltd.* (2), and *Briton Ferry Steel Co., Ltd. v. Barry* (3). Whilst these cases admittedly deal with a different question, i.e., succession to a trade or business, he relied on certain observations of SIR WILFRID GREENE, M.R., which, he claimed, supported his contention in this case. My Lord has already referred to the more material passages in the *Briton Ferry* case (3), and I will not repeat his citations. I would, however, add a reference to a passage from the *Freeman, Hardy & Willis* case (2), which seems to me to assist counsel's contention. The question was whether the taxpayers, having absorbed two subsidiary companies, which formerly manufactured boots and shoes and sold them to the parent company for re-sale in their retail shops, had succeeded to the wholesale business formerly carried on by the subsidiaries, SIR WILFRID GREENE, M.R., said ([1938] 4 All E.R. 616):

"The profit that Freeman, Hardy & Willis, Ltd., now make by selling those products retail in their shops is realised by the intervention of the retail business, which was their business all along, and is their old business. It therefore seems to me impossible to predicate of the profits which they

make by selling in their retail shops these boots and shoes manufactured in these factories that they are profits referable, for the purposes of the rule, to the trade to which they succeeded. The Crown endeavours to get out of that difficulty by an argument to this effect. It says: The profit which is made by selling the boots and shoes retail in the shops can, for the present purpose, be dissected and split up into two profits, the wholesaler's profit and the retailer's profit, and, in so far as the profit is referable to the head of the wholesaler's profit, that is to be deemed for the purpose of the rule to be the profit derived from the carrying on of the trade taken over. In my judgment, that is wholly illegitimate. There is no such thing in a case of this kind, for any income tax purpose, as a wholesaler's profit. It is wholly non-existent. The expression is a convenient one from the point of view of accountants, whose task it is to dissect profits and attribute them in part to one aspect of their client's activities and in part to another aspect of their client's activities. Obviously a wholesaler makes a wholesaler's profit and a retailer makes a retailer's profit. Nevertheless, to say of a manufacturer who sells retail that he makes two profits, a wholesaler's profit and a retailer's profit—although for accountancy purposes it may be very convenient and useful that the accounts should be kept on that basis—has no reality in fact, since no profit is realised until the goods are sold, and the profit that is realised is the profit realised by disposing of the goods by sale."

In my view, that passage, as well as the passages in the *Briton Ferry* case (3) to which my Lord has referred, does support the contention of counsel for the taxpayer. There has been no sale in this case—no realisation of any profit—and there is no justification for assuming a sale for the purpose of imputing to Lady Zia a profit which she has never in fact realised.

On the Crown's side, it is urged that the market value must be taken in order to give a true picture of the financial results to Lady Zia of the carrying on of the stud farm, and they say that that is so because Lady Zia's main object in breeding horses is to supply her racing stable, and the effect of her operations in carrying on the stud farm is to supply her racing stable with horses. I am unable to follow that argument. The Crown say that the figure of market value can be adopted without assuming a sale of these five horses by Lady Zia. I cannot agree. It seems to me that the phrase "market value" necessarily means the price which the property in question would fetch if sold in the market, and, therefore, charging Lady Zia with a market price figure does mean assuming, for the purpose of calculation, that she has realised the horses by sale. That assumption, to my mind, by no means gives a true picture of the financial results to Lady Zia of carrying on the stud farm. There is no sale and no realisation of the market value. All that has happened is that these horses, for reasons which seemed sufficient to Lady Zia, have been withdrawn from the trade and placed at the racing stable. They are the same horses as they were when included in the assets of the stud farm. Their value has not increased merely by their being moved to the racing stable. If Lady Zia did not choose to realise these horses in the course of the stud farm business, but preferred to withdraw them and send them to the racing stable, it cannot, in my view, be said that she has by that transaction made any profit in her trade or business of a stud farm, even though she may sell them at a profit at some future date.

For these reasons, both on principle and on the authorities, the conclusion contended for on behalf of the taxpayer is, in my opinion, the right one, and the figure to be credited to the books of the stud farm in relation to these five horses should be the cost figure. The learned judge took a different view, but, as appears from his judgment, he did that largely because he considered himself bound by the case of *Watson Bros. v. Hornby* (1). In my view, the learned judge, sitting as a judge of first instance, was right in considering himself so bound, and though I agree with the Master of the Rolls that *Watson Bros. v. Hornby* (1) cannot stand

with the *Freeman, Hardy & Willis* case (2) and the *Briton Ferry* case (3), it was later in date than either of those two cases, which would have made it difficult for the learned judge, sitting at first instance, to do otherwise than hold that they were distinguishable from the case of *Watson Bros. v. Hornby* (1), since it was not necessarily to be assumed that MACNAGHTEN, J., had not those two earlier cases in mind when he decided that case. Accordingly, in the state of the authorities, the learned judge, in my view, really had no option but to conclude as he did in favour of the Crown.

I agree with what the Master of the Rolls has said about *Inland Revenue Comrs. v. Wm. Ransom & Son, Ltd.* (4) where the figure of market value was taken in a case in which, according to the principles which, in my view, should prevail, the cost would have been the appropriate figure. There was no argument in that case as between the cost figure and the market value figure, and it cannot, in my view, be regarded as any authority for saying that the market value figure ought to be adopted in the present case. Accordingly, for the reasons my Lord has given, and the reasons I have added, I agree that this appeal should be allowed.

HODSON, L.J.: I agree. The learned judge said that he based his decision in this case on the fact that it was, in his judgment, indistinguishable in principle from MACNAGHTEN, J.'s decision in *Watson Bros. v. Hornby* (1). I agree with him that this case is so indistinguishable, and I agree with my Lords that, in the circumstances, the learned judge was right in following that decision. But, in my judgment, for reasons which have been given, the decision in *Watson Bros. v. Hornby* (1) is inconsistent with principle and authority and ought to be overruled. In this case there was no sale from the stud farm to Lady Wernher in her capacity as racehorse owner, and there is no justification for valuing the horses at market value, which is, I think, the same thing as treating the horses which passed from the stud farm to herself in the latter capacity as having passed by a notional sale. I am of the opinion that the authorities quoted by the Master of the Rolls, *Laycock v. Freeman, Hardy & Willis, Ltd.* (2) and *Briton Ferry Steel Co., Ltd. v. Barry* (3), are both strongly in favour of the contention of the taxpayer and illustrate the general principle for which he has contended. I agree that the appeal should succeed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Withers & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

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NOTE.

R v. INDUSTRIAL DISPUTES TRIBUNAL AND ANOTHER.
Ex parte AMERICAN EXPRESS CO., INC.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Slade, J.J.), July 22, 1954.]

Costs Prohibition Motion for prohibition to Industrial Disputes Tribunal
 Unnecessary for both Minister and trade union to be represented Costs to
 be allowed only for one of them.

MOTION for an order of prohibition directed to the Industrial Disputes Tribunal to prohibit them from further proceeding on a reference made to them by the Minister of Labour and National Service.

The applicants were employers who were a party to an industrial dispute, the other party to the dispute being the National Union of Bank Employees. Both the trade union and the Minister had been served with notice of the motion (see R.S.C., Ord. 59, r. 5 (2)), and at the hearing the applicants, the trade union and the Minister were all separately represented by counsel.

After the application had been refused the court made an order that the applicants should pay the costs of the Minister and of the trade union.

LORD GODDARD, C.J., after consultation with the other members of the court, said: The court does not like having to give two sets of costs in these cases. It seems to us that if the Minister is satisfied that the trade union is going to be represented and argue the case, then the Minister ought not to be represented, or if the trade union is satisfied that the Minister is going to argue the case, as he generally has done, then the trade union need not be represented. It is desirable to say that the opinion of the court is that in future in matters of this sort not more than one set of costs will be granted. The Minister may in some cases wish to be represented, even if he appears as *amicus curiae*, but I do not think we ought to put on employers the burden of paying two sets of costs. In this case, as we have not given special directions and both the Minister and the union were properly served because it was sought to prevent them from continuing with the proceedings, they will have their costs, but we do not think we ought to order it in the future. The mere fact that parties are served does not make it necessary for them to appear. I have no doubt that both the union and the Minister ought to be served. But as a general rule they may be able to settle which of the two is going to argue the matter and whether the Minister is content to rely on counsel for the union. It is very seldom that we have found it necessary to hear both counsel for the Minister and for the union. I want it noted that in the future the court will consider very carefully whether or not they will give more than one set of costs.

Renton, Q.C. for the applicants.

W. Gumbel for the Minister.

Pain for the trade union.

Solicitors: *Stafford Clark & Co.* (for the applicants); *Solicitor, Ministry of Labour and National Service* (for the Minister); *Blatchfords* (for the trade union).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

R. v. HADFIELD.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Cassels and Slade, JJ.), July 19, 20, 1954.]

Court-Martial Jurisdiction—Time-expired soldier not transferred to the reserve—Whether subject to military law—Army Act, s. 90.

A The appellant, a serving soldier whose service of five years with the colours expired on June 10, 1953, was not transferred on that date to the reserve but remained with his unit overseas drawing the pay of his rank. On June 17, 1953, he was arrested on charges of conspiring to steal and stealing government property and was subsequently tried before a court-martial and convicted. He appealed against that conviction on the ground that the court-martial had no jurisdiction.

B HELD: the appeal failed and must be dismissed. Although by the provisions of s. 90 (3) of the Army Act a member of the regular forces was entitled to be transferred to the reserve, it was further provided by sub-s. (1) that until so transferred he should be subject to that Act as a soldier of the regular forces. The appellant had not been transferred to the reserve at the time of his arrest or at the time of his trial and, therefore, the court-martial had jurisdiction.

C Appeal dismissed.

FOR THE ARMY ACT, s. 90, see HALSBURY'S STATUTES, Second Edn., Vol. 22, p. 324; compare AIR FORCE ACT, s. 90, *ibid.*, p. 547.

APPEAL against conviction by court-martial.

D The appellant, Sergeant George Hadfield of the Royal Army Service Corps, was convicted by court-martial in the Suez Canal Zone of conspiracy to steal and stealing large quantities of Sten gun parts and other government property and selling them to the Egyptians and was sentenced to ten years' imprisonment. He appealed against his conviction on two grounds: (i) that the court-martial which tried him had not jurisdiction because he was not subject to military law; and (ii) that the court-martial was misdirected on corroboration. Leave to appeal on the first ground was granted by GORMAN, J., and it is only on this point that the case is reported.

Skelhorn, Q.C., and Brodrick for the appellant.

E. Garth Moore for the Crown.

F LORD GODDARD, C.J., delivered the following judgment of the court. The appellant, who was a sergeant in the Royal Army Service Corps, was convicted of various offences, serious offences, before a court-martial sitting in the Canal Zone, and was sentenced to ten years' imprisonment. He has appealed, and the first point that has been taken by his counsel is that he was not subject to military law, the fact being that he was enlisted on June 10, 1948, for five years with the colours and seven years on the reserve. His colour service terminated, so it is said, on June 10, 1953. He was arrested for these particular offences on June 17 while in Egypt, still apparently drawing pay as a sergeant, and not having at that time been sent back to the United Kingdom.

G The point that is raised is this. By the Army Act, s. 90 (1)*, it is provided:

H "Save as otherwise provided by this Act or the Acts relating to the reserve forces, every soldier of the regular forces, upon becoming entitled to be discharged, shall be discharged with all convenient speed, but until so discharged shall be subject to this Act as a soldier of the regular forces."

By sub-s. (3) it is provided:

"Every soldier of the regular forces upon the completion of the period

*Section 90 (1) is here printed as amended by the Army and Air Force (Annual) Act, 1952, s. 10 and sched. I.

of his army service, if shorter than the term of his original enlistment, shall be transferred to the reserve, but until so transferred shall be subject to this Act as a soldier of the regular forces."

That sub-section seems to have been amended [by the Army and Air Force (Annual) Act, 1952, s. 10, and sched. I], though counsel for the appellant has submitted that the amendment does not affect the soldier, to:

"Every soldier of the regular forces, upon falling to be transferred to the reserve, shall be transferred to the reserve, but until so transferred shall be subject to this Act as a soldier of the regular forces."

We are asked to say that this appellant ought to have been transferred to the reserve, and as he had not been transferred to the reserve but was still in Egypt and was still serving with his unit, he cannot be subject to military law. That seems to me to give the go-by to the words "until so transferred shall be subject to this Act as a soldier of the regular forces".

It is also provided by the Army Act, s. 90 (4) [as amended by the Act of 1952]:

"Where a soldier of the regular forces, when falling to be transferred to the reserve, is serving out of the United Kingdom, he shall be sent to the United Kingdom free of expense with all convenient speed, and on his arrival shall be transferred to the reserve."

It is impossible to read these sub-sections as saying that the moment a man's turn arrives for him to be entitled to be transferred to the reserve he ceases to be subject to military law. That would seem to be exactly contrary to the provision that he ceases to be subject to military law when he is transferred, but not until. He had not been transferred to the reserve at the time he was arrested or at the time he was brought before the court-martial, and I think it is quite unnecessary to consider the provisions of s. 158 or s. 87 of the Army Act, to which we have been referred. In my opinion, the court-martial had jurisdiction. On that point this appeal fails, and we will now proceed to hear the appeal on the ground that there was misdirection.

[Counsel then addressed the court on the ground of misdirection and on this point the appeal was also dismissed.]

Appeal dismissed.

Solicitors: *Hunt & Hunt*, agents for *Kingswell & Berney*, Gosport (for the appellant); *Directorate of Army Legal Services* (for the Crown).

[Reported by T. J. KELLY, ESQ., Barrister-at-Law.]

ROBERTSON v. ABERDEEN JOURNALS, LTD. AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), July 13, 14, 1954.]

Practice—Payment into court—Several causes of action Three defendants sued severally—Payment in of lump sum—Discretion of court—Damages for breach of confidence and infringement of copyright—R.S.C., Ord. 22, r. 1 (2), r. 4.

A A plaintiff's statement of claim disclosed two causes of action, viz., breach of confidence and infringement of copyright, against three defendants sued severally. On a summons for leave for all the defendants to pay into court a single sum in respect of all causes of action,

B HELD: notwithstanding the provisions of R.S.C., Ord. 22, r. 4 (1), the defendants were entitled, by virtue of Ord. 22, r. 1 (1), and Ord. 71, r. 2, to join together in making a payment into court in respect of a single cause of action: and since the plaintiff knew, and the defendants did not know, on which cause of action the plaintiff would primarily rely, it would be a grave hardship on the defendants if they had to pay in separate sums in respect of each cause of action, and, therefore, the court could properly exercise its discretion under Ord. 22, r. 1 (2) by giving leave for all the defendants to pay into court a single sum in respect of all causes of action.

C Per curiam: Order 22, r. 4, is appropriate solely to a case where some only of the defendants make payment into court.

AS TO PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 26, p. 62, para. 100; and FOR CASES, see DIGEST, Practice, pp. 478-484, Nos. 1590-1637.

Cases referred to:

- D (1) *Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q.B. 147; 65 L.J.Q.B. 262; 74 L.T. 83; 60 J.P. 52; 17 Digest 80, 13.
- (2) *Fenning Film Service, Ltd. v. Wolverhampton, Walsall & District Cinemas, Ltd.*, [1914] 3 K.B. 1171; 83 L.J.K.B. 1860; 111 L.T. 1071; 17 Digest 80, 14.
- E (3) *Tallent v. Coldwell*, [1938] 2 All E.R. 107; [1938] Ch. 653; 107 L.J.Ch. 230; 158 L.T. 347; Digest Supp.

SUMMONS in an action for leave for all the defendants to pay into court a single sum in respect of all causes of action therein.

F The plaintiff, the author and owner of the copyright in a document entitled "Proposed Memorandum on Government Fish Selling Scheme", by his statement of claim alleged: first, that he delivered a copy of the said memorandum to the third defendant, Lady Tweedsmuir, the member of Parliament for the south division of Aberdeen and that it was delivered to her in confidence in her aforesaid capacity; secondly, that the third defendant in breach of her duty of confidence permitted the second defendant, Herbert Catto, a journalist, to examine the memorandum; thirdly, that in further breach of confidence and in infringement of the plaintiff's said copyright, the first defendants, Aberdeen Journals, Ltd., and the second defendant, and each of them, without the plaintiff's consent, caused to be reproduced and published in certain newspapers of which the first defendants were proprietors, the said memorandum or a substantial part thereof. The plaintiff alleged further that by reason of the Copyright Act, 1911, s. 7, the first and second defendants had converted all copies and reproductions of the memorandum to their own use.

H The causes of action as appearing in the statement of claim were as follows: as against the third defendant, first, that she delivered the memorandum to the second defendant in breach of confidence and, secondly, that she authorised the publication and consequential infringement of the plaintiff's copyright. No claim in respect of conversion was made against the third defendant. As against the first and second defendants: first, the use of confidential information; secondly, infringement of copyright; thirdly, conversion.

F. E. Skone James for the applicants, the first and second defendants.

T. G. Roche for the third defendant.

Shelley, Q.C., and *Falconer* for the plaintiff.

UPJOHN, J.: This is an application by two of three defendants, with the concurrence of the third defendant, asking .

" for leave for all the defendants to pay into court a single sum in respect of all causes of action ",

pursuant to the discretion vested in the court by R.S.C., Ord. 22, r. 1 (2). [His Lordship stated the facts and continued:] It is plain that leave is required if it is desired to pay a lump sum into court to meet all causes of action, for Ord. 22, r. 1 (2), provides:

" Where the money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the cause or causes of action in respect of which payment is made and the sum paid in respect of each such cause of action unless the court or a judge otherwise order."

Two points arise: first, whether I should exercise my discretion under that rule; and, secondly, whether it is permissible under the rule for all defendants to make a payment in by one single payment. It is said that the causes of action here are several and not joint, and that in such circumstances no good payment in may be made by all defendants together, by reason of r. 4 (1) which provides:

" Money may be paid into court under r. 1 by one or more of several defendants sued jointly or in the alternative, upon notice to the other defendant or defendants."

It is said that that rule excludes payment in by defendants sued severally. As against that, the point was taken that the defendants can make a single payment in, and nothing can prevent them, and it can be determined at the trial whether the payment in is a good one or not. All the parties have argued that matter fully before me and I think, in the circumstances, it is my duty to express a view on the power of defendants, sued severally, to join together in making a payment into court.

Order 22, r. 1 (1), is in these terms:

" In any action for a debt or damages or in an Admiralty action the defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action: provided that with a defence setting up tender before action the sum of money alleged to have been tendered must be brought into court."

The word " defendant " there is in the singular, but Ord. 71, r. 2, provides:

" In these rules, unless repugnant to the context, the singular number shall include the plural, and the plural number shall include the singular."

While dealing with this point I am, of course, considering only a payment in in respect of one cause of action; *prima facie*, therefore, " defendant " includes the word " defendants ", and there would appear to be nothing in so reading the rule which is repugnant to the context. There would seem no injustice to any party if all the defendants, sued jointly, severally or in the alternative, make a payment in in respect of one cause of action; the plaintiff can only recover in the aggregate the damage he has suffered, and I can see nothing to prevent all the defendants sued making one single payment in together. If the plaintiff thinks that that is insufficient he proceeds with his action; if he thinks it covers his cause of action he takes the payment out and his costs are paid. In my judgment, therefore, the rules permit a payment in by all the defendants, who are sued jointly, severally or in the alternative, joining together. In my judgment,

Ord. 22, r. 4, is only dealing with the situation where some only of the defendants make payment in, and it makes elaborate provisions as to giving notice to other defendants, and also with regard to costs.

A I turn, then, to the point on Ord. 22, r. 1 (2). Ought I to exercise my discretion and permit a payment in in respect of all the causes of action? Prima facie—
 B and there is no doubt about this—a separate payment in should be made, and it is only in cases where the court can properly exercise its discretion that a
 C payment in covering more than one cause of action should be allowed. It was suggested by the applicants that damages would be very much the same for the cause of action depending on breach of confidence as for the cause of action depending on infringement of copyright, and I was referred to two cases: *Exchange Telegraph Co. v. Gregory & Co.* (1) and *Fenning Film Service, Ltd. v. Wolverhampton, Walsall & District Cinemas, Ltd.* (2), which were said to support that view. I do not accept that. All that those cases decide is that damages are at large, and it seems to me that damages will not be the same in respect of, in substance, two causes of action, that is to say, the breach of confidence and the infringement of copyright. I say “in substance two” because, in *Tallent v. Coldwell* (3), FARWELL, J., permitted a single payment in to cover the infringement of copyright and conversion under the Copyright Act, 1911, s. 7. Counsel for the plaintiff does not desire to contend—at any rate in this court—that that case was wrongly decided; so that he agrees that one payment in may be made for infringement and conversion, and the issue in this case is as regards one payment in for breach of confidence and breach of copyright.

D As I have said, it seems to me that damages for breach of confidence may be very different from damages for breach of copyright. Counsel for the plaintiff
 E urges, with some force, that for the purposes of the rule there is no real inter-relation of damages between the two and each case must be regarded on its own, and, therefore, in justice to the plaintiff separate payments in should be made. He points out that damages for breach of confidence may well be a matter which will affect the reputation of the plaintiff, and he may be able to claim damages for breach of confidence which would not be available to him in an action
 F for breach of copyright, although he does not concede that that is necessarily so. It is quite true that these two causes of action are quite separate and, in a sense, quite distinct, and they may give rise to different quanta of damages; but they are, in my judgment, inseparably bound up together, depending largely though not entirely on the same set of facts, and I ask myself this question: Is there any
 G injustice to the plaintiff in ordering one payment in to cover both causes of action? I can see none. He must know what he expects to get out of the action, and I cannot see that he is prejudiced in any way. Then I ask myself: Is there any prejudice to the defendants if they are ordered to pay in, or if they are compelled to pay in, separate sums under the separate causes of action? I think there is, for this reason: damages for breach of confidence may be serious for the plaintiff may say: “I wanted this document kept secret” and if that is his
 H main case he will hardly recover a large sum for breach of copyright. On the other hand, he may say: “I wanted to publish this document and it has become less attractive to publishers”, and if that is his main case it would seem that his claim for breach of confidence must at any rate be very small. The truth is that the plaintiff knows which is his main claim; the defendants do not; and I think that there would be grave hardship on the defendants, in those circumstances, if I ordered them to pay in separate sums for each cause of action. Accordingly, I propose to grant an order as asked.

Order accordingly.

Solicitors: *Theodore Goddard & Co.* (for the first and second defendants); *Farrer & Co.* (for the third defendant); *Malcolm Slowe & Co.* (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

HEISLER v. ANGLO-DAL, LTD.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), June 16, 17, 18, 30, 1954].

Contract—Construction—Vendor's undertaking to furnish a "guarantee"—No third party's guarantee furnished—Whether vendor's personal guarantee a good discharge of undertaking.

By a contract dated Oct. 7, 1952, the plaintiff agreed to sell and the defendants agreed to buy three hundred tons of aluminium ingots, the goods to be delivered at Antwerp within thirty days of the defendants establishing a confirmed, irrevocable, transferable and divisible letter of credit for the goods. Paragraph 2 provided: "We [the plaintiff] undertake to furnish you [the defendants] with a ten per cent. guarantee that we will deliver the goods to your forwarding agents in Antwerp as soon as we receive confirmation from your bankers that the necessary letter of credit . . . will be established in our favour . . ." By letter dated Oct. 20, the defendants' bankers wrote that they would open the necessary letter of credit in the defendants' favour only on condition that they received from the defendants within fourteen days a sum equivalent to ten per cent. of the value of the goods. As a result of further negotiations between the plaintiff and the defendants' representative on Oct. 24, the plaintiff wrote to the defendants as follows: "We herewith guarantee to deliver three hundred metric tons of aluminium ingots . . . to your forwarding agents in Antwerp and undertake to pay to you . . . ten per cent. of the amount of the goods we have sold to you if we default to deliver the three hundred tons. For and on behalf of the Metex Co., J. Heisler". The defendants contended that under the terms of the contract they were entitled to a bank or third-party guarantee prior to providing the plaintiff with confirmation of the letter of credit and they refused to provide the confirmation and did not continue with the fulfilment of the contract. In an action for damages for breach of contract *DEVLIN, J.*, held that the defendants had committed a breach of contract. On appeal,

HELD: on the true construction of the contract of Oct. 7, 1952, the plaintiff's undertaking to furnish the defendants with a guarantee could be satisfied by furnishing to them the plaintiff's personal guarantee; his letter of Oct. 24 was a compliance with his undertaking, and, accordingly, the defendants, having failed to provide confirmation of the letter of credit, were in breach of the contract and the plaintiff was entitled to recover damages therefor.

Appeal dismissed.

AS TO THE MEANING OF GUARANTEE, see *HALSBURY*, Hailsham Edn., Vol. 16, p. 3, para. 1; and FOR CASES, see *DIGEST*, Vol. 26, p. 9 et seq., No. 2 et seq.

Cases referred to:

- (1) *Barker v. M'Andrew*, (1865), 18 C.B.N.S. 759; 34 L.J.C.P. 191; 12 L.T. 459; 144 E.R. 643; 41 Digest 332, 1872.
- (2) *Nicolson, Ltd. v. Simmonds*, [1953] 1 All E.R. 822; [1953] 1 Q.B. 543.
- (3) *Taylor v. Oakes, Rencorom & Co.*, (1922), 127 L.T. 267; 39 Digest 593, 1923.
- (4) *Willshalge & Davidges Case*, (1586), 1 Leon. 41; 74 E.R. 38.
- (5) *Anderson v. Equitable Assurance Society of United States*, (1926), 134 L.T. 557; 35 Digest 176, 62.

APPEAL by the defendants from an order of *DEVLIN, J.*, dated Mar. 19, 1954.

By a contract in writing dated Oct. 7, 1952, the plaintiff agreed to sell and the defendants agreed to buy three hundred metric tons of aluminium which at that date was in Norway. The contract was in the following terms:

"It is herewith agreed that we have sold to you and you have bought from us 300 (three hundred) metric tons of aluminium ingots of 99.5 per cent. Al minimum, consignment to arrive in Antwerp within thirty days from your establishing the confirmed irrevocable transferable and divisible letter of credit for three hundred metric tons of aluminium ingots at \$718 (seven hundred eighteen U.S. dollars) per metric ton f.o.b. Antwerp. We undertake to furnish you with a 10 per cent. (ten per cent.) guarantee that we will deliver the goods to your forwarding agents in Antwerp as soon as we receive confirmation from your bankers that the necessary letter of credit, valid not less than six weeks, will be established in our favour in free transferable U.S. dollars. You undertake to establish your confirmed irrevocable transferable and divisible letter of credit in free U.S. dollars, validity not less than six weeks containing the following stipulation: Payment to be released against (1) Official weight certificate to be contrasigned by P.S.A.L. in Antwerp; (2) Works certificate that the ingots are of 99.5 per cent. Al minimum and contrasigned by P.S.A.L. Antwerp; (3) Confirmation of P.S.A.L. evidencing actual shipment of the goods from the port; (4) Part shipments allowed. You guarantee that your forwarding agents in Antwerp will load the goods as soon as possible after arrival, that they will receive the goods on arrival and store them in their warehouse until they can be loaded, and that you will extend the letter of credit should there be any delay in Antwerp."

On Oct. 20, 1952, the Midland bank wrote to the defendants a letter confirming that they had received instructions to open in the plaintiff's favour the appropriate credit, but that the opening of the credit was conditional on their receiving from the plaintiff within fourteen days dollars representing ten per cent. goods value as full delivery guarantee. As a result of negotiations between the plaintiff and a Mr. Ettinger on behalf of the defendants the plaintiff sent to the defendants a guarantee in these terms:

"We herewith guarantee to deliver three hundred metric tons of aluminium ingots of 99.5 per cent. Al minimum to your forwarding agents in Antwerp and undertake to pay to you the amount of \$21,540 (twenty-one thousand five hundred and forty U.S. dollars) which is ten per cent. of the amount of the goods we have sold to you if we default to deliver the three hundred tons. For and on behalf of the Metex Co., J. Heisler."

The guarantee was sent with a covering letter from the plaintiff asking for confirmation of the credit. In reply the defendants demanded an agreed bank guarantee within the next four days. On Nov. 18, 1952, the defendants informed the plaintiff that they were no longer interested. In fact, the defendants were never in a position to confirm the credit in accordance with the contract but they relied on the plaintiff's refusal to produce a third-party guarantee as an anticipatory breach which they accepted.

Pritt, Q.C., and Solley for the defendants.

Blackledge, Q.C., and F. G. Paterson for the plaintiff.

Cur. adv. vult.

June 30. The following judgments were read.

SOMERVELL, L.J., stated the facts and after referring to the defendants' demand for an agreed bank guarantee within four days, continued: Pausing there, that raises the point of construction which is the first point to be decided. Four possible views emerge as to the meaning of the second paragraph of the contract. The plaintiff maintains that the document which he signed fulfilled the terms of that paragraph with regard to the document to be furnished. The defendants maintain in the plaintiff's letter which I have cited that they were entitled to a guarantee either by a joint stock or merchant bank. A third construction was that in any event the word "guarantee"

implied an undertaking by some third party not necessarily a bank. The fourth suggestion was that assuming a third party was intended the absence of any indication as to the nature of the third party made it uncertain and, therefore, unenforceable. The defendants as against the plaintiff's construction relied on the word "guarantee". It was also submitted that if the undertaking was to be by the plaintiff it was quite unnecessary to provide for the furnishing of a further document; the contract itself could have provided that the plaintiff should pay the ten per cent. if there was a failure to deliver the goods, the defendants having fulfilled their obligations as to the credit. It was submitted on behalf of the plaintiff that if a bank guarantee had been required it would have been so stated; and if a third-party guarantee other than a bank the defendants would necessarily have stipulated expressly as to the financial standing of the third party. Counsel for the defendants relied on the provisions of the Exchange Control Act, 1947, as supporting his argument that the parties must be taken to have intended a guarantee from a banker or an authorised dealer within that Act.

The learned judge held that the plaintiff's construction succeeded, and I have come to the conclusion that he was right. The word "guarantee" is often used in other than its legal sense. An example of the word meaning simply an undertaking by the contracting party can be found in *Barker v. M'Andrew* (1). The learned judge says this:

"Again I think one has to bear in mind that commercial men do not look at these things quite from the lawyer's point of view. To a lawyer to say: 'I guarantee that I will perform my contract' is quite worthless, but a commercial man would regard the guarantee, perhaps furnished in a proper form of letter, as having some value as underlining, as it were, the promise that had been undertaken. He does not think in terms of damages, liquidated damages, penalty clauses and the rest of it; he says to himself 'I have got it in writing and if for any reason these goods do not come forward I will get ten per cent. of their price', and he may well think that is a valuable thing."

I have quoted this passage as it deals with the strongest argument against this construction, namely, that the form of a separate document adds nothing to what could have been provided in the contract. On the other hand, I think there are greater difficulties in the way of the defendants' contention that one should imply the word "bank" before the word "guarantee". It is one thing for a party to undertake a liability in the nature of a penalty—although I am not dealing with its enforceability—and a different and far more onerous undertaking to produce a bank guarantee for the equivalent of the sum of £7,000. I agree with the learned judge that if the plaintiff's construction was not a possible one the provision may well have been void for uncertainty. On that view, however, I find difficulty in holding that the other terms of the contract would have remained operative. [His LORDSHIP referred to *Nicolene, Ltd. v. Simmonds* (2) and after stating that the present case would not come under that principle continued:] On the view I take of the construction this point does not arise. Counsel on behalf of the defendants then submits that the "guarantee" was valueless because the payment of the dollars referred to would require Treasury permission and the condition of permission should have accompanied the document. I am not satisfied that contractually such permission had to accompany the document, but I am clear the point cannot now be taken. The point was not taken in the correspondence at the time, and in the letter [of Oct. 27] I have read the defendants demanded the bankers' or approved guarantee, but were not raising the question of Treasury sanction. Counsel relied on the principle which will be found stated by GREER, J., in *Taylor v. Oakes, Roncoroni & Co.* (3) (127 L.T. 269):

"It is a long established rule of law that a contracting party, who, after

he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not."

This rule is, however, subject to a proviso. If the point not taken is one which if taken could have been put right, the principle will not apply. This has, I think, clear application here. The plaintiff was producing his document before he was under any obligation to do so. If the defendants had accepted it subject to the provision of a Treasury permission it might have been obtained; further, the plaintiff could have said that he was not bound to produce any guarantee until the defendants obtained from the bankers confirmation of the letter of credit. It is doubtful whether they could ever have done so, but if they had this might itself have assisted the plaintiff in getting Treasury permission. I think, therefore, assuming the point was a good one it fails on the ground that it was not taken and it is not one which can now be relied on. A further answer was suggested by counsel for the plaintiff. He submitted that a contract to pay a sum in foreign currency in England could on its true construction be fulfilled by the payment of the equivalent in sterling. He relied in the first instance on an old case *Willshalghe & Davidge's Case* (4). It is perhaps worth noting that in the report of this case in the *ENGLISH REPORTS* (74 E.R. 38) the word "demand", four lines from the end, should be "divide". The case decides that the payer can elect whether he will discharge his obligation in the foreign currency of the contract or in the equivalent sterling. This *prima facie* principle will be found stated by BANKES, L.J., in *Anderson v. Equitable Assurance Society of United States* (5) (134 L.T. 562). On this view the undertaking would be an undertaking to pay dollars or sterling at the option of the plaintiff and no Treasury permission would be required.

For the reasons I have given it is unnecessary to express an opinion on this line of argument. The principle, which I think is primarily a rule of construction, was understandable at a time when foreign exchange was normally freely obtainable. It may well be related to the well-known fact that if a sum in foreign currency is not paid a writ can only claim the equivalent in sterling. It may well require, as I think, re-consideration as a *prima facie* rule if and so long as the foreign currency in question is not freely obtainable. It may well defeat the intention of a purchase to construe contracts in those circumstances as giving the payer an option to pay in sterling.

I should perhaps have stated that it was suggested below that the "guarantee" was illegal as an undertaking, and the learned judge I think accepted this position. Before this point was abandoned and the provisions of the Exchange Control Act were examined in more detail than they were below. The argument before us proceeded, as I have said, not on the basis of the undertaking itself being illegal, but that if there had been default and the dollars had become payable permission from the Treasury would have had to be obtained before payment could have been made.

For those reasons I think that the learned judge was right in his conclusion that the plaintiff had established a breach of contract by the defendants and it becomes unnecessary to consider the later correspondence in any detail, or the other points which would have arisen if I had taken a different view of the construction of the contract. [His LORDSHIP then referred to the further course of events and to other issues and submissions and, after saying that on the view that he took it was unnecessary to consider arguments which would have had to be considered if the case had turned on these issues, concluded:] I would dismiss the appeal.

BIRKETT, L.J.: I agree with the judgment which has just been delivered by my Lord. I have also had the opportunity of reading in advance and considering the judgment about to be delivered by ROMER, L.J., and with that judgment I agree. I, therefore, do not desire to add a judgment of my own.

ROMER, L.J.: It is common ground between the plaintiff and the defendants that the written contract which was signed on Oct. 7, 1952, embodied, comprehensively and finally, the mutual rights and obligations of the parties in relation to the sale and purchase of the three hundred tons of aluminium ingots which they had been discussing for some days previously; no terms or provisions were left for further negotiation or were the subject of any collateral oral bargain. From this it follows that the intentions of the parties respectively must be ascertained, and can only legitimately be ascertained, by construing the language of the document in which those intentions were expressed. No extraneous evidence of intention can be admitted in the performance of this task whether such evidence be proffered in the form of oral statements, of letters, or of earlier draft forms of contract which had been submitted by either side for the consideration of the other. It is, however, permissible to note as one of the surrounding circumstances in which the document was signed that it was in fact the final outcome of earlier discussions and of the exchange of earlier drafts; its language was deliberate and empirical.

The most important question of construction which arises on the contract is whether the guarantee which the plaintiff undertook to furnish to the defendants meant, or at all events included, the guarantee of the plaintiff himself or whether the undertaking could only be effectually discharged by the production of a guarantee by some third party. The defendants have urged various reasons in support of the latter alternative. First they say that the ordinary, *prima facie*, meaning of "guarantee" in relation to the performance of a contract is the assumption of liability for its non-performance by someone other than the performer. Secondly, it is contended that the undertaking in this agreement to "furnish" a guarantee tends to attract this *prima facie* view. Thirdly, the defendants argue that if all that was intended was the plaintiff's own personal undertaking it could very well have been given in the contract itself and that this element, coupled with the production of a separate document which the agreement apparently envisaged, affords further proof that the suretyship of a third party was intended. Fourthly, it is suggested that the plaintiff's own unsupported guarantee would add nothing to the obligation which was imposed on him by the contract itself and would, therefore, give the defendants nothing in the way of an additional security for the performance of that obligation. And, finally, they say that the guarantee involved the exercise of a power which is possessed by banks but which the plaintiff did not himself possess, namely, a power to acquire and dispose of dollars; and that this consideration is relevant to the construction of the document.

I doubt whether the first of the above reasons is of any considerable significance. Although among lawyers the word "guarantee" would normally (although not always) imply the promise of some third person, the parties to this contract were not lawyers but were commercial men, as *DEVLIN, J.*, in the course of his judgment pointed out. But, further than this, the expression "guarantee" is used in the last paragraph of the contract in the sense of a personal undertaking, for the defendants "guaranteed" that they would extend their letter of credit should there be any delay in Antwerp. Then as to the fifth reason our attention was not directed to any evidence which showed that the plaintiff could not procure the necessary dollar credit and, on the contrary, it is reasonably clear that he could have procured it once the defendants' letter of credit had been opened; and, therefore, I do not think that this is an element which is of much assistance in the interpretation of the contract. However, the considerations on which the defendants rely are undoubtedly deserving of weight, at all events collectively, the assessment of which can only be determined by comparing them with the points on which counsel for the plaintiff relied.

The first of these is that if the parties in this carefully negotiated contract had intended that the guarantee of some third party should be procured they would

surely have indicated who that third party was to be. Not only, however, was the agreement silent as to this, but it gave no indication as to the class from which he was to be drawn. He might be (i) any responsible person nominated by the plaintiff; (ii) any responsible person nominated by the plaintiff and approved by the defendants; (iii) any "authorised dealer" within the meaning of the Exchange Control Act, 1947; (iv) any similar dealer of whom the defendants approved. There may be other categories as well but, even assuming that those which I have mentioned are exhaustive, the plaintiff argues that it is difficult to explain why none was mentioned if any of them were in fact in contemplation. The second point on which the plaintiff relies emerges from and is in a sense dependent on the first. If, it is said, two interpretations of an expression in a document are both reasonably acceptable but one gives rise to uncertainty in its effect and the other does not, the courts will adopt the latter in preference to the former. This principle, which I accept, is applied to the present case as follows. The interpretation of guarantee as meaning the guarantee of the plaintiff himself is reasonably acceptable and leads to no uncertainty in its result; but assuming that it is construed as meaning the guarantee of some third party then, even on the assumption that such construction is also reasonably acceptable, its adoption would involve so great a degree of uncertainty (that is, as to the identity of the guarantor) as might bring about the complete annihilation of the contract. The court (so the plaintiff contends) should, therefore, accept the first interpretation and reject the second.

In my judgment, the guarantee provision was so important an ingredient in the agreement as a whole, in that it constituted an inseparable part of the consideration moving to the purchasers, the defendants, that its invalidity would vitiate the entire contract. There may very well be cases in which there are two considerations for a promise and in which the promise will remain binding notwithstanding that one of the considerations fails. Such cases would, however, in general be limited to contracts where the consideration which fails is both subordinate to and severable from the other and it cannot be said that the contract now in question comes within that category. I am, accordingly, of opinion that the principle which counsel for the plaintiff invokes should be applied and a construction be given to the word "guarantee" which will preserve the agreement rather than one which will destroy it. In the result I have arrived at the same conclusion as my Lord, namely, that the arguments in favour of the view that the guarantee which is mentioned in the agreement meant the personal guarantee of the plaintiff considerably outweigh the defendants' arguments to the contrary and, in my judgment, the learned judge came to a correct decision on this point.

On the other matters also which were argued before us, I am in entire agreement with the judgment which my Lord has delivered and there is nothing that I can usefully add to what he has said on them; and I agree with my brethren that the appeal fails and should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Harold Miller & Co.* (for the defendants); *A. Bieber & Bieber* (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

WOOLLETT v. MINISTER OF AGRICULTURE AND FISHERIES.

[QUEEN'S BENCH DIVISION (Stable, J.), July 19, 20, 21, 1954.]

Agriculture—Compulsory acquisition of agricultural land—Proposed certificate for retention of land in the interests of agricultural production—Reference to Agricultural Land Tribunal—Minister's certificate issued—Tribunal improperly constituted—Application to court not within six weeks of service of notice of certificate—Agriculture Act, 1947 (c. 48), s. 85, s. 92, sched. IX, para. 20 (2)—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), s. 1, sched. I, para. 16.

Agricultural Land Tribunal—Appointment of members—Two members not appointed by Minister of Agriculture—Invalidity of proceedings—Agriculture Act, 1947 (c. 48), sched. IX, para. 15.

The plaintiff was the owner of a plot of agricultural land of about three acres. On June 16, 1951, the Minister of Agriculture and Fisheries gave notice in writing to the plaintiff that under the Agriculture Act, 1947, s. 85 (2), he proposed to issue a certificate certifying that he was satisfied that it was necessary, for the purpose of enabling him to secure or maintain the full and efficient use of the land for agriculture, that possession of the land should be retained by him or on his behalf. In accordance with s. 85 (5) of the Act the plaintiff required that the Minister's proposal should be referred to the Agricultural Land Tribunal. On Sept. 24, 1951, the tribunal heard the reference. For that hearing the two nominated members of the tribunal, who should have been appointed by, the Minister, were appointed by the secretary of the tribunal (who had no specific instructions from, and had no powers delegated to him by, the Minister to make the appointments) in consultation with the chairman of the tribunal. On Oct. 12, 1951, the tribunal issued its report confirming the Minister's proposal. On Sept. 30, 1952, a certificate was issued by the Minister and on Oct. 6, 1952, notice of this certificate was served on the plaintiff. The plaintiff did not apply to the court to quash the certificate within the six weeks after service allowed by para. 15 of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946. In an action by the plaintiff for a declaration that the proceedings before the tribunal were null and of no effect, it was contended on behalf of the Minister that the tribunal was validly constituted, and that, even if there had been a defect in the appointments to the tribunal, by the Agriculture Act, 1947, s. 92, and para. 16 of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, it was not open to the plaintiff to question the validity of the certificate in any legal proceedings whatsoever.

Held: (i) as the secretary of the tribunal had no powers delegated to him by the Minister to appoint members of the tribunal, there was no appointment of the two members of the tribunal and the tribunal was not properly constituted.

(ii) accordingly, the certificate issued by the Minister never was a certificate in accordance with the provisions of the Act of 1947 because the essential condition of reference to a properly constituted tribunal had not been observed; the plaintiff was not precluded by para. 16 of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, from questioning the validity of the Minister's certificate, and the proceedings for compulsory acquisition of the land (namely, the Minister's proposal and certificate and a notice to treat) were null and void.

EDITORIAL NOTE. In this case it was held that an appointment of members of an Agricultural Land Tribunal by the chairman and the secretary of the tribunal in consultation, which in effect was an appointment by the

chairman, was invalid. The law is changed prospectively by the Agriculture (Miscellaneous Provisions) Act, 1954, s. 4 and sched. I, so that, when that section has been brought into force by statutory instrument, a chairman will be the proper person to nominate the two members who sit with him, but they must be selected from panels drawn up by the Lord Chancellor. In the course of the judgment (see p. 783, letter F, post) STABLE, J., refers to the fact that appeal does not lie from decisions of Agricultural Land Tribunals to the High Court. That also is altered prospectively by s. 6 of the Agriculture (Miscellaneous Provisions) Act, 1954, which will come into force on a day to be appointed; appeal will then lie by Case Stated on points of law, and the procedure is prescribed by R.S.C., Ord. 59B, added by R.S.C. (No. 2) 1954 (S.L., 1954, No. 1027).

AS TO THE CONSTITUTION OF AGRICULTURAL LAND TRIBUNALS AND THE RETENTION OF REQUISITIONED AGRICULTURAL LAND, see HALSBURY, Simonds Edn., Vol. 1, p. 492, para. 961 and p. 357, para. 735.

FOR THE AGRICULTURE ACT, 1947, s. 85, s. 92 and sched. IX, para. 15, see HALSBURY'S STATUTES, Second Edn., Vol. 1, pp. 198, 205 and 226.

FOR THE ACQUISITION OF LAND (AUTHORISATION PROCEDURE) ACT, 1946, s. 1 and sched. I, para. 16, see *ibid.*, Vol. 3, pp. 1065 and 1080.

Cases referred to:

- (1) *West Riding County Council v. Wilson*, [1941] 2 All E.R. 827; 2nd Digest Supp.
- (2) *Carltona, Ltd. v. Works Comrs.*, [1943] 2 All E.R. 560; 2nd Digest Supp.
- (3) *Lewisham Metropolitan Borough & Town Clerk v. Roberts*, [1949] 1 All E.R. 815; [1949] 2 K.B. 608; 113 J.P. 260; sub nom. *Roberts v. Lewisham Borough Council*, [1949] L.J.R. 1318; 2nd Digest Supp.
- (4) *Acton Corpn. v. Morris*, [1953] 2 All E.R. 932; 117 J.P. 498; 3rd Digest Supp.

ACTION for declaration.

The plaintiff was the owner in fee simple of a plot of agricultural land of approximately three acres in the parish of Woodham Ferrers, adjacent to the bungalow where she lived with her husband. On July 1, 1941, the Essex War Agricultural Executive Committee gave notice in writing that in the exercise of the powers conferred on them by the Cultivation of Lands Order, 1939 (S.R. & O., 1939, No. 1078), they had taken possession, with the plaintiff's consent, of her land under the provisions of reg. 51 of the Defence (General) Regulations, 1939. On June 16, 1951, the Minister of Agriculture and Fisheries gave notice in writing to the plaintiff that under the Agriculture Act, 1947, s. 85 (2), he proposed to issue a certificate certifying that he was satisfied that it was necessary for the purpose of enabling him to secure or maintain the full and efficient use for agriculture of the land, that possession of the land should be retained by him or on his behalf. In accordance with s. 85 (5) of the Act, the plaintiff required that the Minister's proposal should be referred to the Agricultural Land Tribunal. On Sept. 24, 1951, the tribunal heard the reference in accordance with s. 74 of the Act. At that hearing the chairman of the tribunal was Sir Cecil Oakes. The secretary of the tribunal was Mr. Comyns, who was a civil servant employed by the Ministry and had other duties as an assistant land commissioner. He had taken over the duties of secretary from a Mr. Smithies. He had no specific instructions and neither the Minister nor anyone acting for him had delegated to Mr. Comyns the Minister's powers of appointing the nominated members of the tribunal. On this occasion the two other members of the tribunal, Mr. Elliott and Mr. Soper, had been appointed by Mr. Comyns in consultation with Sir Cecil Oakes. The proceedings before the tribunal comprised many different properties in different ownerships, and the tribunal's report dealt generally with them all together. On Oct. 12 the tribunal issued and published its decision or report confirming the Minister's proposal. On Sept. 30, 1952, in accordance with s. 85 (2) of the Act, a certificate was issued

under the defendant's seal, and authenticated by Mr. H. Garside, an official of the Ministry of Agriculture and Fisheries, certifying that the possession of the land should be retained by the defendant or on his behalf. On Oct. 6, 1952, notice of the certificate was served on the plaintiff. The plaintiff did not apply to the court within six weeks of the service of the notice as allowed by para. 15 of sched. 1 to the Acquisition of Land (Authorisation Procedure) Act, 1946. On behalf of the plaintiff it was contended, first, that the Minister had failed to appoint the tribunal or that there was a defect in the appointment, that, therefore, the conditions of the Agriculture Act, 1947, had not been complied with and that the tribunal's decision was consequently null and void; secondly, that the certificate purported to be issued under the seal of the Minister was not the act of the Minister, and, thirdly, by the inclusion of lands belonging to various owners in the same certificate and in one hearing before the tribunal, the requirements of the Act of Parliament had not been complied with. On behalf of the Minister it was contended that the tribunal was validly constituted; that the two members of the tribunal other than the chairman were appointed by the Minister acting through Mr. Comyns who, in addition to being the secretary of the tribunal was at all material times assistant land commissioner on the Minister's staff and as such acted on the Minister's behalf. It was also contended on behalf of the Minister that the certificate issued by Mr. Garside on the Minister's behalf was valid; and that by virtue of s. 92 of the Act the certificate took effect as if it were a compulsory purchase order made under the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 1, and, consequently, as the plaintiff failed to make application to the High Court questioning the validity of the certificate within six weeks of notice being given to her of the issue of the certificate on Oct. 6, it was not open to the plaintiff, by reason of the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. 1, para. 16, to question the validity of the certificate in any legal proceedings whatsoever.

HIS LORDSHIP found on the facts that, as regards the second contention of the plaintiff, the certificate of Sept. 30, 1952, issued by Mr. Garside, was given by the authority of the Ministry and, consequently, was valid. As regards the third contention of the plaintiff His Lordship decided that, whether it was a desirable practice or not, the fact that the proceedings and documents related to a large number of properties under different ownership did not invalidate the proceedings.

Marshall, Q.C., and Dare for the plaintiff.

Wingate-Saul for the Minister.

STABLE, J., stated the facts and his decision on two contentions as mentioned above and continued: That leaves the last point, which goes to the composition of the Agricultural Land Tribunal. The Agriculture Act, 1947, s. 85 (1), provides that:

"... for the purpose of enabling the Minister to secure or maintain the full and efficient use for agriculture—(a) of agricultural land of which the Minister or a person acting under his authority is in possession, or (b) of other such agricultural land in conjunction with which in the opinion of the Minister the land mentioned in para. (a) of this sub-section ought to be farmed "

he, by taking the appropriate steps, has the power to acquire that land compulsorily, i.e., to acquire it over the heads of the person or persons who own the land. In passing, one glances at the sections of the Act, as, for example, s. 16 and s. 17, where the machinery is set up for dispossessing people who were either farming their land badly or not managing the land as it should be managed, and one sees there that, albeit those sections come into force by reason of the failure of the owner or the occupier as the case may be, there are various safeguards to ensure that the procedure under the sections is not abused. Section 85

is a very far-reaching section. Quite how far that section could be held to extend if the matter came before the ordinary courts of the country for construction we shall not know, because the effect of the section is that the only safeguard as between the subject whose land is being compulsorily acquired and the executive or government who are taking it, is the report and the determination of a statutory tribunal whose decision on the matter is binding on the Minister.

A The importance of the tribunal and the gravity of the duty that it is called on to discharge is indicated by the fact that not only are they the judges of fact in each case but it is to them alone that the construction of this particular section of the Act of Parliament is left. It is very difficult to envisage a state of facts in which an action could be brought before the courts on the grounds that the Minister, in acquiring land under the section, had gone outside and beyond the powers that the section confers, which are simply to acquire land for the purpose of enabling the Minister to secure or maintain the full and efficient use of it for agriculture. The Minister has to be satisfied, as a condition of setting the machine in motion, that it is necessary for those purposes that he should obtain possession of the land, and he has to certify accordingly. The emphasis I place on that is that the word used is not "desirable" or "advantageous", but "necessary", and I have no doubt that that section is susceptible of interpretation by the competent courts, where the exact meaning or emphasis placed on the word "necessary" would receive proper consideration.

B As I have said, the Act provides certain machinery for putting the powers into force, and it provides for the appointment of a tribunal. Section 74 makes it compulsory on the Minister to act in accordance with the report of the tribunal "and not otherwise". The tribunal is a most important feature in relation to that particular section, and the constitution of the tribunal is set out in para. 13 and the following paragraphs of sched. IX to the Act. Paragraphs 13 (1) and 14 (1) provide that:

C "13 (1). An Agricultural Land Tribunal shall consist of a chairman and two other members . . . 14 (1). The chairman shall be appointed by the Lord Chancellor . . ."

E and he must have the legal qualifications there set out. He holds office for three years and is eligible for re-appointment. He may resign his office by notice in writing served on the Lord Chancellor and so on. Paragraph 15 provides that:

F "The two members of an Agricultural Land Tribunal other than the chairman (hereinafter referred to as 'nominated members') shall, for each reference to the tribunal, be appointed by the Minister and shall be so appointed respectively from a panel of persons . . ."

drawn from two sources which I need not specify more particularly. The operative words are that

G "the two members . . . shall, for each reference to the tribunal, be appointed by the Minister,"

and the complaint here is that, far from the tribunal which inquired into this particular matter, before which the plaintiff and others appeared and ventilated their grievances, being appointed by the Minister, it was never appointed by anybody.

H There was a certain amount of evidence, and there was a certain conflict of evidence, as to what took place on the hearing of this matter before the tribunal. In my judgment, it does not really very much matter what happened on that occasion, because what Sir Cecil Oakes, the chairman, said or what he did not say does not appear to me to be evidence affecting the Minister; but it is, indeed, a most remarkable thing that the chairman of the tribunal himself seems to have been under a complete misapprehension on one point, viz., on whom the duty of appointing the nominated members had been imposed. There was a considerable conflict of evidence as to what exactly took place, but where the evidence of

Mr. Marsh (one of the applicants before the tribunal) is in conflict with that of Sir Cecil. I say without hesitation that I prefer the evidence of Mr. Marsh. Mr. Comyns, the secretary of the tribunal, who was present, made it perfectly plain in the witness-box that he had no doubt whatever that the substance of Mr. Marsh's outburst was that the tribunal was neither impartial nor unprejudiced because the two nominated members had been appointed by the Minister. Of course, they should have been appointed by the Minister, because the Minister was the only possible person who could appoint them, but the chairman, Sir Cecil Oakes, to use his own words, "to remove the misapprehension" which was present, as he thought, in the mind of Mr. Marsh, interposed with the observation that the Minister had got no more to do with the appointment of the two nominated members than had Mr. Marsh himself, and that he, Sir Cecil, had appointed or selected or chosen—it does not matter which word he used—the two nominated members himself.

What happened was this. Mr. Comyns, who was a civil servant employed by the Ministry and was attached to the department which was actually concerned with the management of the land, was also appointed secretary of this tribunal. I should like to emphasise as plainly as human language can do that no sort of hint or suggestion against Mr. Comyns' bona fides in this matter has been made from first to last. Mr. Comyns acted throughout with complete good faith and absolute integrity. He was perfectly, transparently, accurate and careful in the witness-box, and his account of the matter was this: that he had succeeded Mr. Smithies as secretary of the tribunal; that he had never had any specific instructions from anybody, but simply carried on with the job. There is no doubt whatever in this case that nobody, neither the Minister nor anybody acting for the Minister nor anybody to whom the Minister's powers had been delegated, had ever purported to authorise or instruct anybody to appoint the two nominated members, either to this inquiry or, so far as I know, to any other. Mr. Comyns himself said that he regarded himself in a sort of dual capacity, that when he was doing the Ministry's work he regarded himself as the servant of the Ministry; when he was acting as the secretary to this judicial tribunal he regarded himself as the servant of the tribunal. That, if I may say so, is, in my view, a most proper attitude for Mr. Comyns to adopt.

The first of the two nominated members to be chosen was a Mr. Elliott, who was selected in this way. Mr. Comyns was present with the chairman, Sir Cecil Oakes, and Mr. Elliott, I think, inspecting some farm buildings in relation to matters not connected with this case, and after discussion with Sir Cecil, and with Sir Cecil's knowledge and approval, Mr. Comyns approached Mr. Elliott and asked him if he would be good enough to sit on the tribunal for the purpose of this particular inquiry. The other nominated member, Mr. Sinclair, apparently was telephoned, and in the initial stages was prepared to act as the second nominated member, but because the dates were inconvenient Mr. Sinclair dropped out, and a Mr. Soper, again after consultation with and with the approval of Sir Cecil Oakes, the chairman, was approached by Mr. Comyns, and Mr. Soper agreed to act as one of the two nominated members. Again, there is not the slightest suggestion that either of those two gentlemen was biased or misconducted himself in any shape or form. The whole point of the case is whether they were appointed to the tribunal, whether this tribunal ever was a properly constituted tribunal or not.

It is to be observed that all Mr. Comyns' letters confirming the appointments, fixing dates, enclosing documents, etc., are signed by him as secretary; they are all written on the notepaper of the Agricultural Land Tribunal, and I have not the slightest doubt that Mr. Comyns in acting as he did was, as he quite honestly thought, properly acting in his capacity as secretary to the tribunal and not as a civil servant to whom had been delegated the selection and appointment of members to the tribunal by the Minister.

As I have said, where a tribunal of this kind is literally the only protection that the subject has against the encroachments of the executive, it is of absolutely vital importance that the tribunal and the appointment of the tribunal should be regarded as the very serious matter that, indeed, it is. The appointments should be made strictly in accordance with the provisions of the Act of Parliament.

A I was referred to a number of authorities, and in deference to a very able argument that was addressed to me by counsel for the Minister, I will deal in some detail with the submissions that he made on this matter and with the authorities that he cited in support of those submissions. Turning to the authorities cited, the first is *West Riding County Council v. Wilson* (1). In that case the instrument under criticism was a letter signed by the assistant land commissioner and expressed to be authorised by the Minister of Agriculture and Fisheries giving a requisite consent, and VISCOUNT CALDECOTE, L.C.J., in disposing of that point said ([1941] 2 All E.R. 831):

B “The further point is taken that the letter from Hole is void because the Minister had no power to delegate his responsibility to Hole. I do not read the letter in that way. Hole was authorised, according to the letter, by the Minister of Agriculture and Fisheries, and, in the absence of any evidence C that he was not so authorised, I accept that letter as the letter of the Minister, or as the consent of the Minister in writing. It is not the case that all consents of ministers have to be signed by the ministers themselves. The business and duties of ministers of the Crown would very often be quite impossible if they had to sign all the documents in which their consent was given or their opinion expressed.”

D The next case, which is constantly cited, is the case of *Carltona, Ltd. v. Works Comrs.* (2). The question in issue was as to the validity of an order of the Commissioners of Works purporting to requisition certain premises, and the validity of the order was attacked on a number of grounds which have no real bearing on the problem in the present case. The passage which was cited, and which is not infrequently cited as laying down a general principle in one's approach to these E matters, appears in the judgment of LORD GREENE, M.R. He said ([1943] 2 All E.R. 563):

F “In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public G business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to H answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.”

Then at the close of his judgment the Master of the Rolls says this (*ibid.*, 564):

“All that the court can do is to see that the power which it is claimed

to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."

The next case, another decision of the Court of Appeal is *Lewisham Metropolitan Borough & Town Clerk v. Roberts* (3). There the instrument was a letter emanating from the Ministry of Health, written by a general inspector in the Ministry stating that he was directed by the Minister to say that he delegated to the town clerk certain functions under reg. 51 of the Defence (General) Regulations, 1939. BUCKNILL, L.J., deals with the matter and cites a passage [1949] 1 All E.R. 821 from the judgment of the judge whose decision was under appeal. What the learned judge at first instance said was this. He had cited to him a passage from the judgment of LORD GREENE, M.R., in *Carltona Ltd. v. Works Comrs.* (2) that I have just read, and then the judge continued:

"... applying these considerations to the present case, I am unable to say that the evidence shows that Mr. O'Gara in purporting to sanction on behalf of the Minister the requisitioning of property, and in particular in issuing the document of Nov. 12, 1946, was acting without authority to do so. On the contrary, the presumption being that ministerial acts will be performed, not by the Minister in person, but by responsible officials in his department, I think that where such acts of an official nature, all of them involving the knowledge and some of them requiring and receiving the concurrence of other officials, have, as here, continued over a long period, this of itself affords cogent evidence that the person in fact acting in such an official capacity was duly authorised to act."

The lord justice proceeds to point out that that was a finding of fact of the learned county court judge which might properly be drawn from the evidence before him.

DENNING, L.J. ([1949] 1 All E.R. 824), says this:

"The first point taken here was that the town clerk was not authorised to requisition this house because his only authority was derived from a letter from an official in the Ministry of Health who could point to no authority from the Minister himself. I take it to be quite plain that when a Minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorised official of his department. The Minister is not bound to give his mind to the matter personally. That is implicit in the modern machinery of government: see the *Carltona* case (2), and an article by PROFESSOR WILLIS in 21 CANADIAN BAR REVIEW, p. 257. When, therefore, a government department requisitions property itself under reg. 51 (4) of the Defence (General) Regulations, it is not necessary for the Minister himself to consider the matter. It is sufficient if one of the officials of that department brings his mind to bear on the propriety of it. When the government department delegates its functions to a town clerk under reg. 51 (5) it is only putting someone in its place to do the acts which it is authorised to do. The town clerk is, so to speak, an agent of the department and a sub-agent of the Crown. The delegation to the town clerk is simply administrative machinery so as to enable the administrative functions of requisitioning to operate smoothly and efficiently, and, like all administrative functions, the act of delegating can be exercised by any authorised official of the government department."

The last case, which was cited by counsel for the plaintiff, again has no direct bearing on the present problem, but he cited it for the purpose of reading a passage of general application in the judgment of SOMERVELL, L.J. The case is *Acton Corp. v. Morris* (4). SOMERVELL, L.J., said ([1953] 2 All E.R. 935):

"In my opinion, this is a case in which the principle to be applied is that those who are exercising special powers to take private property must see

A that they carry out accurately and in detail the Act of Parliament, or, in this case, the conditions of the requisitions under the circulars and Defence Regulations. Nor is it clear that this is a matter of no substance. All that has happened here is that there was confirmation by the Minister of something which did not require confirmation, namely, taking possession of the premises. There are no words to suggest that the Minister has been asked to extend the time or that he has done so. For these reasons I think this first point succeeds . . .”

B The sharp distinction between the first three cases cited to me and the facts of the present case is this, that in each of those cases there was an instrument, a letter of some kind or another, emanating from an official, in which it was expressly stated that he was authorised to act for the Minister and purported to be so acting. In the present case it is abundantly plain that neither the Minister nor, so far as I know, anybody connected with the Ministry, gave the matter a moment's thought; so far from the Minister acting by an agent in the appointment of this tribunal, the evidence is perfectly plain that he did absolutely nothing of the kind. There was no instrument of appointment. All that happened was that Mr. Comyns rang up the members, found out if it was convenient for them to sit, and then confirmed the date and so on in the letters that he wrote. But in so doing, Mr. Comyns was not expressing himself to be authorised by the Minister; he did not purport to be acting on behalf of the Minister; he did not think that he was acting on behalf of the Minister, and, in point of fact, he was not. He was functioning as the secretary of the tribunal and nothing else.

D The next point that was taken by counsel for the Minister is somewhat formidable. He refers me to sched. IX to the Agriculture Act, 1947, para. 19 and para. 20. Paragraph 19 deals with the disqualification of persons from sitting as members of a land tribunal, and sub-para. (2) of para. 20 is in these terms:

E “All acts done at any meeting of any such body shall, notwithstanding that it is afterwards discovered that there was a defect in the appointment or disqualification of a person purporting to be a member thereof, be as valid as if that defect had not existed.”

F There must be some limit to the operation of that paragraph. Can it be said that, if inadvertently the wrong person selected two people, or, if you like, three, from the wrong panel to act as an agricultural land tribunal, that that body so constituted in disregard of every single provision of the Act of Parliament acquires under this sub-paragraph validity for what it does? One must not forget for a moment that the determination of this tribunal is binding on the subject and it is binding on the Minister and is subject to no appeal either in relation to matters of fact or questions of law. It is the only tribunal and the final tribunal.

G Counsel for the plaintiff meets the paragraph I have just read with the contention, which I accept, that in this case there was not a defect in appointment: there never was an appointment at all. It is important to observe that this land tribunal is not a permanent body in more or less permanent session or even in a state of suspended animation. Paragraph 13 of the schedule provides that an Agricultural Land Tribunal shall consist of a chairman and two other members. The appointment of the chairman is a matter for the Lord Chancellor and I can pass that by, but, reverting again to para. 15,

H “The two members of an Agricultural Land Tribunal other than the chairman . . . shall, for each reference to the tribunal, be appointed by the Minister . . .”

and, therefore, unless and until in relation to a particular reference two nominated

members have been appointed by the Minister, there is not an Agricultural Land Tribunal in esse at all.

In my judgment, that is exactly the position here. It is not a defective appointment; there never was an appointment which could have had a defect because it did not exist.

Before I pass from that, there is just one further matter to which reference should be made, and that is s. 74 of the Act. That section, so far as is material for the purposes of what I am going to say, provides that when, under the Act, the Minister's action is referred to the Agricultural Land Tribunal and a reference is required, then by sub-s. (2)

"... The tribunal shall determine—(a) whether the conditions as to which the Minister must be satisfied before taking the action are fulfilled, and (b) whether, having regard to their determination under the foregoing paragraph and to all the circumstances of the case, the Minister should or should not take the action proposed, and shall report to the Minister accordingly; and the Minister shall forward a copy of the report to any person who availed himself of an opportunity to make representations to the Minister . . ."

and so on. Then sub-s. (4), to which I have already referred, directs that

"... the Minister shall act in accordance with the report of the tribunal and not otherwise."

Not unnaturally, the plaintiff in the present case applied to the Minister for a copy of the so-called tribunal's report. The result, I confess, of her request has astonished me. There were no fewer than twenty-five persons whose rights were involved, and the deliberation of the tribunal which was finally to determine these rights occupied no more than one day. The result was that nineteen of the objectors were unsuccessful and had their land taken, whereas six, for one reason or another, succeeded and escaped from being compulsorily bought out. The so-called report of this tribunal is headed,

"Between owners detailed overleaf, applicants, and the Minister of Agriculture and Fisheries, respondent,"

and there are a number of names on the back, which are apparently the names of the unsuccessful applicants. It is headed "Decision of the Tribunal". It seems to be a typed or printed form; it is signed by the chairman

"For and on behalf of the Eastern Province Agricultural Land Tribunal", and it is in these terms:

"Whereas in exercise of the powers conferred upon him by s. 85 of the Agriculture Act, 1947, the Minister of Agriculture and Fisheries has proposed to certify that it is necessary for the purpose mentioned in sub-s. (1) of the said s. 85 for possession of the land above mentioned to be retained by him or on his behalf, and whereas the applicants being persons on whom notice of a proposed compulsory purchase order would be required to be served under sub-s. (4) of the said s. 85 have duly required that the proposal of the Minister be referred to the said tribunal, now the tribunal, having satisfied itself that all parties entitled to appear before it have so appeared or have been duly summoned to appear and having heard the evidence tendered by such parties and having inspected the said land and having determined that the conditions as to which the Minister is required to be satisfied under sub-s. (2) of the said s. 85 have been fulfilled and having regard to such determination and to all the circumstances of the case hereby confirms the proposal of the Minister of Agriculture and Fisheries in respect of the said land."

The form of the report is not a matter that is relied on as invalidating these

proceedings, but I venture to say that I believe that, when the legislature said that the tribunal should report and the interested parties should have a right to receive a copy of that report, what the legislature had in mind was something in the nature of a considered judgment which would expand not merely the result at which the tribunal arrived but also the process by which that conclusion was reached.

A The next point that counsel for the Minister made arises under the joint operation of the material sections of the Agriculture Act, 1947, and the Acquisition of Land (Authorisation Procedure) Act, 1946. The Agriculture Act, 1947, s. 92 (1), provides that where the Minister has authority to purchase land compulsorily, the procedure shall follow the procedure laid down in the Acquisition of Land (Authorisation Procedure) Act, 1946. Section 92 (2) of the Act of 1947 provides:

B "Where under any provision of this Act power is conferred on the Minister to purchase any particular land compulsorily on the giving of a certificate by him, the certificate shall have effect as if it were a compulsory purchase order made under s. 1 of the said Act of 1946 . . ."

Again, under the same sub-section, para. (c), Part IV of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, *mutatis mutandis*,
C is tied to the Agriculture Act, 1947.

Schedule I, Part IV, para. 15, of the Acquisition of Land (Authorisation Procedure) Act, 1946, provides that where, as in this case, notice of the Minister's certificate has been served on a person aggrieved by the making of the certificate* then within a period of six weeks an application may be made by him if he does not like its contents, to the High Court for relief. Paragraph 16 provides:

D "Subject to the provisions of the last foregoing paragraph, a compulsory purchase order [for this purpose it will read, "the Minister's certificate"] shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever, and shall become operative on the date on which notice is first published as mentioned
E in the last foregoing paragraph."

Counsel for the Minister contended that once notice of the Minister's certificate had been served on the plaintiff and six weeks had elapsed without an application being made to the court under para. 15, then the Minister's certificate thereby acquired a degree of sanctification which precluded anybody from questioning it in any legal proceedings whatsoever. If that is the right interpretation to put
F on that paragraph, it comes to this, that all the safeguards provided in the Agriculture Act, 1947, are not only completely neutralised but they are far worse: they may create an illusion of security which does not exist, because if, let us assume, every conceivable irregularity has been committed, once the Minister's certificate has been advertised for the requisite length of time, it then, for all practical purposes, becomes a document of title which cannot be attacked by anybody
G in any court in any proceedings whatsoever. I find it very difficult to believe that para. 16, tucked away in Part IV of sched. I to the Act of 1946, was intended by the legislature to destroy all the safeguards which they were so careful to insert in the Agriculture Act, 1947.

Counsel for the plaintiff meets that attack in this way. He says, and I accept
H his submission, that this certificate only becomes immune under the paragraph if it was in the first instance a proper certificate in accordance with s. 85 of the Agriculture Act, 1947. If the view that I have taken of this case is right, it never was a certificate in accordance with the provisions of that Act because the most essential condition, namely, the reference to a properly appointed tribunal, had not been observed; and, in as much as there never was a certificate, then it

* The service of notice of the giving of the Minister's certificate under s. 85 of the Agriculture Act, 1947, replaces, in such cases as the present, publication of the confirmation of a compulsory purchase order (s. 92 (2) (c) of the Agriculture Act, 1947).

never did obtain the freedom and shelter afforded by para. 16 of sched. 1 to the Act of 1946.

That, I think, disposes of all the matters that have been raised. In my view, the plaintiff has succeeded in this action on the ground that I have already stated.

Declarations accordingly.

Solicitors: *Lucien Fior* (for the plaintiff); *Solicitor, Ministry of Agriculture and Fisheries* (for the Minister).

[Reported by MICHAEL MALONEY, ESQ., *Barrister-at-Law.*] A

GRESHAM AND ANOTHER v. LYON.

[QUEEN'S BENCH DIVISION (McNair, J.), March 25, July 20, 1954.]

Inn—Loss of guest's property—Theft of luggage from motor car—Car parked in inn garage three hundred yards from inn—Hospitium of inn—Notices excluding liability—Guest's own negligence. B

At 7.30 p.m. on Aug. 22, 1951, the plaintiffs, who were husband and wife, arrived by car at a hotel (which was admittedly a common inn) owned by the defendant. Having been allotted a room, the male plaintiff then drove his car to the garage accommodation provided by the hotel. This was three hundred yards from the hotel and consisted of a damaged one storey warehouse and a yard surrounded by brick walls ten to twelve feet high. The premises were open to the sky except for the shelter provided by the damaged roof of the warehouse. The entrance to the yard for cars was by two large sliding doors and there was also a small side door bolted on the inside. Inside the yard five notices were prominently displayed, reading as follows: "Important notice. This overflow garage is not weatherproof and no responsibility is accepted for damage due to inclement conditions. Hotel guests garaging their cars here do so entirely at their own risk and no responsibility is accepted for damage, theft, fire or any other cause whatsoever." There was another convenient place for passengers' luggage within the hotel itself. No oral warning was given by the defendant or his servants to the plaintiffs not to leave their luggage in their car. At the garage the male plaintiff was met by the attendant and shown where to park his car. On the instructions of the attendant the male plaintiff locked all the doors of his car and the boot in which was the plaintiffs' luggage. Later in the evening the sliding doors to the yard were secured by a padlock and the side door was bolted. During the night the plaintiffs' luggage was stolen from their car. In an action to recover £250, the agreed value of the luggage, C

HELD: (i) the garage space was not within the hospitium of the inn in relation to travellers' luggage, because it was not a place in which they were invited, as distinct from permitted, to put their luggage; accordingly the defendant was not under the absolute liability of an innkeeper in regard to the luggage and the plaintiffs' claim failed, notwithstanding that the garage space was within the hospitium of the inn so far as the car itself was concerned. D

DICTA OF LORD TUCKER in *Williams v. Livitt* ([1951] 1 All E.R. 284), and of DEVLIN, J., in *Watson v. People's Refreshment House Assocn., Ltd.* ([1952] 1 All E.R. 290), applied. E

(ii) in addition the defendant was not liable because the plaintiffs' loss of their luggage was due to their own failure to take reasonable care. F

Principle stated by LORD MACMILLAN in *Shacklock v. Ethorpe, Ltd.* ([1939] 3 All E.R. 374), applied. G

AS TO LIMITS OF LIABILITY OF INNKEEPER IN RESPECT OF GUEST'S PROPERTY, see HALSBURY, *Hailsham Edn.*, Vol. 18, p. 151, para. 208 text and note (s), p. 153, para. 211, p. 156, para. 214; and FOR CASES, see DIGEST, Vol. 29, pp. 10-17, Nos. 125-213. H

Cases referred to:

- (1) *Williams v. Linnitt*, [1951] 1 All E.R. 278; [1951] 1 K.B. 565; 2nd Digest Supp.
- (2) *Watson v. People's Refreshment House Assn., Ltd.*, [1952] 1 All E.R. 289; [1952] 1 K.B. 318; 3rd Digest Supp.
- (3) *Shacklock v. Ethorpe, Ltd.*, [1939] 3 All E.R. 372; Digest Supp.
- (4) *Cashill v. Wright*, (1856), 6 E. & B. 891; 27 L.T.O.S. 283; 20 J.P. 678; 119 E.R. 1096; 29 Digest 14, 178.

A Action for damages for loss sustained through theft of guests' luggage from the boot of a car in the hotel garage.

B The plaintiffs were husband and wife and the defendant was the owner of a common inn in Dover called the Hotel de France. The plaintiffs, who were going to France, made a reservation at the hotel for the night of Aug. 22-23, 1951, and were assured that accommodation would be available for them and for their car. There was no car park attached to the hotel, but in 1950 the defendant had acquired from the Dover Harbour Board the tenancy of premises, about three hundred yards from the hotel, for use as a garage by the hotel guests. These premises consisted of an old one storey warehouse, partly damaged by enemy C action and only partially repaired, and a yard surrounded by brick walls about ten to twelve feet high. The premises were open to the sky except for the shelter provided by the damaged roof of the warehouse. The entrance to the yard for cars was by two large sliding doors marked on the outside with the words "Garage. Hotel de France", and secured at night by a stout padlock. There was also a small side door, bolted on the inside. Within the garage yard, in D conspicuous positions, were exhibited five notices, measuring about sixteen inches by eight inches, in plain type in the following terms:

E "Important notice. This overflow garage is not weather-proof and no responsibility is accepted for damage due to inclement conditions. Hotel guests garaging their cars here do so entirely at their own risk and no responsibility is accepted for damage, theft, fire or any other cause whatsoever."

At about 7.30 p.m. on Aug. 22, 1951, the plaintiffs arrived at the hotel and at the reception desk the male plaintiff was handed a card on which was his room number and certain printed information (which he did not read) including the following:

F "Temporary garage accommodation has been secured in Northampton Street. This is not entirely weatherproof, but is under lock and key. No responsibility can be accepted for vehicles, and parking outside the hotel is strictly forbidden by the police."

G Having received the key to his room, the male plaintiff went outside with the porter. The porter removed a small bag from the boot of the car, leaving inside two large suitcases and a small hand grip. The male plaintiff then drove his car to the garage where he was met by the attendant and shown where to park his car. On the instructions of the attendant, he locked all the doors of his car and the boot. Later in the evening the small side door to the garage was bolted on the inside and the padlock to the sliding doors was locked. Next morning it was H discovered that the two suitcases from the plaintiffs' car had disappeared with their contents. The padlock on the sliding doors was intact and the bolts on the side door had been drawn from the inside. In an action by the plaintiffs to recover £250, the agreed value of the goods lost, on the basis of the innkeeper's absolute liability for goods of travellers received into the hospitium of the inn, His LORDSHIP found the following facts: that, though the male plaintiff stated in evidence that he did not see the notices displayed in the garage, all proper steps were taken to draw them to the attention of intending users of the garage; that no warning was given to the plaintiffs by the porters at the hotel or by the garage

attendant not to leave luggage in the car; that the suitcases had been stolen by a thief who gained access to the garage by climbing over the wall, and that there had been another convenient place for passengers' luggage within the inn itself. It was admitted that the plaintiffs were travellers and were received into the hotel as guests and that the hotel was a common inn. On behalf of the defendant, it was contended that neither the motor car nor the luggage was received into the hospitium of the inn; that the overflow garage accommodation was only made available for guests to park their motor vehicles on the conditions indicated in the notices exhibited there; alternatively, that, if the garage was part of the hospitium of the inn, it was only such in regard to guests' cars and not their luggage; and, alternatively, that the loss of the goods was due to the plaintiffs' own negligence.

Branson for the plaintiffs.

Stephen Chapman and *Stuart-Smith* for the defendant.

Cur. adv. vult.

July 20. **McNAIR, J.**, in a written judgment stated the facts and continued: The first question I have to decide is whether or not the garage in question formed part of the hospitium of the inn for any purpose. In my judgment it clearly did, so far as the motor car itself is concerned. It is clear on authority that today the keeper of a "common inn" is under obligation to provide accommodation not only for the guest himself, but for his motor car, as he was in the olden days obliged to provide accommodation for the traveller's gig and horse and, if the innkeeper offers no other accommodation for his guests' motor cars than such accommodation as was provided by the garage space here in question, there is no reason in law why such a garage space should not be treated as part of the hospitium notwithstanding that it is not contiguous with or adjacent to the inn premises proper. So far as the male plaintiff's motor car is concerned, the garage space in question was the place where he, as a hotel guest, was invited to park his car and for this facility a small charge was made. The judgments of **LORD TUCKER** and **ASQUITH, L.J.**, in *Williams v. Linnitt* (1) lead inevitably to the conclusion stated above.

It was argued, however, that though the garage space might be regarded as part of the hospitium of the inn so far as the car itself was concerned, it could not be so regarded in relation to luggage left in the car. So far as I have been able to ascertain, this distinction has not been effectively drawn in any of the decided cases. There are, however, indications in certain of the recent decisions on this topic which seem to me to support this argument. For example, in *Williams v. Linnitt* (1), **LORD TUCKER** said ([1951] 1 All E.R. 284):

"The liability of the innkeeper, in my view, extends to the goods of his guest which are placed by the guest in that part of the premises in which such goods are usually taken in the inn."

In *Watson v. People's Refreshment House Assocn., Ltd.* (2), **DEVLIN, J.**, used the following language ([1952] 1 All E.R. 290):

"As I have said, an innkeeper is absolutely liable in respect of goods, whether baggage or a conveyance, which he receives within the inn. In the case of baggage there is very little difficulty about determining that those words mean receiving within the inn buildings."

Though this expression of opinion was not strictly necessary for the decision in that case, it is an observation of weight. There was no evidence, or no evidence that satisfied me, that guests generally, or the male plaintiff in particular, were invited (as distinct from being permitted) to leave their luggage in their cars when using the garage space or that luggage was usually so left, though there was evidence, which I accept, that on occasions guests' heavy luggage was removed from cars and placed in a convenient place within the inn. The distinction between

invitation and permission is properly drawn by DEVLIN, J., in the case last cited.

In these circumstances, whether the garage space is properly to be regarded as part of the hospitium of the inn in relation to passenger luggage seems to me to be primarily a question of fact to be determined on the evidence as to the physical attributes of the premises in question (which I have already summarised), the availability of any other more suitable place for its reception and the existence or absence of any invitation so to use it. The evidence satisfied me that the garage space was open to the sky and protected only by walls which were readily scalable, that there was another convenient place for passengers' luggage within the inn itself and that in the garage space itself there were exhibited conspicuous notices in the terms set out above. These notices seem to me to negative any implied invitation, though admittedly they have no contractual force if in fact the garage space was part of the hospitium of the inn in relation to the luggage, and there was no evidence of any express invitation. Accordingly, in so far as it is a question of fact, I find, and so far as it is a question of law I hold, that the garage space was not part of the hospitium of the inn so far as concerns the plaintiffs' luggage, and, accordingly, the defendant was not under the absolute liability of an innkeeper in relation to these goods. To hold the contrary would, in my judgment, have the effect of extending the innkeeper's liability to a wholly unreasonable extent. Accordingly, the plaintiffs' claim fails.

There is, however, a second ground on which, in my judgment, the plaintiffs' claim fails. In *Shacklock v. Ethorpe, Ltd.* (3), in the speech of LORD MACMILLAN, the following language occurs ([1939] 3 All E.R. 374):

"It has always been the law, however, that the innkeeper can escape liability if he can show that, as ERLE, J., delivering the judgment of the court in *Cashill v. Wright* (4) said (6 E. & B. 900): '... the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.' The word 'negligence' is tending in modern legal usage to be restricted to denoting the breach of a duty owed to some other person, but it is not in this correlative sense that the word is used in the present context. The innkeeper's defence is not based on the breach of any duty owed to him by his guest, but simply on the plea that the loss or theft of his guest's property was due to the guest's own carelessness, his own failure to take reasonable care of it."

In my judgment, the loss of the plaintiffs' luggage in this case can properly be held to be due to the plaintiffs' own carelessness and failure to take reasonable care of their luggage. Being no doubt anxious to get away to a good start on the following morning, the plaintiffs took the chance of leaving the luggage in the boot of the car in a garage space which was open to the sky and completely unprotected against evilly disposed persons who might be minded to climb over the wall for the purpose of theft. They may have been misled by the fact that the owner of another car in the same garage space had left his luggage strapped on the back of his car. The male plaintiff, however, apparently relied on the security of the lock on the boot of his car, which common experience demonstrates to be no security at all against a determined thief. Accordingly, in my judgment, the plaintiffs' claim fails on this ground also.

Judgment for the defendant.

Solicitors: *W. W. Bax & Co.* (for the plaintiffs); *L. Bingham & Co.* (for the defendant).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

Re BAKER. *Ex parte* EASTBOURNE WATERWORKS
COMPANY v. OFFICIAL RECEIVER.

[CHANCERY DIVISION (Danckwerts, J.), July 19, 1954.]

Bankruptcy - Preferential claim Water rate - Bankruptcy Act, 1914 (c. 59), s. 33 (1) (a).

Water Supply Rates and charges - Water rate Whether preferential debt in bankruptcy - "Parochial or other local rates" - Bankruptcy Act, 1914 (c. 59), s. 33 (1) (a).

A waterworks company as authorised by the Eastbourne Waterworks Acts, 1859 to 1921, and in particular by s. 3 of the Act of 1921, made charges (called in the Acts "the rate") on a debtor for a supply of water to certain premises for the period Dec. 25, 1952, to Feb. 10, 1954, and for a supply to other premises for the period June 24, 1952, to Jan. 14, 1953. The amount of the rate was calculated according to the rateable value of the relevant premises. On Feb. 10, 1954, a receiving order was made against the debtor, and on Feb. 28, 1954, he was adjudicated bankrupt. The company claimed that unpaid charges for water rate becoming payable within twelve months before the receiving order were preferential debts.

HELD: the water rate was a payment for a commodity and was not a matter of taxation so as to fall within the term "parochial or other local rates" as used in the Bankruptcy Act, 1914, s. 33 (1) (a), and, therefore, the water rate was not a preferential debt.

Re Ellwood ([1927] 1 Ch. 455) and *Re Flack. Ex p. Berry* ([1900] 2 Q.B. 32), distinguished.

Dicta of LORD ALVERSTONE, C.J., and SIR RICHARD HENN COLLINS, M.R., in *Northampton Corpn. v. Ellen* ([1904] 1 K.B. 313, 315), applied.

EDITORIAL NOTE. Although this case is decided on the Bankruptcy Act, 1914, s. 33 (1) (a), the terms of s. 319 (1) (a) (i) of the Companies Act, 1948, conferring priority in a winding-up in respect of the payment of local rates, are sufficiently similar to make this case relevant on the construction of that enactment. Preferential debts in a winding-up are discussed in HALSBURY, Simonds Edn., Vol. 6, p. 662, para. 1312, where the meaning of "local rates" in the Act of 1948 is considered in note (r).

AS TO PREFERRED DEBTS, see HALSBURY, Simonds Edn., Vol. 2, p. 486, para. 963; and FOR CASES, see DIGEST, Vol. 4, pp. 471-481, Nos. 4250-4334.

Cases referred to:

- (1) *Re Mannesmann Tube Co., Ltd.*, [1901] 2 Ch. 93; 70 L.J.Ch. 565; 84 L.T. 579; 65 J.P. 377; 10 Digest 798, 5042.
- (2) *Spanish Telegraph Co. v. Shepherd*, (1884), 13 Q.B.D. 202; sub nom. *Direct Spanish Telegraph Co. v. Shepherd*, 53 L.J.Q.B. 420; 51 L.T. 124; 48 J.P. 550; 31 Digest, Replacement, 322, 4576.
- (3) *Badcock v. Hunt*, (1888), 22 Q.B.D. 145; 58 L.J.Q.B. 134; 60 L.T. 314; 53 J.P. 340; 31 Digest, Replacement, 330, 4647.
- (4) *Bourne & Tant v. Salmon & Gluckstein, Ltd.*, [1907] 1 Ch. 616; 76 L.J.Ch. 374; 96 L.T. 629; 71 J.P. 329; 31 Digest, Replacement, 322, 4578.
- (5) *Re Ellwood*, [1927] 1 Ch. 455; sub nom. *Re Ellwood. Ex p. River Don Drainage Board v. Hooson*, 96 L.J.Ch. 170; 136 L.T. 696; Digest Supp.
- (6) *Re Flack. Ex p. Berry*, [1900] 2 Q.B. 32; 69 L.J.Q.B. 458; 82 L.T. 503; 4 Digest 206, 1899.
- (7) *Northampton Corpn. v. Ellen*, [1904] 1 K.B. 299; 73 L.J.K.B. 329; 90 L.T. 71; 68 J.P. 197; 43 Digest 1091, 227.

SPECIAL CASE Stated by the judge of the Tunbridge Wells County Court on the question of law whether the sums of £1 13s. 8d. and £2 9s. due to the company, being "water rates" and having become payable within twelve months before the receiving order were "parochial or other local rates" under the Bankruptcy Act, 1914, s. 33 (1) (a), and as such were entitled to be paid in priority.

On Feb. 10, 1954, a receiving order was made against the debtor in the Tunbridge Wells County Court and he was adjudicated bankrupt on Feb. 28, 1954. The respondent, the official receiver, became and remained trustee ex officio of the property of the debtor. The applicant company (hereafter called "the company") was incorporated by the Eastbourne Waterworks Act, 1859, to acquire the undertaking of the Eastbourne Waterworks Co., Ltd. The company carried on the undertaking of the supply of water in Eastbourne and adjacent areas and the powers of the company were regulated by the Eastbourne Water Acts, 1859 to 1921, together with the Eastbourne Water Order, 1948. The company filed its proof of debt sworn on Mar. 1, 1954, in respect of a sum due from the debtor for water rates and the company claimed that the "water rate" fell within the category of "all parochial or other local rates" in the Bankruptcy Act, 1914, s. 33 (1) (a), and was accordingly payable in priority. The official receiver admitted the debt, but rejected the company's claim to priority. It was not disputed that the sum claimed was a proper charge, the imposition of which was authorised by the company's Acts and in particular by the Eastbourne Waterworks Act, 1921, s. 3.

G. C. D. S. Dunbar for the applicants.

Muir Hunter for the respondent.

DANCKWERTS, J.: This case raises the question (I do not think it has been directly decided by any court hitherto, except possibly in a county court) whether a sum of money due to a waterworks company in respect of the supply of water is to be treated as a preferential debt in bankruptcy by reason of the provisions of the Bankruptcy Act, 1914, s. 33. Section 33 (1) provides:

"In the distribution of the property of a bankrupt there shall be paid in priority to all other debts—(a) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax, assessed on the bankrupt up to Apr. 5 next before the date of the receiving order, and not exceeding in the whole one year's assessment."

The Eastbourne Waterworks Co. in the present case was formed under the Eastbourne Waterworks Act, 1859, and has powers conferred by the Eastbourne Waterworks Acts, 1859 to 1921, which incorporate the provisions of the Waterworks Clauses Act, 1847. It is, no doubt, true that under those Acts the waterworks company is entitled to charge for supply of water what in these statutes is called "the rate", and the rate is to be ascertained, in certain circumstances, by reference to the rateable value of the property of the occupier who is supplied with water. On the other hand, the question is whether the money which is payable in respect of the supply of water is a rate of the kind which is referred to in the Bankruptcy Act, 1914, s. 33 (1).

I have been referred to a considerable number of authorities, but very few, if any, of them touch the point which I have to decide. In *Re Mannesmann Tube Co., Ltd.* (1), it is plain that it was assumed that a sum payable for the supply of water, and, therefore, commonly termed "a water rate", was a preferential debt in bankruptcy and the only point in the case was the date relevant for the purpose of the preference. The point does not seem to have been argued at all.

I was referred to a number of cases of landlord and tenant in which the point was argued on covenants to pay rates, taxes, impositions and the like under the special terms of the covenant contained in the lease. Such cases were cited to me as *Spanish Telegraph Co. v. Shepherd* (2), *Bulcock v. Hunt* (3) and *Bourne & Tait v. Salmon & Gluckstein, Ltd.* (4). However, none of those cases, I think, really touches the matter which I have to decide, which depends, not on a covenant in a lease, but on a statute giving a preference to particular kinds of

creditors. The nearest case, in a sense, is *Re Ellwood* (5), in which it was held that what is called a drainage rate, chargeable by a drainage board, was a preferential payment for the purpose of bankruptcy. On the other hand, the argument in that case against preference was based on the *cjusdem generis* rule, and I am satisfied, as the court was in that case, that the *cjusdem generis* rule does not assist in construing s. 33 (1) of the Act of 1914. On the other hand, the drainage rate, as it has been pointed out by counsel for the respondent, is a rate which the local inhabitants in the district cannot avoid. They cannot say, "We will not have drainage" or "We will not contribute towards it". If they are in a district which is liable to flooding, they will have to pay. It is not like water supply which, though it may for practical purposes be a necessity, is something which one need not take unless one decides to have a supply of water.

Re Fluck, Ex p. Berry (6), to which I was also referred, was again a different case, because there the supply of water was paid for according to a meter and did not involve payment by reference to the rateable value of the property.

It seems to me that the matter is put most accurately by the learned judges who decided *Northampton Corpn. v. Ellen* (7), which, it is true, was not a decision on the point which I have to decide. The question was whether the charge to the consumers in respect of water supplied had to be at the same rate for everybody. The observations to which I would refer are those of LORD ALVERSTONE, C.J., where he said ([1904] 1 K.B. 313):

"In my opinion it is not correct to speak of this corporation as rating in respect of water supply. There may be cases in which that expression could properly be used with regard to a corporation; but in the present case I think they do not rate in respect of water supply in the proper sense of the words, but merely charge a sum, the amount of which is ascertained by reference to a percentage upon the rateable value of the house, and I do not think that s. 36 [of the Northampton Waterworks Act, 1884] gives rise to any implication that they must charge all consumers at an equal rate in the pound."

SIR RICHARD HENN COLLINS, M.R., said (*ibid.*, 315):

"The only expression in it which gives any countenance to that suggestion [i.e., the equality argument] is that the charge is spoken of as a 'water rate'. I do not think that it is a necessary implication from that expression that the charge must be at an equal rate on all consumers. The basis upon which that implication is suggested is the supposed analogy to a poor-rate. But there is no such analogy. The original statute of Elizabeth, from which the poor-rate derives its origin, no doubt contains no provision for equality in rating, but, having regard to the nature of the charge, the reason for its imposition, and the persons on whom it is imposed, it is obvious that the very essence of the thing involved that the charge on all the ratepayers should be at an equal rate. It is an imposition upon citizens of a duty to the community in proportion to their means, and the character of the duty necessarily involves equality in rating. There is no analogy between such a rate and a charge to be made for a marketable commodity, such as water, which a company is under an obligation to sell, and householders needing it have a right to buy for their individual consumption."

That, to my mind, makes a right distinction in regard to these matters.

So far I have not referred in terms to the definitions contained in the respective statutes. As regards the Waterworks Clauses Act, 1847, the definition of "a water rate", so called, is to be found in s. 3 and it is in these terms:

"The expression 'water rate' shall include any rent, reward, or payment to be made to the undertakers for a supply of water."

In other words, it is a payment to be made for a supply of a commodity, as pointed out by SIR RICHARD HENN COLLINS, M.R., in *Northampton Corp'n. v. Ellen* (7).

A definition which is typical of the various rating Acts is that in the Rating and Valuation Act, 1925, s. 68 (1). There "rate" is defined in this way:

- "Rate" means a rate the proceeds of which are applicable to local purposes of a public nature and which is leviable on the basis of an assessment in respect of the yearly value of property, and includes any sum which, though obtained in the first instance by a precept, certificate or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate as before defined, but does not include—
- (a) any rate which is assessed under any commission of sewers or in respect of any drainage, wall, embankment, or other work for the benefit of the land; or (b) any rate of the description commonly known as a church rate, a tithe rate, or a rector's rate, or any other rate of a similar character; or (c) any rate which is leviable by the conservators of a common; or (d) any rate payable by consumers for a supply of water; or (e) any rate of the description commonly known as a garden rate or square rate, if levied by any persons other than a rating authority."

That shows, to my mind, that a rate of the type described in that Act, which of course is later than the Acts which are relevant to the supply of water, is quite different from what is known popularly and indeed in those Acts as "a water rate".

- * One must turn to the Bankruptcy Act, 1914, s. 33 (1) (a), to see what the legislature really had in mind. Section 33 (1) (a) is as follows:

"All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax, assessed on the bankrupt up to Apr. 5 next before the date of the receiving order . . ."

- The matters there mentioned differ from each other, but they are alike in that they are matters of taxation. The legislature had in mind in that paragraph local and general taxation, or, it may be called, local and national taxation; and, therefore, it excludes completely payments for the supply of water, which may be called rates merely because they are assessed at a particular rate or payable at a particular rate. Section 33 (1) is a provision which confers special preference on certain debts, and one must be careful not to extend unduly the privilege or preference in question. The words, therefore, must be construed with some strictness. I am satisfied that a rate which is payable to a water company in respect of the supply of water to some occupier is neither a parochial or other local rate within the meaning of s. 33 (1) (a) of the Bankruptcy Act, 1914.

Order accordingly.

Solicitors: *Shelton, Cobb & Co.*, agents for *Coles & James*, Eastbourne (for the applicants); *Solicitor, Board of Trade*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

NOTE.

Re G.'S APPLICATION FOR A COMMITTAL ORDER.

[CHANCERY DIVISION (Vaisey, J.), July 20, 1954.]

Contempt of Court—Committal—Application for order by complainant in person.*

AS TO COMMITTAL, see HALSBURY, Simonds Edn., Vol. 8, p. 30, para. 56 et seq.

Cases referred to:

- (1) *Ex p. Fenn*, (1834), 2 Dowl. 527; 16 Digest 61, 690.
- (2) *Ex p. Liebrand*, [1914] W.N. 310; 16 Digest 61, 691.

Motion by the applicant in person for an order of committal for contempt of court. The court, having stopped the applicant, raised the preliminary question whether an applicant in person could move a motion for an order of committal. It was contended by counsel for the respondent that the applicant could not be heard.

The applicant appeared in person.

Seuffert for the respondent.

VAISEY, J.: It is a well-settled rule of this court that a party in person cannot move for a writ of attachment, which is precisely the same, in its nature, as moving for a committal order. The reason is that a motion to commit is, as LORD DENMAN, C.J., in *Ex p. Fenn* (1) (2 Dowl. 527), said of an application for an attachment, "in the nature of a criminal information" and, as LORD DENMAN went on to say (*ibid.*),

"... the court always requires that such a motion should be made by a gentleman at the Bar, in order that it may have the sanction of that gentleman's name for the application. To you, therefore, who apply in person, the court cannot grant a rule for an attachment."

In *Ex p. Liebrand* (2) the applicant appeared in person and moved for a rule nisi for a writ of attachment for contempt of court. LAWRENCE, J., said ([1914] W.N. 310) that

"the court would not hear an application of this sort by an applicant in person."

The only difference between those two cases and the present case is that the application in the present case is for committal for contempt, but it is a difference without significance. In either case the application is not only, as LORD DENMAN, C.J., said in *Ex p. Fenn* (1) (2 Dowl. 527) "in the nature of a criminal information," but it is a report to the court of information on which the court is asked to uphold its own honour and protect its own dignity, and that is a matter on which the court may not be addressed by anyone except counsel at the Bar. Accordingly, the applicant in the present case cannot be heard, and his motion must be dismissed.

Solicitors: *Miller, Clayton & Co.* (for the respondent).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

*In two unreported cases, noted in HALSBURY, Simonds Edn., Vol. 8, p. 34, para. 61, note (g), Divisional Courts of the Queen's Bench Division have heard applicants in person on motions for mandamus and for attachment. The rule in the present case is based on the practice established by the cases cited above in relation to applications for attachment, but it seems uncertain whether that practice still prevails strictly in the Queen's Bench Division.

Re PORTER (A BANKRUPT). *Ex parte* THE BOARD OF TRADE
v. OLLARD, OLLARD AND SESSIONS.

[CHANCERY DIVISION (Danckwerts, J.), July 19, 1954.]

Bankruptcy Costs—Petitioning debtor's solicitor's bill of costs—Assets certified as likely to realise £100 but not to exceed £200—Estate not administered summarily under Bankruptcy Act, 1914 (c. 59), s. 129—Bankruptcy Rules, 1952 (S.I., 1952, No. 2113), r. 100 (1), (2), Appendix II, Part I, items No. 3 to No. 11.

The assets of a petitioning debtor were certified as likely to realise £100 but not to exceed £200. These values were such that an order for summary administration under the Bankruptcy Act, 1914, s. 129, could have been made, but no such order was made in fact. The bill of costs of the solicitors for the petitioning debtor having been taxed, the Board of Trade having required the taxation to be reviewed and having appealed from the review of the taxation,

HELD: the method to apply in ascertaining the amount to be allowed, under the Bankruptcy Rules, 1952, r. 100, on taxation of the bill of costs of the solicitor for a petitioning debtor was, first, to add together the amounts stated against items No. 3 to No. 11, inclusive, in Part I of Appendix II to the rules, then to increase the total by fifty per cent., in accordance with r. 100 (2), and, finally to allow three-fifths of the resultant total, in accordance with the proviso to r. 100 (1).

EDITORIAL NOTE. The Bankruptcy Rules, 1952, came into force on Jan. 1, 1953, during the currency of these proceedings. The solicitors' bill of costs was carried in for taxation before that date and at a time when the old rules applied. By r. 3 of the rules of 1952, the rules of 1952 apply, subject to a qualification which is not material here, to all proceedings taken in a matter in bankruptcy whether begun before or after Jan. 1, 1953. Accordingly, the decision in this case is expressed as a decision on the rules of 1952, although the circumstances arose and the bill was presented for taxation at times when the Bankruptcy Rules, 1915, were in force.

AS TO PETITIONING DEBTOR'S COSTS, see HALSBURY, Simonds Edn., Vol. 2, p. 605, para. 1209.

MOTION by the Board of Trade (referred to hereinafter as "the applicants") for an order to review the taxation of the costs of the respondents as solicitors for the bankrupt. The taxation was made by the registrar of the King's Lynn County Court and was reviewed by the bankruptcy taxing master on June 2, 1954.

On Apr. 9, 1951, the debtor was adjudicated bankrupt in the King's Lynn County Court on his own petition and on May 10, 1951, a trustee was appointed.

On Oct. 2, 1952, the trustee certified in writing that the assets of the bankrupt were likely to exceed £100 but not to exceed £200, but an order for the summary administration of the estate under the Bankruptcy Act, 1914, s. 129, was not made. On Oct. 30, 1952, the respondents, who acted as the bankrupt's solicitors for the presentation of his petition, carried in their bill of costs in respect of the petition for taxation with a view to payment of the taxed costs out of the bankrupt's assets pursuant to the Bankruptcy Rules, 1915, r. 117 (now the Bankruptcy Rules, 1952, r. 115). The registrar of the county court dealt with the matter on the basis that, as it was a "non-summary case", the items which were set out under the heading "In Non-Summary Cases" in Part II of the appendix to the rules of 1915, and which now appear as items No. 3 to No. 11 in Part I of Appendix II of the Bankruptcy Rules, 1952, were applicable and that, notwithstanding that the estimated assets were less than £300, the provision in r. 103 (2) of the rules of 1915 (now in r. 100 (1) of the rules of 1952) that only

three-fifths of the charges ordinarily allowable should be allowed did not apply; and, accordingly, he taxed the profit charges in the bill at £12 6s.

On Mar. 4, 1954, the applicants required the taxation to be reviewed by the bankruptcy taxing master under r. 114 of the rules of 1952. The ground of their objection was that the amount allowed by the registrar was excessive in that he had allowed the full amounts of the appropriate items and had not deducted two-fifths from the total, as required by r. 100 of the rules of 1952 since the trustee had certified that the assets were likely to exceed £100 but not likely to exceed £200. On June 2, 1954, Master GIBBON, chief taxing master, reviewed the taxation and allowed the bill at £4 13s. 4d., plus the fifty per cent. increase allowed by r. 100 (2) of the rules of 1952, making a total of £7. In his written answers to the applicants' objections the master said, in support of his review and allowance:

"[The applicants] contend that under r. 100 only three-fifths of such costs should be allowed. To my mind, there are three possible ways of dealing with such a bill: (i) to disregard the certificate of value of the assets entirely, and allow the full taxation as has been done by the registrar; (ii) to allow the full taxation in the first place, and then reduce the total to a sum equal to three-fifths thereof, under r. 100, which, with the exception of item No. 1 and item No. 2 in Part I of Appendix II, is of general application; or (iii) to pay strict attention to the certificate of value which has been given by the trustee and allow the amount set out in item No. 1 and No. 2 of Part I of Appendix II. It is submitted that method (i) above is not allowable in view of r. 100. It, therefore, remains to decide which of Nos. (ii) and (iii) apply. If one looks at note 2 under item No. 3 of the said appendix it is stated that the allowance for instructions is to be made in accordance with the certificate as to value, and in this case one has a definite certificate that the assets exceed £100, but do not exceed £200, that is, the certificate referred to in item No. 1 of the said appendix. In the High Court the practice has always been to read the said appendix as a continuing scale and, therefore, in a case of this nature, where the assets are so small, to allow the appropriate amounts under items No. 1 and No. 2, i.e., to adopt method (iii). This is the only way one can have strict regard to a certificate of value and ensure the main object of the rules, i.e., to prevent the incurring of large costs where there is only a small estate to distribute."

The applicants contended that both the registrar's taxation and the taxing master's review were erroneous in principle, in that (a) the registrar, while correctly applying items No. 3 to No. 11 of Part I and item No. 1 of Part IV of Appendix II to the Bankruptcy Rules, 1952, wrongly allowed a sum in excess of three-fifths of the amounts stated in the said appendix, contrary to the provisions contained in the proviso to r. 100 (1); (b) the taxing master wrongly applied items No. 1 and No. 2 of the said Part I, as if this were a summary case under s. 129 of the Act, which it was not, and wrongly disallowed all other items in the bill. It was submitted on behalf of the applicants that the correct principle of taxation in the case of a debtor's petition where the assets did not exceed £300 was to tax under items No. 3 to No. 11 of Part I, and item 1 of Part IV, and to take three-fifths of the resulting total. If that principle were applied to the present bill, the sum allowable would be £7 7s. 7d. The applicants claimed no relief against the respondents and conceded their right to an allocatur in respect of their profit costs of £7 7s. 7d.

Muir Hunter for the applicants.

The respondents did not appear.

DANCKWERTS, J.: It seems to me that under the original taxation the items were correctly taxed but there should have been a deduction which was not

made, and that the review taken subsequently by the taxing master was not in accordance with the Bankruptcy Rules, 1952, which regulate the matter.

The rule which applies is r. 100, which provides:

- A “ (1) The scales of costs and allowances and the directions contained in Appendix II and Appendix III to these rules shall, subject to these rules, apply to the taxation and allowance of costs and charges in proceedings under the Act and these rules: Provided that, subject to the provisions of Part I of Appendix II, where the estimated assets of the debtor do not exceed the sum of £300 and costs are payable out of the estate, not more than three-fifths of the amounts stated in or applied by the scale of costs in Appendix II may be allowed in any proceedings under the Act in respect of solicitor’s costs, disbursements being added. (2) The total of the amounts allowed in
- B accordance with the provisions of Appendix II for solicitors’ costs and charges (as distinct from disbursements) shall be increased by fifty per cent. in respect of bills taxed after the coming into operation of these rules.”

- C Part I of Appendix II, to which the proviso to r. 100 (1) is made subject, deals with the bill of costs of the solicitor to a petitioning debtor, and items No. 1 and No. 2 apply only in summary cases under the Bankruptcy Act, 1914, s. 129, and
- D provide that certain fixed amounts shall be allowed in such cases. In the present case the assets were certified as likely to exceed £100 and not likely to exceed £200, and in fact they realised £162. Therefore, under s. 129 of the Act of 1914, the estate could have been administered in a summary manner and, if a summary order had been made, items No. 1 and No. 2 would have applied. A summary order was not made, however, and consequently, as it seems to me, items No. 1 and No. 2 of Part I of Appendix II to the rules have no application whatever. Accordingly, the costs allowed, in the first instance, in the present case, are to be found against items No. 3 to No. 11 in Part I of Appendix II. Item No. 3 is “Instructions for petition”, and then a number of other items are set out [items No. 4 to No. 11], and there is an appropriate fee against each, which are the amounts primarily to be applied in the present case. Item No. 3 commences:

- E “Instructions for petition: Where the assets are certified—(a) As not likely to realise more than £500—£3 3s.”

- As this is not a summary case and as item No. 3 appears under the heading “Non-Summary Cases”, this is the provision which must be applied, and, consequently, £3 3s. was the appropriate sum to be allowed in respect of the
- F instructions for petition. Similarly, the amounts set out against item No. 4, which is “Search for prior petition”, item No. 5, which is “Drawing and attesting petition”, and the other items up to and including item No. 11, would apply. The amounts primarily allowed having been ascertained in that way, it seems to me that the proviso to r. 100 (1) must then be applied, and consequently, having added together the sums allowed in respect of items No. 3 to No. 11, and
- G having increased the total by fifty per cent., under r. 100 (2), one must then apply the proviso to r. 100 (1) by allowing not more than three-fifths of the amounts stated against these items in Appendix II. In other words, two-fifths is to be deducted from the total.

Consequently, neither of the methods applied previously in the present case was correct and the correct amount to be allowed for the costs is that which will be reached by adopting the method which I have just indicated. The amount reached in that way is £7 7s. 7d.

Order accordingly.

Solicitor: *Solicitor, Board of Trade.*

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. R. W. PROFFITT, LTD.

[MANCHESTER ASSIZES (JONES, J.), March 19, 1954.]

Hire-Purchase Agreement to hire goods—Provision that, if agreement shall continue in force for two years, hirer may purchase goods for 1s., "subject to the enactment of the necessary legislation"—Whether "hire-purchase agreement"—Hire-Purchase Act, 1938 (c. 53), s. 21 (1).

By an agreement, dated Aug. 13, 1952, a company agreed to hire a television set to a customer. A clause in the agreement provided: "If this agreement shall continue in force for the period of two years from the date hereof then the company shall afford the customer the three alternatives following: (a) subject to the enactment of the necessary legislation to purchase the above-mentioned goods for the sum of 1s. . . ." The company was charged with a breach of art. 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1952, in that, inter alia, the agreement did not state the cash price of the goods, as required by sched. II, para. 2, to the order.

Held: as the point of time in relation to which it must be determined whether the property in goods would or might pass to the hirer under an agreement, if the agreement is to be a "hire-purchase agreement" within the Hire-Purchase Act, 1938, s. 21 (1), was the date of the agreement, and as the right to acquire the goods depended in this case at that time on legislation being passed in the future, the agreement was not a "hire-purchase agreement" within s. 21 (1) of the Act of 1938; and, accordingly, the company was not in breach of the Order of 1952.

EDITORIAL NOTE. The Hire-Purchase and Credit Sale Agreements (Control) Order, 1952 (S.I., 1952, No. 121), and the orders amending it, namely, S.I., 1952, No. 724, S.I., 1953, Nos. 652, 1264, are revoked by the Hire-Purchase and Credit Sale Agreements (Control) (Revocation) Order, 1954 (S.I., 1954, No. 935). Although such an offence as was the subject of this case cannot arise in respect of acts after the date of revocation, the decision may be useful for its relevance to the provisions of the Hire-Purchase Act, 1938, and to the question, which may arise in relation to other legislation, of the effect of an agreement giving options subject to future legislation removing existing prohibitions.

FOR THE HIRE-PURCHASE ACT, 1938, s. 21 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 22, p. 1033; and FOR THE HIRE-PURCHASE AND CREDIT SALE AGREEMENTS (CONTROL) ORDER, 1952, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 19, p. 231.

TRIAL on indictment.

The defendants, R. W. Proffitt, Ltd., were charged at Manchester Assizes, before JONES, J., and a jury, with an offence against the Defence (General) Regulations, 1939, reg. 55, in that on Aug. 13, 1952, they entered into a hire-purchase agreement with Eric James Marsh in respect of a television set, contrary to art. 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1952, made under reg. 55. It was contended by the prosecution that the agreement was unlawful as it did not comply with the requirements of sched. II to the Order. The defendants contended that the agreement was not a hire-purchase agreement and that, therefore, they had not committed any breach of the Order.

C. T. B. Leigh for the prosecution.

Laski, Q.C., and C. N. Glidewell for the defendants.

JONES, J.: Hire-purchase agreements take various forms, and the usual one is that of hire with an option to purchase. The Hire-Purchase Act, 1938, imposed certain restrictions in respect of hire-purchase agreements and further

restrictions were imposed by the Hire-Purchase and Credit Sale Agreements (Control) Order, 1952 (S.I., 1952, No. 121). Article 1 of the Order provides:

"A person shall not dispose of any goods to which this Order applies in pursuance of a hire-purchase or credit sale agreement entered into after Jan. 31, 1952, unless the requirements specified in sched. II hereto are or have been satisfied in relation to that agreement."

A Paragraph 1 of sched. II is that the agreement is in writing. Nothing arises on that in the present case. Paragraph 2 of sched. II reads:

"The agreement contains in respect of each description of goods a statement of the cash price of the goods of that description comprised in the agreement and of any amount payable by instalments under the agreement for the installation or maintenance of those goods."

B The document in the present case does not comply with that requirement. The defendants say that it does not do so because it is not a hire-purchase agreement. The prosecution, on the other hand, contend that it is a hire-purchase agreement, and that, therefore, it ought to comply with para. 2. Accordingly, what has to be decided is a pure question of law whether or not the document is a hire-purchase agreement.

C Paragraph 3 of sched. II to the Order reads:

"Before the signing of the agreement actual payment was made in respect of each description of goods comprised in the agreement of not less than an amount equal to the percentage specified in column 2 of sched. I. hereto in relation to that description of goods of the aggregate of—(a) the cash price of the goods of that description comprised in the agreement; and (b) any amount payable by instalments under the agreement for the installation or maintenance of the goods of that description comprised in the agreement."

D The percentage specified in column 2 of sched. I in respect of a television set, which was the subject-matter of the agreement, is $33\frac{1}{3}$ per cent. and the maximum period during which the instalments may be paid is eighteen months [column 3 of sched. I]. In the present case, no cash price has been stated in the document, the requirement about the payment of $33\frac{1}{3}$ per cent. has not been carried out, nor is the period for the payment of the instalments limited to eighteen months. Therefore, if the document is a hire-purchase agreement it is entirely in breach of the Order of 1952, and the defendants are liable to be convicted of having broken the Order by entering into a hire-purchase agreement which does not comply with its requirements.

E Members of the jury, before I can allow you to come to the conclusion, as a matter of fact, that the defendants have been guilty of a breach of the Order, I have to decide and direct you on the point whether the document in the present case is a hire-purchase agreement or not. If I decide that it is a hire-purchase agreement, you would have to convict. On the other hand, if I decide that it is not a hire-purchase agreement you cannot convict, and, therefore, you would say that the defendants are not guilty.

F The question whether or not the document is a hire-purchase agreement is not an easy one. It is seldom easy to construe regulations of this kind, and the point really turns on whether cl. 11 (a) of the document gives an option to purchase or whether it is so restricted that no such option is given. Clause 11 provides:

G "If this agreement shall continue in force for the period of two years from the date hereof then the company shall afford the customer the three alternatives following: (a) subject to the enactment of the necessary legislation to purchase the above-mentioned goods for the sum of 1s. . . ."

H It is obvious that, if the words "subject to the enactment of the necessary legislation" were left out of cl. 11 (a) and only the words "to purchase the

above-mentioned goods for the sum of 1s." remained, there would be an option to purchase, and the document would be a hire-purchase agreement, which would have to comply with the Order of 1952. What is the meaning of the words "subject to the enactment of the necessary legislation"?

In the Hire-Purchase Act, 1938, s. 21 (1), "hire-purchase agreement" is defined as

"an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee . . ."

It could not be suggested by counsel for the prosecution that the document in the present case was an agreement under which the bailee "may buy the goods", but he contended that it was an agreement under which the property in the goods "will or may pass to the bailee". He agreed (and, undoubtedly, it is the case) that the time when one had to judge whether, under the agreement, the property in the goods "will or may pass to the bailee" was the time when the agreement was entered into.

The conclusion to which I have come is, that, to make the document a hire-purchase agreement, the hirer, or bailee, should either have been given a right to buy the goods if he wanted to buy them, or there should have been such a provision that, if the property in the goods might pass to the bailee, it might pass to him only by virtue of some right which had been conferred on him by the agreement. In my view, no such right was conferred on him by the agreement in the present case, because the right to purchase would be acquired only if new legislation were passed, and there is no certainty whatever whether the new legislation would be passed or when it would be passed. In view of that, it seems to me that it cannot be said that this is

"an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee . . ."

within s. 21 (1) of the Act of 1938. For these reasons, members of the jury, I have come to the conclusion, as a matter of law, that the document in the present case is not a hire-purchase agreement. Therefore, the defendants have not committed any breach of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1952, and there is no case to go to you. In those circumstances, on my direction, will you find a verdict of not guilty?

Verdict: "Not Guilty".

Solicitors: *Solicitor, Board of Trade* (for the prosecution); *David Blank, Alexander & Co., Manchester* (for the defendants).

[*Reported by MISS M. D. CHORLTON, Barrister-at-Law.*]

BEDDER v. DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Lord Simonds, L.C., Lord Porter, Lord Goddard, C.J., Lord Tucker and Lord Asquith of Bishopstone), July 23, 30, 1954.]

Criminal Law—Murder—Provocation—Accused sexual impotent—Killed prostitute—Reasonable man not to be invested with physical peculiarities of accused for purpose of determining whether there was provocation.

A The appellant, who was sexually impotent, attempted in vain to have intercourse with a prostitute, who jeered at him and hit and kicked him. He then stabbed her with a knife and killed her. He was indicted for murder and pleaded provocation. At his trial he was convicted of murder. He appealed to the Court of Criminal Appeal on the ground of misdirection as to the test to be applied in determining whether there was provocation and, his appeal having been dismissed, he appealed to the House of Lords.

B **HELD:** the test to be applied in determining whether there had been provocation sufficient to reduce the homicide from murder to manslaughter was that of the effect of the alleged provocation on the mind of a reasonable man: and in applying this test the hypothetical reasonable man did not have to be invested notionally with the physical peculiarities of the accused.

C *Mancini v. Public Prosecutions Director* ([1941] 3 All E.R. 272), applied. Appeal dismissed.

AS TO PROVOCATION, see HALSBURY, Hailsham Edn., Vol. 9, p. 434, para. 745; and FOR CASES, see DIGEST, Vol. 15, pp. 776-782, Nos. 8305-8384.

Cases referred to:

D (1) *Mancini v. Public Prosecutions Director*, [1941] 3 All E.R. 272; [1942] A.C. 1; 111 L.J.K.B. 84; 165 L.T. 353; 2nd Digest Supp.

(2) *Holmes v. Public Prosecutions Director*, [1946] 2 All E.R. 124; [1946] A.C. 588; 115 L.J.K.B. 417; 175 L.T. 327; 2nd Digest Supp.

(3) *R. v. McCarthy*, ante, p. 262.

(4) *R. v. Lesbini*, [1914] 3 K.B. 1116; 84 L.J.K.B. 1102; 112 L.T. 175; 15 Digest 779, 8332.

E (5) *R. v. Alexander*, (1913), 109 L.T. 745; 9 Cr. App. Rep. 139; 14 Digest 61, 271.

(6) *R. v. Welsh*, (1869), 11 Cox, C.C. 336; 15 Digest 777, 8314.

F APPEAL from a decision of the Court of Criminal Appeal (HILBERY, CASSELS and HAVERS, J.J.), dated June 21, 1954, dismissing an appeal against a conviction of murder at a trial before SELLERS, J., at Leicester Assizes, on May 27, 1954. The facts appear in the opinion of LORD SIMONDS, L.C.

Marshall, Q.C., and *O. J. V. Kitson* for the appellant.

The Attorney-General (Sir Lionel Heald, Q.C.), *Elwes, Q.C.*, and *Stimson* for the Crown.

G The House took time for consideration.

July 23. Their Lordships dismissed the appeal and on July 30 the following opinions were read.

H LORD SIMONDS, L.C.: My Lords, this appeal raises once more a question of importance in the criminal law. Your Lordships, I think, agree with me that, on examination, the question appears to be amply covered by the highest authority, but the answer can usefully be re-stated.

The appellant, a youth of eighteen years, was convicted on May 27, 1954, at Leicester Assizes of the murder of Doreen Mary Redding, a prostitute. He appealed to the Court of Criminal Appeal on the substantial ground of misdirection, claiming that the learned judge who tried the case had wrongly directed the jury on the test of provocation and that, had they been rightly directed, they might have found him guilty not of murder but of manslaughter

only. The Court of Criminal Appeal dismissed his appeal, holding that the jury had been rightly directed.

The relevant facts, so far as they bear on the question of provocation, can be shortly stated. The appellant has the misfortune to be sexually impotent, a fact which he naturally well knew and, according to his own evidence, had allowed to prey on his mind. On the night of the crime he saw the prostitute with another man and, when they had parted, went and spoke to her and was led by her to a quiet court off a street in Leicester. There he attempted in vain to have intercourse with her whereupon—and I summarise the evidence in the way most favourable to him—she jeered at him and attempted to get away. He tried still to hold her and then she slapped him in the face and punched him in the stomach: he grabbed her shoulders and pushed her back from him whereat (I use his words),

“She kicked me in the privates. Whether it was her knee or foot, I do not know. After that I do not know what happened till she fell.”

She fell, because he had taken a knife from his pocket and stabbed her with it twice, the second blow inflicting a mortal injury.

It was in these circumstances that the appellant pleaded that there had been such provocation by the deceased as to reduce the crime from murder to manslaughter, and the question is whether the learned judge rightly directed the jury on this issue. In my opinion, the summing-up of the learned judge was impeccable. Adapting the language used in this House in the cases of *Mancini v. Public Prosecutions Director* (1) and *Holmes v. Public Prosecutions Director* (2) to which I shall later refer, he thus directed the jury:

“Provocation would arise if the conduct of the deceased woman, Mrs. Redding, to the prisoner was such as would cause a reasonable person, and actually caused the person to lose his self-control suddenly and to drive him into such a passion and lack of self-control that he might use violence of the degree and nature which the prisoner used here. The provocation must be such as would reasonably justify the violence used, the use of a knife”,

and a little later he addressed them thus:

“The reasonable person, the ordinary person, is the person you must consider when you are considering the effect which any acts, any conduct, any words, might have to justify the steps which were taken in response thereto, so that an unusually excitable or pugnacious individual, or a drunken one or a man who is sexually impotent is not entitled to rely on provocation which would not have led an ordinary person to have acted in the way which was in fact carried out. There may be, members of the jury, infirmity of mind and instability of character, but if it does not amount to insanity, it is no defence. Likewise infirmity of body or affliction of the mind of the assailant is not material in testing whether there has been provocation by the deceased to justify the violence used so as to reduce the act of killing to manslaughter. They must be tested throughout this case by the reactions of a reasonable man to the acts, or series of acts, done by the deceased woman.”

Other passages may be found in his summing-up in which he takes as the test the reaction of the hypothetical reasonable man to the alleged provocation. In the Court of Criminal Appeal, these directions were quoted and approved, and reference was made also to the recent case of *R. v. McCarthy* (3) where it was held (ante, p. 265) that there is

“... no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication.”

It appeared to that court, as it appears to me, that

“no distinction is to be made in the case of a person who, though it may not be a matter of temperament is physically impotent, is conscious of that impotence, and therefore mentally liable to be more excited unduly if he is ‘twitted’ or attacked on the subject of that particular infirmity.”

A The court thereupon approved and reiterated the proposition that the question for the jury was whether, on the facts as they found them from the evidence, the provocation was, in fact, enough to lead a reasonable person to do what the accused did.

B My Lords, no other conclusion was open to the Court of Criminal Appeal, nor is any other conclusion open to your Lordships in view of the recent cases in this House of *Mancini* (1) and *Holmes* (2). The relevant part of the former decision is accurately stated in the headnote in these words:

“The test to be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did.”

C And VISCOUNT SIMON, L.C., in a speech in which all their Lordships concurred, referred ([1941] 3 All E.R. 277) with approval to the decision of the Court of Criminal Appeal in *R. v. Lesbini* (4). It is worth recalling that, in that case, the court said ([1914] 3 K.B. 1120):

D “We agree with the judgment of DARLING, J., in *R. v. Alexander* (5) and with the principles enunciated in *R. v. Welsh* (6), where it is said that (11 Cox, C.C. 338), ‘there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion’.”

E Finally, in *Holmes’* case (2), VISCOUNT SIMON, in a speech in which my noble and learned friend, LORD PORTER and I, as well as LORD MACMILLAN and LORD DU PARCQ, concurred, after a prolonged hearing and an exhaustive examination of the relevant law used these words ([1946] 2 All E.R. 126):

F “If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict.”

G My Lords, in the face of this authority, I am at a loss to know what other direction than that which he gave could properly have been given by the learned judge to the jury in this case. The argument, as I understood it, for the appellant was that the jury, in considering the reaction of the hypothetical reasonable man to the acts of provocation, must not only place him in the circumstances in which the accused was placed, but must also invest him with the personal physical peculiarities of the accused. Learned counsel, who argued the case for the appellant with great ability, did not, I think, venture to say that he should be invested with mental or temperamental qualities which distinguished him from the reasonable man: for this would have been directly in conflict with the passage from the recent decision of this House in *Mancini’s* case (1) which I have cited. But he urged that the reasonable man should be invested with the peculiar physical qualities of the accused, as in the present case with the characteristic of impotence, and the question should be asked: what would be the reaction of the impotent reasonable man in the circumstances? For that proposition I know of no authority: nor can I see any reason in it. It would be

plainly illogical not to recognise an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognise for that purpose some unusual physical characteristic, be it impotence or another. Moreover, the proposed distinction appears to me to ignore the fundamental fact that the temper of a man which leads him to react in such and such a way to provocation, is, or may be, itself conditioned by some physical defect. It is too subtle a refinement for my mind or, I think, for that of a jury to grasp that the temper may be ignored but the physical defect taken into account.

It was urged on your Lordships that the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the "reasonable" or the "average" or the "normal" man is invoked. If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value. This is precisely the consideration which led this House in *Mancini's* case (1) to say that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In my opinion, then, the Court of Criminal Appeal was right in approving the direction given to the jury by the learned judge and this appeal must fail.

My Lords, my noble and learned friend, **LORD GODDARD, C.J.**, authorises me to say that he has read and concurs in this opinion.

LORD PORTER : My Lords, I concur.

LORD TUCKER : My Lords, I also concur.

LORD ASQUITH OF BISHOPSTONE : My Lords, I also concur.

Appeal dismissed.

Solicitors: *C. D. Geach*, Leicester (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

SENANAYAKE v. NAVARATNE AND ANOTHER.

[PRIVY COUNCIL (Lord Simonds, L.C., Lord Cohen and Mr. L. M. D. de Silva),
June 21, July 15, 1954.]

Privy Council—Appeal—Jurisdiction to hear appeal on a matter within the competence of a tribunal—No intention that right of appeal to Crown should attach—Ceylon—Validity of Parliamentary election—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 50, s. 83.

By the Ceylon (Parliamentary Elections) Order in Council, 1946, an election judge was the appropriate tribunal to determine whether an election was void. By amendments to the Order in Council made after the decision of the tribunal which was considered in *De Silva v. A.-G. for Ceylon* (1949) (50 Ceylon N.L.R. 481) a right was given to appeal to the Supreme Court of Ceylon from the determination of the tribunal on a point of law but not otherwise. A petition was presented to the tribunal alleging charges of corrupt practices and that the appellant's election was void, and the tribunal, having given leave for the petition to be amended, determined (inter alia) that the appellant's election was void. The appellant appealed to the Supreme Court on the grounds that the tribunal's decision was not supported by the evidence and that the tribunal had no jurisdiction to determine the amended petition as the application for amendment had not been made within the period allowed by the Order in Council. The Supreme Court having affirmed the decision of the tribunal that the election was void, and having rejected the plea to the tribunal's jurisdiction, the appellant appealed to the Crown. On a preliminary point whether there was jurisdiction to determine the appeal,

HELD: the election judge was a tribunal with jurisdiction not only to determine finally the question whether the corrupt practices alleged had been committed but also to determine whether, on the true construction of the Order in Council, it was competent for the petitioner to maintain his amended petition; and that appeal to the Crown did not lie, since the nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter showed that in creating the tribunal it had not been intended that the ordinary incident of a right of appeal to the Crown should attach to decisions within the tribunal's jurisdiction.

De Silva v. A.-G. for Ceylon (1949) (50 Ceylon N.L.R. 481), followed.

EDITORIAL NOTE. The principle of the decision in this case appears in the headnote; but as the case arose in relation to an election it may be noted that the provision of the English statute law comparable to s. 83 (1) of the Ceylon Order in Council mentioned in the report is s. 114 of the Representation of the People Act, 1949: HALSBURY'S STATUTES, Second Edn., Vol. 8, p. 676.

AS TO THE APPELLATE JURISDICTION OF HER MAJESTY IN COUNCIL, see HALSBURY, Simonds Edn., Vol. 5, p. 682, para. 1458.

Cases referred to:

- (1) *Théberge v. Laudry*, (1876), 2 App. Cas. 102; 46 L.J.P.C. 1; 35 L.T. 640; 17 Digest 476, 394.
- (2) *Strickland (Lord) v. Grima*, [1930] A.C. 285; sub nom. *Parnis v. Agius*, 99 L.J.P.C. 81; 142 L.T. 386; Digest Supp.
- (3) *De Silva v. A.-G. for Ceylon*, (1949), 50 Ceylon N.L.R. 481; [1949] W.N. 248; 2nd Digest Supp.
- (4) *Renouf v. A.-G. for Jersey*, [1936] 1 All E.R. 936; [1936] A.C. 445; 105 L.J.P.C. 84; 155 L.T. 1; Digest Supp.
- (5) *Nawaz v. King-Emperor*, (1941), L.R. 68 I.A. 126.

- (6) *R. v. Income Tax Special Purposes Comrs.*, (1888), 21 Q.B.D. 313; 53 J.P. 84; sub nom. *R. v. Income Tax Special Comrs.*, 57 L.J.Q.B. 513; 59 L.T. 455; 2 Tax Cas. 332; 28 Digest 97, 580.

PRELIMINARY POINT in an appeal by special leave against an order of the Supreme Court of Ceylon, dated Dec. 18, 1953, affirming an order of the election judge (DE SILVA, P.J.), dated Feb. 13, 1953. The facts appear in the judgment. On June 21, 1954, their Lordships decided that they had no jurisdiction to hear the appeal and reserved their reasons.

Sir Hartley Shawcross, Q.C., Diplock, Q.C., Handoo and W. Jayawardene for the appellant.

S. Nadesan, Q.C., Amerasinghe and P. B. Tampoe for the respondents.

July 15. LORD SIMONDS, L.C.: The Supreme Court of Ceylon, by judgment dated Dec. 18, 1953, affirmed by a majority an order of the election judge (DE SILVA, P.J.) dated Feb. 13, 1953, determining that the appellant's election to the House of Representatives Ceylon as the member for the Kandy Electoral District was void. The election judge found that the appellant had committed two corrupt practices. The Supreme Court reversed his decision on one of them but affirmed his determination that the election was void on the ground that the appellant, in breach of s. 58 (f) of the Ceylon (Parliamentary Elections) Order in Council, 1946, had knowingly made the declaration as to election expenses required by s. 70 of the Order in Council falsely. Before the Supreme Court, the appellant argued that the determination of the election judge ought to be reversed on two grounds: (i) that there was not evidence to support the finding of the election judge; (ii) that he had no jurisdiction to hear the petition since, although the petition had been presented in accordance with s. 83 (1) of the Order in Council, the application for leave to amend the petition by alleging a false declaration as to election expenses had not been made within twenty-one days of the date on which the result of the election had been published in the government GAZETTE, in accordance with s. 50. The Supreme Court rejected both pleas, the second by a majority on the ground that the case fell within the proviso to s. 83 (1), the original petition (which raised other charges of corrupt practices) having been presented within the specified period of twenty-one days and the amendment raising the charge now in question having been made within twenty-eight days after the transmission to the returning officer of the allegedly false return of election expenses.

The appellant applied to this Board for leave to appeal from this decision. The respondents did not appear on the hearing of the petition, but the appellant's counsel very properly called the Board's attention to certain authorities which raised a doubt whether the appeal could be entertained, having regard to the subject-matter, the validity of a Parliamentary election with which it dealt. Leave was granted on Feb. 10, 1954, but

"without prejudice to the right of the Attorney-General of Ceylon or the respondents to argue the question as to the jurisdiction of the Lords of the Committee to entertain the appeal."

The Case lodged on behalf of the respondents contained no reference to the question thus reserved, but the respondents, shortly before the hearing, gave notice of their intention to raise it, and it was argued before their Lordships as a preliminary point.

Having regard to the conclusion which their Lordships have reached thereon, it will not be necessary to set out in great detail the provisions of the Ceylon (Parliamentary Elections) Order in Council, 1946, or Acts of the Ceylon legislature amending the same, but it will be convenient to refer to a few sections which may throw some light on the preliminary point. Section 81 of the Order in Council in its original form was as follows:

"At the conclusion of the trial of an election petition the election judge shall determine whether the member whose return or election is complained of, or any other and what person was duly returned or elected, or whether the election was void, and shall certify such determination to the governor. Upon such certificate being given, such determination shall be final; and the return shall be confirmed or altered, or the governor shall within one month of such determination by notice in the government GAZETTE order the holding of an election in the electoral district concerned, as the case may require, in accordance with such certificate."

By s. 82 (1) of the Order in Council, the election judge was also required to report in writing to the governor whether any corrupt or illegal practice had, or had not, been committed by or with the knowledge of any candidate at the election, or by his agent, and by s. 82 (3), when an election judge reported that a corrupt or illegal practice had been committed by any person, that person was to be submitted to the same incapacities as if at the date of the said report he had been convicted of that practice pursuant to s. 58 of the Order in Council.

Sections 81 and 82 of the Order in Council were repealed by s. 3 of the Parliamentary Elections (Amendment) Act, No. 19 of 1948, and new ss. 81, 82, 82A, 82B, 82C and 82D were substituted therefor. Their Lordships need not set out the new sections in full. Suffice it to say that they confer a right of appeal to the Supreme Court on a person dissatisfied with the determination of an election judge on a question of law but not otherwise. The appeal has to be presented before the expiry of a period of one month next succeeding the date of the determination against which the appeal is preferred. Section 82B (3) provides that the decision of the Supreme Court is to be final and conclusive. A right of appeal from a determination of the election judge having been given, the provisions in the original s. 81 directed to securing an early election to fill any vacancy created by the determination had to be modified, but the substituted s. 82C and s. 82D contain provisions securing that the governor-general shall direct the holding of a new election within one month after receiving notice of the final determination that an election was void.

In support of his preliminary point, counsel for the respondents relied on three decisions of this Board, *Théberge v. Laudry* (1), *Lord Strickland v. Grima* (2), and *De Silva v. A.-G. for Ceylon* (3). In *Théberge v. Laudry* (1), their Lordships were considering a petition for leave to appeal from a decision of the Superior Court of Quebec declaring the appellant's election to the House of Assembly void on the ground of corrupt practices. The jurisdiction of the Superior Court in election matters had been established by the Quebec Controverted Elections Act, 1875 (38 Vict. c. 8. Quebec Statutes), which had transferred to the Superior Court a jurisdiction previously exercised by the Assembly itself, and which contained a provision that the judgment of the Superior Court in such cases should not be susceptible of appeal. Refusing leave to appeal, LORD CAIRNS, L.C., delivering the judgment of the Board, said (2 App. Cas. 106):

"Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. These two Acts of Parliament, the Acts of 1872 and 1875 [the Quebec Controverted Elections Acts, 1872 and 1875], are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction, in a particular court of the colony for the purpose of taking out,

with its own consent, of the Legislative Assembly, and vesting in that court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known."

In *Lord Strickland v. Grima* (2), a similar issue arose as to the constitution of the Senate of Malta. Leave to appeal had been granted, but the question of their Lordships' jurisdiction was raised at the hearing of the appeal. LORD BLANESBOROUGH, delivering the judgment of the Board, said (1930] A.C. 288):

"Although special leave to appeal had been granted by His Majesty in Council, it was recognised that it was not thereby intended that the Board, with all the facts before it, should be precluded from re-considering whether the appeal was competent . . ."

The statutory provisions as to the composition of the Senate were complicated, and it is sufficient for present purposes to say that letters patent [Malta Constitution Letters Patent, 1921] governing the matter contained a provision in these terms (art. 33):

"All questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by Our Court of Appeal in Malta."

Their Lordships, applying *Thiberge v. Laundry* (1), held that, on the construction of the letters patent, an appeal would not lie and, accordingly, refused further to entertain the appeal.

In *De Silva v. A.G. for Ceylon* (3), their Lordships were considering an application for leave to appeal from a determination of the election judge under the original s. 81 of the Order in Council now before their Lordships. The determination had been given before the passing of Act No. 19 of 1948 and there was, therefore, no right of appeal to the Supreme Court. Their Lordships advised Her Majesty to refuse leave to appeal. Delivering the judgment of the Board, LORD SIMONDS, after referring to *Thiberge v. Laundry* (1), continued (50 Ceylon N.L.R. 483):

"It is no doubt true, as counsel for the petitioner urged, that the prerogative right to entertain an appeal is 'taken away only by express words or the necessary intendment of a statute or other equivalent act of State' (see *Renouf v. A.G. for Jersey* (4)), but, as was pointed out in *Thiberge v. Laundry* (1), the preliminary question must be asked whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown. In this case as in that it appears to their Lordships that the peculiar nature of the jurisdiction demands that this question should be answered in the negative. It was contended for the petitioner that different considerations apply where, as here, the jurisdiction of the election judge to hear election petitions is not substituted for that of the legislative body itself but is created de novo upon the establishment of that body. But this appears to their Lordships to be an unsubstantial distinction and in effect to be met by the later case of *Lord Strickland v. Grima* (2). Such a dispute as is here involved concerns the rights and privileges of a legislative assembly, and, whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject-matter is such that the determination must be final, demanding immediate action by the proper executive authority and

admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted."

Since *De Silva v. A.-G.* (3) was decided, the Ceylon Order in Council has been amended by allowing an appeal to the Supreme Court on questions of law, but their Lordships cannot regard that amendment as affecting the application to the present case of the principle laid down in the cases cited.

In none of these cases was the jurisdiction of the tribunal to deal with the subject-matter at issue challenged, whereas, in the present case, counsel on behalf of the appellant seeks to challenge the jurisdiction of the election judge on the second ground raised by the appellant before the Supreme Court, namely, that the application for leave to amend the petition was not made within twenty-one days after the publication of the result of the election in the government GAZETTE. The jurisdiction of the election judge being challenged, the Judicial Committee, so the argument ran, must have jurisdiction to determine whether his order was a nullity.

In support of this argument, he relied on the observations of VISCOUNT SIMON, L.C., in *Nawaz v. King-Emperor* (5) where, dealing with the question of the class of criminal cases in which the Judicial Committee will give leave to appeal, he said (L.R. 68 I.A. 128):

"Another and obvious example would arise if the courts had no jurisdiction either to try the crime, or to pass the sentence."

But in that case their Lordships were considering not whether an appeal to the Judicial Committee was competent but whether in a class of cases in which, admittedly, an appeal was competent their Lordships should, in their discretion, grant leave to appeal. Here, as was pointed out in *De Silva v. A.-G.* (3), their Lordships are dealing with

"the preliminary question . . . whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown."

Counsel for the appellant mainly relied, however, on some observations of LORD ESHER, M.R., in *R. v. Income Tax Special Purposes Comrs.* (6) (21 Q.B.D. 319), where LORD ESHER was dealing with the powers which an Act of Parliament may confer on an inferior court or tribunal or body when first creating it. He said:

"It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends:

and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Counsel said that the courts, in determining into which class a particular tribunal falls, should lean against the second alternative, since it might leave the subject at the mercy of an arbitrary tribunal without any right of appeal. Such, he said, would have been the position in Ceylon before the amending Act No. 19 of 1948. Their Lordships must point out that LORD ESHER was dealing with a case where the statute had made the existence of a special set of facts a condition precedent to the exercise of jurisdiction by a tribunal, whereas their Lordships have to deal with a case where the question of jurisdiction depends on the construction of the statute itself. Their Lordships are, therefore, unable to derive much assistance from the case last cited. They are satisfied that the election judge, as established by the Order in Council of 1946, was a tribunal with a jurisdiction not only to determine finally the question whether the corrupt practices alleged in the petition had been committed but also to determine finally whether, on the true construction of the Order in Council, it was competent in the circumstances for the petitioner to maintain his amended petition. Their Lordships do not desire to repeat what was said by their predecessors in the cases cited. Suffice it to say that, in their Lordships' opinion, the peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter and the representation in Parliament of the constituency affected make it clear that it was not the intention of the Order in Council to create a tribunal with the ordinary incident of an appeal to the Crown.

It is for these reasons that their Lordships have humbly tendered their advice to Her Majesty that the appeal ought not to be further entertained. The appellant must pay the respondents' costs of this appeal less the appellant's costs of the respondents' two applications [as to costs] made on July 15, 1954 and July 20, 1954, respectively.

Appeal not entertained.

Solicitors: *De Silva & Mendis* (for the appellant); *Smiles & Co.* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re ERNEST SIMMONS & ERIC B. POLITZER.

[COURT OF APPEAL (Somervell, Birkett and Romer, L.J.J.), June 24, 25, July 21, 1954.]

Costs—Taxation—Solicitor and client—Contentious business—Alleged agreement—Receipt of sum due thereunder No submission of agreement to taxing officer—Whether solicitors entitled to immunity from taxation—Solicitors Act, 1932 (c. 37), s. 60 (5), s. 62.

A Prior to January, 1953, S. & Co., solicitors, acted professionally for the applicant in three actions (the C. litigation). The applicant requested S. & Co. to deliver a complete statement of account, but the statement delivered was unsatisfactory. The applicant instructed other solicitors to act for him in the C. litigation and on Jan. 29, 1954, a summons was issued against S. & Co. asking for taxation of the bill of fees and that, on payment of any amount found due, S. & Co. should deliver to the applicant all documents in their possession belonging to him. On Feb. 2, 1954, at a meeting between S. & Co. and the applicant's solicitors, S. & Co. were handed a letter signed by the applicant's solicitors enclosing a cheque which was described as representing "the balance due on your account with" the applicant, and requesting a "formal receipt in full and final settlement of all outstanding costs". S. & Co. accepted the cheque and signed a form of receipt which was prepared by the applicant's solicitors, acknowledging receipt of the amount of the cheque "in full discharge of all claims costs disbursements and other moneys owing" to them by the applicant. S. & Co. then handed over all the applicant's documents. When the amount paid was received by the solicitors the agreement had not been allowed by a taxing officer as required by the Solicitors Act, 1932, s. 60 (5). On Feb. 4, 1954, the summons was served on S. & Co. Assuming, but not accepting, that the letter and receipt of Feb. 2, 1954, constituted a written agreement within the Solicitors Act, 1932, s. 59 by the applicant with S. & Co. as to their remuneration for contentious business done for him,

E HELD: S. & Co. were not entitled to immunity from taxation of their costs by virtue of s. 62 of the Act of 1932, because, in disregard of s. 60 (5), they had received the amount payable under the agreement before the agreement had been examined and allowed by a taxing officer of the court.

Re Thompson. Ex p. Baylis ([1894] 1 Q.B. 462), criticised.

F Per curiam: The court can re-open an agreement covering contentious business even though the agreement has been approved by a taxing officer.

Re Stuart. Ex p. Cathcart ([1893] 2 Q.B. 201), applied.

Appeal dismissed.

FOR THE SOLICITORS ACT, 1932, s. 60 (5) and s. 62, see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 54 and 57.

G Cases referred to:

- (1) *Re Stuart. Ex p. Cathcart*, [1893] 2 Q.B. 201; 62 L.J.Q.B. 623; 69 L.T. 334; 42 Digest 134, 1284.
- (2) *Re Attorneys & Solicitors Act, 1870*, (1875), 1 Ch.D. 573; 45 L.J.Ch. 47; 42 Digest 130, 1245.
- (3) *Ray v. Newton*, [1913] 1 K.B. 249; 82 L.J.K.B. 125; 108 L.T. 313; 42 Digest 133, 1270.
- (4) *Clare v. Joseph*, [1907] 2 K.B. 369; 76 L.J.K.B. 724; 96 L.T. 770; 42 Digest 126, 1209.
- (5) *Re Thompson. Ex p. Baylis*, [1894] 1 Q.B. 462; 63 L.J.Q.B. 187; 70 L.T. 238; 42 Digest 127, 1217.

H APPEAL by the respondents, Messrs. Ernest Simmons and Eric B. Politzer, from an order of GLYN-JONES, J., made in chambers and dated Mar. 15, 1954,

whereby he set aside the master's order and ordered that the respondents should deliver to the applicant bills of costs in all matters in which the respondents had been instructed as solicitors for the applicant and that the bills, fees, charges and disbursements so delivered be referred to the master to be taxed.

The following facts are taken from the judgment of the court. Prior to January, 1953, Messrs. Ernest Simmons & Eric B. Politzer (hereinafter referred to as "the solicitors") had, for some years, acted professionally for the applicant, Mr. R. F. H. Norman, in various matters including three actions which are referred to hereafter collectively as "the Conquy litigation". In addition to these actions they had acted in some business of a non-contentious character (or mainly so) (hereinafter referred to as "the Holdron matter"). On Jan. 27, 1953, the applicant wrote to the solicitors asking them to send him a complete statement of account and they forwarded to him, two days later, a summarised bill headed "Yourself and Conquy costs". This document, which showed a balance of £5,112 6s. 11d. as due to the solicitors, was not drawn in sufficient detail to constitute a proper bill of costs. The statement was accompanied by a letter, also headed "re Conquy", in which the solicitors wrote:

"We might mention the fact that having regard to your promise to be generous in any future matter if we merely charged a nominal fee for the Holdron matter, plus disbursements, we have not yet rendered you a bill in respect of that matter, which we may say will amount to a considerable sum. We have, however, endeavoured to draw our bill in the Conquy matter upon a fair and reasonable basis only but we would like you to know that provided a speedy and reasonable settlement thereof be made we shall keep to the understanding regarding Holdron but we must, of course, reserve our right also to deliver a bill in that matter for our proper charges."

At some later date the solicitors rendered to the applicant a "cash account" showing a balance due to them of £1,678 odd. This account, which was brought down to July, 1953, was admittedly inaccurate in certain respects.

Towards the end of 1953 and early in 1954 discussions and negotiations proceeded between the applicant and the solicitors with regard to the amount which they claimed was due from him for costs. The applicant was dissatisfied with the statement and cash account which they had delivered to him, although he did, in fact, pay over £3,000 on account. On Jan. 18, 1954, the solicitors were served with notice of change of solicitors, the applicant having appointed Messrs. Oswald Hickson, Collier & Co. to act for him in their place in connection with the Conquy litigation. On Jan. 28 and 29, 1954, meetings took place between Mr. Simmons, a partner in the firm of Messrs. Ernest Simmons & Eric B. Politzer, and Mr. Carter-Ruck, a partner in Messrs. Oswald Hickson, Collier & Co., on behalf of the applicant. At or shortly after these interviews the solicitors proffered a further statement of account which showed £1,499 6s. 3d. as owing to them. This amount was arrived at by adding to the £5,112 6s. 11d. shown due by the earlier statement of January, 1953, a further sum "Account rendered to January, 1954", of £210 6s. and deducting £3,198 6s. 8d. "Paid on account" and £625 "Amount received from Lord Camrose". If this £625 be added to the £1,499 6s. 3d., the result is a total of £2,124 6s. 3d. A list of cheques which the solicitors had received from the applicant was attached to the statement.

The summons in the present proceedings was issued on Jan. 29, 1954, but it was not served on the solicitors until Feb. 4. By it the applicant asked

"that the bills of fees, charges and disbursements delivered to the applicant by the . . . solicitors be referred to the master to be taxed . . . and that upon payment by the applicant of what (if anything) may appear to be due to the said solicitors the said solicitors do deliver up to the applicant, or as he may direct, all deeds, books, papers and writings in the said solicitors' possession, custody or power which belong to the applicant."

This delivery up of documents was a matter of imperative urgency to the applicant in connection with the Conquy litigation, which was still pending, and he would be in a position of considerable difficulty if the solicitors insisted on retaining them under their lien for costs. Affidavits were sworn by both sides on the hearing of the summons. This evidence disclosed an important divergence of view on what had happened at the two interviews of Jan. 28 and 29 and, in a less degree, at two subsequent interviews which took place between the parties' representatives on Feb. 1 and 2, respectively. The court found that at none of the interviews were the solicitors informed that the summons for taxation had been issued. It appeared from the affidavit of Mr. Politzer that at the meeting on Feb. 2 (at which the solicitors were represented by Mr. Politzer, owing to Mr. Simmons' absence due to illness) Mr. Carter-Ruck produced a cheque for £1,074 6s. 3d. and two documents, viz., a receipt and a letter which had been drafted by him or his firm. The letter was in the following terms:

"Dear Sirs, R. F. H. Norman, Arrowbrook Overalls, Ltd. Marylan Overalls, Ltd. We now enclose cheque value £1,074 6s. 3d. which, after taking into account the release of the sum of £425 previously held to Lord Camrose's account (and to which we confirm Lord Camrose has agreed), represents the balance due on your account with Mr. Norman. Kindly let us have your formal receipt in full and final settlement of all outstanding costs. Yours faithfully, Oswald Hickson, Collier & Co."

The receipt was as follows:

"Received by Messrs. Ernest Simmons & Eric B. Politzer of 8, Lygon Place, Westminster, S.W.1, the sum of £1,499 6s. 3d. (One thousand four hundred and ninety-nine pounds six shillings and three pence) in full discharge of all claims costs disbursements and other moneys owing to Messrs. Ernest Simmons & Eric B. Politzer by Roland Frank Holdway Norman of Coill Vane, Second Avenue, Douglas, Isle of Man. Dated Feb. 2, 1954."

Mr. Politzer signed this receipt and thereupon handed over to Mr. Carter-Ruck all of the applicant's documents (except for a few irrelevant letters) which his firm had in their possession.

The solicitors relied on this receipt and letter of Feb. 2, 1954, as constituting a written agreement within the Solicitors Act, 1932, s. 57 and s. 59, and as a sufficient answer, therefore (by reason of s. 62) to the applicant's prima facie right to have a bill of costs delivered and to have it taxed under s. 66 of the Act. The solicitors' case, in brief, as appeared from the affidavit of Mr. Simmons sworn on Feb. 16, 1954, was that, after various ways of dealing with their costs at the interviews on Jan. 28 and 29, 1954, had been discussed, he made an offer to Mr. Carter-Ruck that

"if the applicant would pay the balance in full of what we claimed in respect of the Conquy actions we would accept that sum in full satisfaction of all our outstanding charges including (inter alia) those in the Holdron matter";

that that offer ripened into the agreement on which his firm relied and that on the faith of that agreement Mr. Politzer released the applicant's papers. He also stated (and this was not in dispute) that on Jan. 29 Mr. Carter-Ruck's cost clerk was given inspection of the applicant's papers which the solicitors held. Mr. Carter-Ruck said in his affidavit that at the interviews on Jan. 28 and 29 he explained that nothing was owing to the solicitors by the applicant in connection with the Holdron matter, as it had been agreed that only disbursements should be charged and these had been paid long ago; that Mr. Simmons told him at the first interview that there was a balance due to his firm of £1,700, but that at the second interview he corrected this figure to £1,200; and that as he (Mr. Carter-Ruck) was extremely anxious to recover for the applicant the papers and documents which the solicitors held he told Mr. Simmons

that his only course would be to arrange for payment of this sum of £2,124 in full and then to take the whole matter to taxation, a proposal which, he said, Mr. Simmons accepted as satisfactory. The payment of £2,124 odd was in fact made and Mr. Carter-Ruck said that the payment was in pursuance of this proposal. The £2,124 so paid included the amount of £625 described in the second statement of account as "received from Lord Camrose", and a further sum of £425 which had also been previously held to Lord Camrose's account, but which he agreed to release and did release to the solicitors by virtue, A apparently, of some arrangement with the applicant.

Master CLAYTON, on the hearing of the summons, took the view that the receipt and letter of Feb. 2 constituted an agreement within the Solicitors Act, 1932, s. 57 and s. 59, but directed that an issue be tried to determine the question. On appeal GLYN-JONES, J., made an order dated Mar. 15, 1954, whereby he set aside the order of the master and ordered that the solicitors should deliver to the applicant bills of costs in all matters in which the solicitors had been instructed as solicitors for the applicant and that the bills, fees, charges and disbursements so delivered be referred to the master to be taxed. The solicitors appealed. B

Paull, Q.C., and *Plume* for the respondents, Messrs. Ernest Simmons & Eric B. Politzer. C

Harvey, Q.C., and *Coningsby* for the applicant.

Cur. adv. vult.

July 21. ROMER, L.J., read the judgment of the court, and having stated the facts as set out above, continued: Counsel's first submission for the solicitors before us was that in any case the learned judge had no jurisdiction to order the delivery of a bill because the applicant had not asked for it by his summons. We do not think there is any force in this submission. If the learned judge was right in setting aside or disregarding the alleged agreement, it would follow as a matter of course that he would enforce the applicant's prima facie right to delivery of a bill and none the less because he had not expressly asked for this relief by his summons. Counsel's main submissions were, first, that the solicitors had successfully established a written agreement for the purposes of the Solicitors Act, 1932, s. 57 and s. 59, covering their remuneration both for non-contentious and contentious business which they had done for the applicant; and, secondly, that they were consequently entitled to immunity from taxation of their costs by reason of the provisions of s. 62. Counsel for the applicant's answer to these contentions is threefold. First, he challenges the agreement itself and says that the payment of £2,124 which was paid to the solicitors was subject to an express reservation by the client of his right to have the costs in respect of which the payment was made submitted to taxation. Alternatively, he contends that, if there was an agreement such as that which the solicitors are relying on, there are "special circumstances" which warrant the re-opening of the agreement; notwithstanding that the costs were paid, under s. 60 (6) of the Act of 1932. And, finally, the applicant says that as the agreement, if any, covered contentious business and the costs which were paid were those alleged to have been incurred by the solicitors in and about the Conquy actions, the solicitors are precluded from relying on s. 62 because they infringed the requirements of s. 60 (5). D E F G

This last point, if sound, is decisive of the case and would render irrelevant an inquiry into issues of fact on which there is considerable difference between the parties. We propose, therefore, to consider it first. Section 60 (5) provides: H

"If the business covered by any such agreement is business done, or to be done, in any action, the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by a taxing officer of the court, and if the taxing officer is of opinion that the agreement is unfair or unreasonable, he may require the

opinion of the court to be taken thereon and the court may reduce the amount payable thereunder, or order the agreement to be cancelled and the costs covered thereby to be taxed as if the agreement had never been made."

It is not at first sight easy to discover what results were intended by Parliament to follow on a disregard of this provision, for, unlike s. 60 (7) and (8), no express sanction is imposed on a solicitor for its infringement. It was suggested in argument by counsel for the solicitors that such sanction is to be found in sub-s. (6) so that if payment is received without reference to a taxing officer the agreement under which it was made can be re-opened, but only if there are special circumstances justifying such a course. Sub-section (6) provides:

"When the amount agreed for under any such agreement has been paid by or on behalf of the client or by any person entitled so to do, the person making the payment may at any time within twelve months after payment apply to the court and the court, if it appears to them that the special circumstances of the case require the agreement to be re-opened, may, on such terms as may be just, re-open the agreement and may order the costs covered thereby to be taxed and the whole or any part of the amount received by the solicitor to be repaid by him."

In our judgment, the court can re-open an agreement covering contentious business even though the agreement has been approved by a taxing officer: *Re Stuart. Ex p. Cathcart* (1). In that case payment had not been received. The Act then in force was the Attorneys and Solicitors Act, 1870. The application was not under s. 10 of that Act (the then equivalent of s. 60 (6)) but under s. 9, which gave the court a general power to set aside agreements which were not fair or reasonable, and order taxation. This provision is now to be found in s. 60 (4) (b) of the Act of 1932. Clearly that provision cannot be regarded as the sanction for a failure to observe the terms of s. 60 (5), because it can be invoked even though approval under s. 60 (5) has been obtained. A fortiori it would seem that s. 60 (6) could be invoked although approval had been obtained and the sanction, therefore, must be sought elsewhere. In any case, the right of a client to delivery of a bill and taxation if, and only if, he can establish "special circumstances" seems to us to be an inadequate redress against a solicitor who acts in defiance of s. 60 (5). In our judgment, the effect of disregarding sub-s. (5) is to deprive a solicitor who ignores it from the privilege conferred by s. 62 of the Act. That section, which is to much the same effect as the Attorneys and Solicitors Act, 1870, s. 15, provides:

"Subject to the provisions of the two last preceding sections, the costs of a solicitor in any case where an agreement has been made in pursuance of the provisions of s. 59 of this Act shall not be subject to taxation, nor to the subsequent provisions of this Part of this Act with respect to the signing and delivery of a solicitor's bill."

The conclusion which we have expressed is supported by such authority as there appears to be on the subject. Section 60 (5) of the Act of 1932 made its first legislative appearance, and in very similar language, in the form of a proviso to s. 4 of the Act of 1870. SIR GEORGE JESSEL, M.R., in *Re Attorneys & Solicitors Act, 1870* (2) (1 Ch.D. 575), expressed himself as follows with regard to that section:

"The meaning of s. 4 . . . is that a solicitor may make what agreement he likes with his clients, but that he is not to receive any payment under it unless the taxing master considers it fair and reasonable; and if he does not consider it so, he may require the opinion of the court or judge to be taken on it."

A similar view was expressed in *Ray v. Newton* (3) where FARWELL, L.J., said ([1913] 1 K.B. 255) that the proviso to s. 4 of the Act of 1870

... makes the inquiry into the agreement, when a prima facie case is made, a condition precedent to the receipt by the solicitor of any money under it."

In *Clare v. Joseph* (4) FLETCHER MOULTON, L.J., said ([1907] 2 K.B. 377), with reference to s. 4 to s. 15 of the Act of 1870:

"That group concludes with a section of great importance (s. 15), which provides that where an agreement has been made in accordance with s. 4, and has not been set aside, the ordinary provisions as to delivery and taxation of a duly signed bill of costs are no longer to have effect. This gives to a solicitor who comes under this group of sections an advantage not previously given to him. In my opinion s. 4 only prescribes the mode in which the solicitor can obtain for himself (and I think also in which the client can obtain for himself) the benefit of the group of sections from s. 4 to s. 15. If either the solicitor or the client wants the privileges which those sections give him, he must comply with the requirements of s. 4 and must have an agreement in writing, but if he does not want the benefit of those sections, s. 4 imposes no duty upon him. It is only those who wish to come under those sections who must take the steps prescribed by s. 4."

In the same case, LORD ALVERSTONE, C.J., had pointed out in his judgment (ibid., 372) that the Act of 1870 gave a solicitor

"certain rights which he did not previously possess, provided that he himself complied with the requirements of the Act."

During the argument, our attention was directed to one reported decision in which the court does seem to have disregarded the requirements of the proviso to s. 4 of the Act of 1870. The case was *Re Thompson. Ex p. Baylis* (5). In that case, an agreement had been made between a solicitor and his client of a kind which attracted the operation of the proviso and the solicitor had received payment under it without reference to a taxing officer. The client applied for taxation notwithstanding the agreement. The points which were dealt with in the judgments of the Divisional Court were whether the solicitor was able to rely on the agreement although he had not signed it, and whether there had been "payment" within the Solicitors Act, 1843, s. 41. The court answered both of these questions in the affirmative and declined to direct taxation of the solicitor's bill. Counsel for the client had argued (inter alia) that the agreement had not been examined and allowed by an officer of the court. This point was not expressly noticed in the judgments, but the court must presumably have rejected it, for otherwise it could hardly have held the solicitor to be entitled to rely on the agreement and refused an order for taxation. As the judges did not deal with the point or refer to it in any way, we cannot regard the case as a satisfactory authority for the view that a solicitor can disregard s. 60 (5) with impunity, and such a view seems to us inconsistent with the expressions of judicial opinion which we have already cited and with a proper reading of s. 57 to s. 62 of the Act as a whole. In our opinion, a solicitor can only rely on s. 62 of the Act of 1932 and claim the privileges which it confers if he has duly observed the requirements which the earlier sections impose. It follows that as the solicitors in the present case, in purported pursuance of the agreement which they have sought to establish, received payment of the sum due thereunder without first submitting the agreement to the taxing officer for examination and allowance by him they are disabled from claiming immunity from taxation under s. 62.

On this view, it becomes unnecessary to consider whether the receipt and letter on which the solicitors rely did or did not constitute an agreement for the purposes of s. 59 of the Act; or, on the footing that it did, whether "special circumstances" have been shown to exist such as would warrant the court in requiring such agreement to be re-opened under s. 60 (6). On the first of these

questions we should have felt considerable hesitation in holding, on the material now before us, that the solicitors had proved an agreement. We have earlier referred to Mr. Carter-Ruck's account, as stated in his affidavit, of what took place at the interviews on Jan. 28 and 29, 1954; and he said, further, in para. 7 of his affidavit

A "that it was known throughout by Mr. Simmons and by his firm that I was reserving Mr. Norman's rights as regards taxation and that I was only making payment in full on behalf of Mr. Norman because of the supreme urgency of obtaining the documents and papers".

Notwithstanding the apparently unqualified terms of the receipt we think it would be difficult to disregard this sworn evidence of Mr. Carter-Ruck without cross-examination. It is, moreover, to be observed that the letter of Messrs. Oswald Hickson, Collier & Co. of Feb. 2, 1954, which accompanied their cheque and the receipt begins with a reference, in effect, to the Conquy litigation alone which to some extent supports Mr. Carter-Ruck's impression that what he was paying were the costs of that litigation and that the Holdron matter was outside the picture altogether. Having regard to these and other elements in the evidence, it would be unsafe, in our opinion, to accept one version and reject the other on affidavit evidence alone and we feel sympathy with the attitude of Master C CLAYTON in directing an issue whether there had been an agreement between the solicitors and the applicant. However, this question does not in fact arise if we are right in our conclusion that even if there was an agreement the solicitors, by their disregard of s. 60 (5) of the Act, cannot now rely on it.

D Counsel for the solicitors intimated that his clients will be in a difficulty in delivering a bill of costs as ordered by the learned judge because they have parted with the applicant's papers and cannot very well prepare their bill without them. Counsel for the applicant, however, offered to make the papers available for the purpose and obviously the applicant must provide the solicitors with such facilities as they may reasonably require. Our order should, we think, give either party liberty to apply to the master in the event of any difficulty arising. Subject to this, the appeal should, in our opinion, be dismissed.

E *Appeal dismissed.*

Solicitors: *Ernest Simmons & Eric B. Politzer* (for the respondents); *Oswald Hickson, Collier & Co.* (for the applicant).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

F DUCHIN v. SWANAGE URBAN DISTRICT COUNCIL. SAME v. DORSET COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Havers, J.), July 9, 1954.]

G *Writ—Renewal—Action against public authority—Writ issued within time limited—Order for renewal of writ made before writ expired—Seal bearing date of renewal not affixed to writ before writ expired—Jurisdiction of master to amend renewal order—R.S.C., Ord. 8, r. 1, r. 2.*

H On Aug. 7, 1952, the plaintiff issued a writ in a separate action against each of the two defendants claiming damages for personal injuries and consequential loss. The facts were the same in each case. Owing to the medical evidence not being complete, the plaintiff did not wish to serve the writ and, on Aug. 5, 1953, an application was made ex parte for renewal. The master renewed the writ for a period of one month, but the writ was not sealed with the date of renewal. The month's period not being sufficient time for the plaintiff, his solicitor applied to the master again. On Aug. 11, being the first date when the same master was practice master again, he amended his original order of Aug. 5 so as to renew the writ for a period of six months. The writ was then sealed with the renewal date, Aug. 11.

Subsequently, the writs and service of the writs were set aside on the defendants' application, and a cross-application by the plaintiff for rectification by substituting Aug. 5 as the renewal date in place of Aug. 11 was not granted. On appeal,

Held: (i) under R.S.C., Ord. 8, the renewal was effected by the sealing of the writ in the manner prescribed, although an order for renewal must first be obtained, and, twelve months from the day of the date of the writ having expired before Aug. 11, 1953, the writ was no longer current on that date for the purpose of being renewed.

(ii) under R.S.C., Ord. 8, r. 1, a writ may be renewed for any period not exceeding six months.

(iii) there being no clerical mistake or accidental slip or omission in the order, the master had no jurisdiction under R.S.C., Ord. 28, r. 11, to amend the order of Aug. 5, 1953, and, if he had made an error in law, would not have had jurisdiction under the rule to rectify that.

(iv) the failure to affix the seal to the master's original order for renewal could not be attributed to the fault of the officer of any court and, therefore, the date of the seal could not be rectified nor the time allowed for affixing it be extended.

Appeals dismissed.

AS TO RENEWAL OF WRIT, see HALSBURY, Hailsham Edn., Vol. 26, p. 26, para. 35; and FOR CASES, see DIGEST, Practice, pp. 311-313. Nos. 358-377 and pp. 845, 846, Nos. 3924-3926.

FOR THE COMMON LAW PROCEDURE ACT, 1852, s. 11 (repealed), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 377.

FOR THE FORM OF MEMORANDUM FOR A RENEWED WRIT, see ENCYCLOPAEDIA OF COURT FORMS, Vol. 15, p. 194.

Cases referred to:

(1) *Nazer v. Wade*, (1861), 1 B. & S. 728; 31 L.J.Q.B. 5; 5 L.T. 604; 121 E.R. 885; 32 Digest 538, 1913.

(2) *Evans v. Jones*, (1862), 2 B. & S. 45; 5 L.T. 673; 121 E.R. 991; sub nom. *Anon.*, 31 L.J.Q.B. 61; 32 Digest 539, 1914.

(3) *Hewitt v. Barr*, [1891] 1 Q.B. 98; 60 L.J.Q.B. 268; 32 Digest 538, 1909.

(4) *Battersby v. Anglo-American Oil Co., Ltd.*, [1944] 2 All E.R. 387; [1945] 1 K.B. 23; 114 L.J.K.B. 49; 171 L.T. 300; 2nd Digest Supp.

APPEALS by the plaintiff under R.S.C., Ord. 54, r. 21, against orders of Master HARWOOD, dated Apr. 13, 1954. The appeals were heard in chambers but were adjourned into open court.

On the night of Aug. 11, 1951, the plaintiff, who was on holiday at Swanage, was returning to the house where he was staying, when he fell from Shore Road, Swanage, on to the beach below. At the place where he fell the sea wall was not protected. On Aug. 7, 1952, he issued writs in separate actions against each of the defendants, claiming damages for personal injuries and consequential loss caused by the defendants' negligence. Owing to the medical evidence not being complete, the writs were not served, and, on Aug. 5, 1953, application was made ex parte for renewal, supported by affidavits. The practice master, Master BURNAND, indorsed the affidavits renewing the writs for one month, and putting the date, Aug. 5, 1953. The period of one month not being sufficient time for the plaintiff, his solicitor applied to the master again. On Aug. 11, 1953, the first day when Master BURNAND was practice master again, he amended his original orders so as to renew the writs for a period of six months. The writs were then sealed with the renewal date, Aug. 11, 1953. They were served on Feb. 4, 1954, accompanied by the statements of claim. On Feb. 11, 1954, the defendants entered conditional appearances, and on Feb. 17, 1954, they issued summonses to set aside the writs and service. On Mar. 31, 1954, the plaintiff made cross-applications for rectification by substituting Aug. 5, 1953, for Aug. 11, 1953. On

Apr. 13, 1954, Master HARWOOD ordered that the writs dated Aug. 7, 1952, and renewed on Aug. 11, 1953, and the service thereof, be set aside on the grounds that the proceedings, the writs and the renewals were irregular, and that the defendants would thereby be deprived of a good defence under the Limitation Act, 1939, s. 21, extending the Public Authorities Protection Act, 1893. On the same day, Master HARWOOD refused to order that the seals of the court bearing the date Aug. 11, 1953, affixed to the writs be rectified, and that the date Aug. 5, 1953, be substituted therefor, or, alternatively, that the time allowed for affixing the seals pursuant to Master BURNAND's order of Aug. 5, 1953, be extended to Aug. 11, 1953, or to the date of drawing up the master's order. The plaintiff appealed against both these orders in each action.

N. Lawson for the plaintiff.

Van Oss for the defendants in both actions.

Cur. adv. vult.

July 9. **HAVERS, J.**, read the following written judgment in which he said that, as the facts in each case were identical, it was only necessary to recite the facts in one of them, that against the Swanage Urban District Council. His LORDSHIP stated the facts and continued: I heard these appeals in chambers and, as they raised a question of construction of the order date and also were matters of general interest, on the request of the parties I reserved my judgment so that it could be delivered in open court.

Counsel on behalf of the plaintiff, contended that, on the true construction of Ord. 8, r. 1, the order for the renewal of the writ was effective or, alternatively, that the writ remained in force if the order for renewal was made within twelve months, notwithstanding that the sealing took place after the expiration of the twelve months. On this footing he contended that the master had jurisdiction under the slip rule, Ord. 28, r. 11, to rectify the order which he had made on Aug. 5, 1953, by altering the period of renewal from one month to six months. Alternatively, he contended, that the master made an order on Aug. 5, 1953, for renewal of the writ for one month, and during this period of renewal made a fresh order for renewal on Aug. 11 for six months.

Counsel for the defendants contended that the making of the order preceded renewal and that the renewal was effected by the sealing of the writ in the manner prescribed in Ord. 8, r. 1. Counsel also contended that the master had purported to amend his previous order, which he had no power to do, under Ord. 8, r. 1, and that he had not purported to make a new order on Aug. 11.

The procedure for the renewal of a writ originated in s. 11 of the Common Law Procedure Act, 1852, and this section provided that:

“No original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date: but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal, bearing the date of the day, month, and year of such renewal, such seal to be provided and kept for that purpose at the offices of the masters of the said superior courts, and to be impressed upon the writ by the proper officer of the court out of which such writ issued, upon delivery to him by the plaintiff or his attorney of a praecipe in such form as has heretofore been required to be delivered upon the obtaining of an alias writ: and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.”

My attention was called to two cases which had been decided on that section.

It is clear that, under that section, renewal of a writ could be obtained by a plaintiff as of right at any time before its expiration and so, from time to time, during the currency of the renewed writ by having the writ impressed by the proper officer of the court with a seal on the plaintiff delivering to such officer a praecipe in the prescribed form together with the appropriate fee.

The two cases to which I was referred were, first, *Nazer v. Wade* (1). The headnote of that case is (1 B. & S. 728):

"On the day of the expiration of a writ of summons issued under the Common Law Procedure Act, 1852, the plaintiffs' attorney attended at the office for the purpose of having it renewed, and paid the fee; but being suddenly called away omitted to get the seal impressed in pursuance of s. 11, and did not discover the mistake until it was too late to keep the writ alive by re-sealing, so as to save the Statute of Limitations: Held, that the court had no power to direct the officer to impress the seal on the writ as of the day when the attorney applied to have it renewed; but that it would have been otherwise if the omission to re-seal the writ had been occasioned by a fault of the officer of the court."

The second case was *Evans v. Jones* (2). The headnote there was this (2 B. & S. 45):

"The last day for re-sealing a writ of summons, so as to save the Statute of Limitations, expired on Saturday, Dec. 28, within the Christmas holidays. A party who attended at the office on that day for the purpose found it shut, and the officer having refused to re-seal the writ on the following Monday, the 30th, the court refused to order him to do it afterwards, *nunc pro tunc*."

In the course of argument CROMPTON, J., stated (*ibid.*, 46) that:

"If the not re-sealing this writ had been the fault of one of our officers, we should order him to do it *nunc pro tunc*. But here the application was made at a time when the officer was not bound to be at his office; and the case is the same as if it had been made on the last day allowed by law at an hour when the office was closed."

It is clear from these cases that, under s. 11 of the Common Law Procedure Act, 1852, the writ was renewed when re-sealed, and, if it was not re-sealed within the period of six months, the court would not order it to be re-sealed unless the failure to re-seal was due to the fault of an officer of the court.

The practice today as regards renewal is governed by Ord. 8, r. 1, which is in these terms:

"No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and the court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 18 in Appendix A, Part I, with such variations as circumstances may require; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited,

and for all other purposes, from the date of the issuing of the original writ of summons."

There was an important change under Ord. 8. Instead of the renewal being as a matter of course, the plaintiff now has to satisfy the master either that reasonable efforts have been made to serve the defendant who has not in fact been served or to give to him other good reasons, and that is a condition precedent to the obtaining of an order for renewal.

A Order 8, r. 2, provides that:

"The production of a writ of summons purporting to be marked with the seal of the court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes."

B In the Queen's Bench Division, the practice is to leave the appropriate affidavit and the original writ in the master's secretary's department and, after the master has made his decision, to obtain the indorsed affidavit. The writ and affidavit are then filed and the writ is sealed "Renewed". The note of the C ANNUAL PRACTICE, 1954, to Ord. 8, r. 1, at p. 60, adds this comment:

"The application should be made a few days before the time expires. The writ will not be sealed as being renewed on a date subsequent to the expiration of its currency."

D Counsel for the plaintiff contended before me that, under Ord. 8, r. 1, the procedure for renewal consisted of two stages, namely, the first stage, the judicial act of making an order which was discretionary and, the second stage, the purely ministerial act of impressing a seal on the writ. He argued that, if the judicial act was done within a stipulated period, the writ remained in force for service even though the ministerial act was not done until after the expiration of the stipulated period. I am unable to accept that argument. In my view, though E an order for renewal must now first be obtained, the renewal is still effected by the sealing of the writ in the manner prescribed by the order. The form of the order, which can be seen in the YEARLY PRACTICE, 1940, p. 2756, was in these terms:

"It is ordered that the writ in this action be renewed for six months from the date of its renewal"

F although it appears that, as a general rule, the order need not be drawn up, a memorandum indorsed under Ord. 52, r. 14, being sufficient. The writ was, therefore, in my opinion, no longer in force (for the purpose of service) on Aug. 11, 1953, and, subject to Ord. 64, r. 7, was incapable of renewal on that date.

G It is quite true that the court has power under Ord. 64, r. 7, to enlarge the time, but the practice is not to do so after the expiration of twelve months from the date of the writ or of six months from the date of the last renewal thereof, where, but for such enlargement of time, the plaintiff's claim would be barred: see *Hewett v. Barr* (3), and *Battersby v. Anglo-American Oil Co., Ltd.* (4). It is not quite clear whether the learned master was asked to exercise his discretion under Ord. 64, r. 7, although I gather he was asked to do so. If he was asked to do so on the facts of this case I see no grounds for disturbing the exercise of his discretion, and if I had to exercise my own discretion I should certainly have exercised it in the way he did. H

Now I come to deal with the next points that were argued by counsel for the plaintiff. I am satisfied that, on Aug. 5, the master took the view that the plaintiff had put forward very slender grounds for the renewal and, accordingly, in the exercise of his discretion, he ordered the renewal for one month only. It may well be that the master had in mind the passage in the judgment of Lord

GODDARD in *Buttersby v. Anglo-American Oil Co., Ltd.* (4) where LORD GODDARD said ([1944] 2 All E.R. 391):

"We conclude by saying that even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by Ord. 64, r. 7, ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course, on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others. But ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future development. It is for the court and not for one of the litigants to decide whether there should be a stay, and it is not right that people should be left in ignorance that proceedings have been taken against them if they are here to be served."

It seems to me, however, that the master was subsequently persuaded that the period of one month would not be adequate and he decided to increase the period to six months. It seems clear to me, however, that he did not make, or intend to make, a fresh order, but he amended his original order by striking out "one month" and substituting "six months". It will be observed that he did not give a new date to the amended order. In my opinion, there was no clerical mistake in the order or accidental slip or omission and the master had no jurisdiction to amend the order of Aug. 5 under Ord. 28, r. 11.

Counsel for the plaintiff also argued that the only period for which an order for renewal can properly be made under Ord. 8, r. 1, is for six months, and that the master was, on Aug. 11, merely rectifying an error which he made by mistake. I hold, however, that, under Ord. 8, r. 1, an order for renewal, though usually made for six months, may be made for any period not exceeding six months. Moreover, I am satisfied that, in making his order of Aug. 11, the master was not seeking to rectify an error of law which he believed he had made, but to grant an additional period which he then thought, in the light of further argument addressed to him, was appropriate. Further, the master would not, in my view, have jurisdiction to rectify an error of law, if he made one, under the slip rule.

That, then, means that I am of opinion that the order of Master HARWOOD setting aside the writ and service was correct, and the appeal against that order should be dismissed.

As to the second appeal, I see no ground for disturbing the master's refusal to order that the date of the seal be rectified or that the time allowed for affixing the seals be extended. The plaintiff had the whole of Aug. 6 in which he could have taken the necessary steps to get the seal affixed to the writ in pursuance of the order of the master dated Aug. 5, but he failed to do so. The failure to affix the seal on Aug. 6 could not be attributed to the fault of the officer of any court, in my view, in refusing to affix the seal on that day. Therefore, I hold that the appeal against this order is also dismissed.

In the second action against the Dorset County Council, as I have already said, the facts relating to these applications and appeals are identical and it is unnecessary for me to recite them. The judgment which I have just given in the case against the Swanage Urban District Council applies also to those appeals and they are both dismissed.

Solicitors: *Alexander A. Kassman* (for the plaintiff); *William Charles Crocker* (for the defendants in both actions).

Appeals dismissed.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

SMITH v. JONES.

[CHANCERY DIVISION (Upjohn, J.), February 18, 19, 22, 23, 1954.]

Landlord and Tenant—Tenancy agreement—Rectification—Repairs provision misconstrued by tenant and original landlord—Farm occupied by tenant sold by landlord to purchaser for value—Constructive notice—Inquiries—Tenant's equity to rectify not effective against purchaser—Law of Property Act, 1925 (c. 20), s. 199 (1) (ii) (a).

Sale of Land—Notice—Tenant in occupation—Inquiries—No constructive notice of equity for rectification of tenancy agreement—Law of Property Act, 1925 (c. 20), s. 199 (1) (ii) (a).

Until about 1921 some eighteen farms on the P. estate were let to tenants, the tenancy agreement in each case being on a printed form which contained a covenant to repair in these terms: "The tenant to keep the house, cottages, and all buildings, walls, fences, gates . . . and the premises generally in good repair, order, and condition . . . the landlord providing . . . the materials necessary therefor . . . to have all hedges properly cut . . . kept, and repaired to the satisfaction of the landlord . . . and to keep all ditches, watercourses, and drains . . . properly scoured and cleaned out . . . " and at the end of the clause was an express covenant in regard to painting. In or about 1921 the rents of the existing tenancies were increased and the agreements were amended by the deletion of the word "repair", in the phrase "in good repair, order, and condition", and of the covenant in regard to painting. Thereafter the landlord carried out repairs to the houses and buildings, but the form of agreement did not put any obligation on him to do so. In 1932 the landlord granted a tenancy of the S. farm to M., the agreement being on the printed form as amended. Early in 1939 the plaintiff entered into negotiations to take over M.'s tenancy, and during the negotiations he was informed by a sub-agent to the estate that the landlord was responsible for repairs to the farm and buildings and that the tenant was required to keep them clean and tidy, and to repair the fences and ditches. The sub-agent had no authority, however, to alter the terms of the form of agreement used on the estate. In April, 1939, the plaintiff took over M.'s tenancy, and by an agreement dated Oct. 5, 1939, he was granted a new tenancy, to take effect from Sept. 29, 1939, on the same terms. Between 1939 and 1946 repairs to the farm and buildings were done by the landlord. At a public auction held on July 18, 1946, the landlord of the P. estate offered S. farm for sale subject to the existing tenancy. Before the auction the defendant saw a copy of the plaintiff's tenancy agreement at the auctioneers' premises. He agreed to purchase S. farm and it was conveyed to him on Oct. 28, 1946. The defendant having required the plaintiff to carry out repairs to the buildings, the plaintiff maintained that he was not responsible for those repairs. In an action by the plaintiff for rectification of the agreement of Oct. 5, 1939, the defendant pleaded, *inter alia*, that he was a bone fide purchaser for value without notice of the equity claimed by the plaintiff. It was contended, *inter alia*, for the plaintiff that, as he was in actual occupation as tenant when the defendant purchased the farm, the defendant was affected with notice of all his rights and equities, including an equity to rectify the tenancy agreement. On the question whether the claim for rectification, if good as between the original parties to the tenancy agreement, was good against the defendant,

Held: the plaintiff was not entitled to rectification of the tenancy agreement against the defendant who was a bona fide purchaser for value without notice because (i) the principle stated in *Barnhart v. Greenshields* (1853) (9 Moo. P.C.C. 32) that, where a tenant was in possession of land, a purchaser was bound by all the equities which the tenant could enforce against the vendor did not apply to an equity for rectification, and (ii) the defendant was

not affected by constructive notice of the equity under s. 199 (1) (ii) (a) of the Law of Property Act, 1925, as he was entitled to assume that the agreement of Oct. 5, 1939, correctly stated the relationship between the tenant and the landlord, and was not bound to inquire whether the plaintiff had any rights which entitled him to have the agreement rectified, although he should have inquired whether the copy of the agreement which he saw was a true copy.

AS TO CONSTRUCTIVE NOTICE, see HALSBURY, Hailsham Edn., Vol. 13, A p. 104, para. 95; and FOR CASES, see DIGEST, Vol. 20, pp. 300, 301, Nos. 551-553, and pp. 329, 330, Nos. 730-748.

AS TO INQUIRIES ON THE SALE OF LAND, see HALSBURY, Hailsham Edn., Vol. 29, p. 335, para. 452.

FOR THE LAW OF PROPERTY ACT, 1925, s. 199 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 822.

Cases referred to:

- (1) *Barnhart v. Greenshields*, (1853), 9 Moo. P.C.C. 18; 22 L.T.O.S. 178; 14 E.R. 204; 20 Digest 301, 552.
- (2) *Taylor v. Stibbert*, (1794), 2 Ves. 437; 30 E.R. 713; 20 Digest 300, 551.
- (3) *Daniels v. Davison*, (1809), 16 Ves. 249; 33 E.R. 978; *subsequent proceedings* L.C., (1811), 17 Ves. 433; 34 E.R. 167; 20 Digest 329, 732.
- (4) *Allen v. Anthony*, (1816), 1 Mer. 282; 35 E.R. 679; 20 Digest 329, 734.
- (5) *Hunt v. Luck*, [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 20 Digest 330, 744.

ACTION for rectification of an agreement, dated Oct. 5, 1939, whereby Charles Alfred Baren Parmoor (referred to hereinafter as the first Lord Parmoor) granted to the plaintiff, Mr. Herbert Douglas Smith, a tenancy of a farm known as Stud Farm in the parish of Skirmett, in the county of Buckingham, at a rent of £100 a year for a term of one year from Sept. 29, 1939, and thenceforward from year to year until terminated by one full year's notice in writing given by either party, such notice to expire on Sept. 29. The agreement contained the following clause, under the heading "Repairs":

"The tenant to keep the house, cottages and all buildings, walls, fences, gates, posts, roads, bridges, culverts, and the premises generally in good order, and condition, damage by fire only excepted, the landlord providing within a distance of seven miles the materials necessary therefor (except glass for glazing and straw for thatching, which shall be provided by the tenant at his own cost and charge, the landlord allowing the fair cost of the necessary labour for thatching); to have all hedges properly cut and laid, kept, and repaired to the satisfaction of the landlord, not to use wire as fencing material, except by written permission of the landlord, and to keep all ditches, watercourses, and drains, both open and covered, properly scoured and cleaned out as often as shall be needed."

The farm, which comprised some sixty-nine acres, originally formed part of the Parmoor estate, which consisted of some three thousand acres and contained about eighteen farms. Under tenancy agreements which were in force until 1920 or 1921, the tenants of the estate were required to do repairs, and the printed form of tenancy agreement used on the estate contained, under the heading "Repairs", the clause:

"The tenant to keep the house, cottages, and all buildings, walls, fences, gates, posts, roads, bridges, culverts, and the premises generally in good repair, order, and condition, damage by fire only excepted, the landlord providing within a distance of seven miles the materials necessary therefor (except glass for glazing and straw for thatching, which shall be provided by the tenant at his own cost and charge, the landlord allowing the fair cost of the necessary labour for thatching); to have all hedges properly cut and

A laid, kept, and repaired to the satisfaction of the landlord, not to use wire as fencing material, except by written permission of the landlord, and to keep all ditches, watercourses, and drains, both open and covered, properly scoured and cleaned out as often as shall be needed: to have all external wood and ironwork heretofore painted or gas tarred, properly painted in good oil colour, or gas tarred once at least every four years, and the interior of the house properly cleaned, whitened, papered and painted, once in every seven years during his tenancy, the landlord allowing the fair cost of the materials necessary therefor."

B In or about 1921 the rents of all the tenancies then in existence were increased and the estate undertook all repairs to buildings. The existing agreements were amended by the deletion of the word "repair" in the "repairs" clause and of the painting covenant at the end of the clause. Thereafter, the form of agreement as amended was the standard form used on the estate. There was no clause therein which put the obligation to repair on the landlord.

C In 1932 the first Lord Parmoor let Stud Farm to a Mr. Miller. The printed form of tenancy agreement was used, with the word "repair" and the painting covenant crossed out. In 1939 Mr. Miller wished to give up the farm owing to ill-health, and the plaintiff entered into negotiations with the Honourable Seddon Cripps (afterwards the second Lord Parmoor), who then acted as agent to the estate, to take over Mr. Miller's tenancy. During the negotiations the plaintiff discussed the terms of the tenancy with Mr. Sherwin, the sub-agent of the estate, who explained to the plaintiff that his liability as tenant would be to keep the farm and buildings clean and tidy and the fences and ditches in repair, and that the estate was responsible for the repairs to the farm and buildings. The sub-agent had no authority, however, to make any agreement or to alter the terms of the form of agreement used on the estate. The plaintiff took over Mr. Miller's agreement as from Apr. 14, 1939, on the understanding that an agreement on the same terms would be made with him at Michaelmas, 1939.

E On Oct. 5, 1939, the first Lord Parmoor and the plaintiff entered into the agreement in respect of which the plaintiff now claimed rectification. The agreement, like that with Mr. Miller in 1932, was on the printed form as altered by the deletion of the word "repair" and of the painting covenant, the deletions being initialled by Mr. Seddon Cripps who signed on behalf of the first Lord Parmoor.

F Between 1939 and 1946 the Parmoor estate carried out a number of repairs on Stud Farm. In 1941 the first Lord Parmoor died. At a public auction held on July 18, 1946, the second Lord Parmoor offered part of the estate, including Stud Farm, for sale, subject to the existing tenancies. Before the auction the defendant, Mr. John Clarence Bonnell Jones, saw a copy of the plaintiff's tenancy agreement at the auctioneers' premises and concluded from it that the plaintiff was liable for repairs and that the landlord had to supply the material. At the auction the defendant agreed to purchase Stud Farm and it was conveyed to him on Oct. 28, 1946. From 1946 to 1949 neither the plaintiff nor the defendant did any repairs. The plaintiff maintained consistently that he was not liable for any repairs except to the hedges and ditches. In or about 1949 the plaintiff had a brick wall mended by a builder and the defendant paid for the work. On Sept. 26, 1951, the defendant served on the plaintiff a notice to quit the farm by Sept. 29, 1952, on the ground that the termination of the tenancy was desirable in the interests of efficient farming, within s. 25 (1) (a) of the Agricultural Holdings Act, 1948, and the plaintiff thereupon served a counter-notice requiring the Minister of Agriculture's consent to the notice, under s. 24 (1) of the Act. On Oct. 24, 1951, the Bucks Agricultural Executive Committee made a supervision order against the defendant as landlord of the farm. On Nov. 7, 1951, the

defendant served on the plaintiff a notice requiring him to do repairs. On Nov. 19, 1951, the agricultural executive committee, acting on behalf of the Minister, considered the notice to quit and the counter-notice, and on Dec. 4, 1951, they announced that the Minister withheld consent to the operation of the notice. On Dec. 12, 1951, the defendant appealed to the Agricultural Land Tribunal, who dismissed his appeal on Feb. 13, 1952.

On Apr. 1, 1952, the defendant served on the plaintiff a notice to quit to expire on Sept. 29, 1953, on the ground that the plaintiff had failed to comply within the stipulated period with the notice to do repairs, dated Nov. 7, 1951 (see s. 24 (2) (d) of the Agricultural Holdings Act, 1948). On Apr. 7, 1952, the plaintiff served on the defendant a notice, under the Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I., 1948, No. 190), reg. 4, requiring arbitration on the reason stated in the notice to quit. When the matter came before the arbitrator on June 5, 1952, the plaintiff did not seek to rectify the agreement but claimed that, in view of the circumstances in which it was executed, it should receive special construction. At the request of the defendant the arbitrator stated a Special Case, under the Agricultural Holdings Act, 1948, sched. VI, para. 24, for the opinion of the county court on these questions:

- " (i) Is the extrinsic evidence given by Mr. Smith and Mr. Sherwin, as to the circumstances in which that deed was executed admissible in law ?
- (ii) If so, is the meaning of the repairing covenant as amended by the deletions, and further expanding in evidence given, such as to make the tenant responsible for the repairs called for in the schedule of dilapidations ?
- (iii) If the answer to the first question is ' No ' : Is the meaning of the repairing covenant to the tenancy agreement dated Oct. 5, 1939, and particularly the words ' in good order and condition ' such as to make the tenant responsible for the repairs called for in the schedule of dilapidations dated Nov. 7, 1951 ? "

On Oct. 16, 1952, the Special Case came before His Honour JUDGE DAYNES at High Wycombe County Court. In a reserved judgment, dated Nov. 13, 1952, His Honour rejected the admissibility of extrinsic evidence in construing the agreement of Oct. 5, 1939, and held that under the terms thereof the obligation to repair the house, cottages and buildings was on the plaintiff. His Honour suggested, however, that the agreement might be rectified. On Dec. 3, 1952, the writ in the present action was issued, and on Dec. 11, 1952, the proceedings in the county court were adjourned generally with liberty to restore.

By his statement of claim the plaintiff claimed (i) a declaration that in the circumstances attending the negotiation and granting of the tenancy to him and on the true construction of the tenancy agreement the defendant was liable for all repairs to the farm save that the plaintiff was under an obligation to maintain all hedges and ditches, the materials therefor being provided by the defendant, and (ii) rectification of the agreement in accordance with the terms of the said declaration. By his defence the defendant pleaded (i) that the right to rectification had not been made out; (ii) that, alternatively, he would rely on the fact that he was a bona fide purchaser for value without notice of the equity now claimed by the plaintiff; and (iii) that, in the further alternative, he would rely on the fact that the plaintiff had unreasonably delayed making his claim for rectification. At the hearing of the action it was not disputed that, under the repairs clause as it stood, the plaintiff was responsible for the repair of the house, cottages and buildings.

J. L. Arnold for the plaintiff.

L. A. Blundell for the defendant.

UPJOHN, J., stated the facts, and rejected the defendant's third plea, namely, that the plaintiff was not entitled to rectification because of his delay in bringing the proceedings. On the first plea His LORDSHIP found that it was

the intention of the parties to the agreement of Oct. 5, 1939, that the agreement should be in the form commonly used on the Parmoor estate, that the parties misunderstood the true construction of that form of agreement, and that, therefore, the claim for rectification failed. His LORDSHIP then considered the defendant's second plea, and said: Counsel for the plaintiff contended that, as the plaintiff was in actual occupation as tenant, the defendant was affected with notice of all his rights and equities, including an equity to rectify. On the view which I have formed of the facts and law as to rectification this point does not strictly arise, but as it has been fully argued I think that I ought to express my views thereon.

In *Barnhart v. Greenshields* (1), where the law is conveniently and compendiously stated, the judgment of the Privy Council was delivered by Mr. PEMBERTON LEIGH (later LORD KINGSDOWN), who said (9 Moo. P.C.C. 32):

"With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor v. Stibbert* (2), but also to interests under collateral agreements, as in *Daniels v. Davison* (3), *Allen v. Anthony* (4), the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be."

Later in the judgment (9 Moo. P.C.C. 33) Mr. PEMBERTON LEIGH cited a passage from the judgment in *Allen v. Anthony* (4), where LORD ELDON, L.C., said (1 Mer. 284):

"It is so far settled as not to be disputed, that a person purchasing, when there is a tenant in possession, if he neglects to inquire into the title, must take, subject to such rights as the tenant may have."

On the other hand, counsel for the plaintiff has not produced any case which goes so far as to say that an equity of rectification is an equity which is enforceable against a purchaser. In my judgment, it would be extending the doctrine of notice and the obligation to make inquiry far too much if the doctrine was intended to cover an equity of rectification. Of course, the purchaser is bound by the rights of the tenant in occupation—that is quite clear. As is shown by earlier cases, notably, I think, *Taylor v. Stibbert* (2), he is not entitled to assume that the tenant is in possession from year to year. He must look at the agreement and he is bound by the agreement, and if, as in *Daniels v. Davison* (3), the tenant has not only a tenancy agreement but also an option to purchase, he is bound by that also. In my judgment, however, a purchaser is not only entitled but bound to assume, when he is looking at the agreement under which the tenant holds, that that agreement correctly states the relationship between the tenant and the landlord, and he is not bound to ask or to make inquiry whether the tenant has any rights which would entitle him to have the agreement rectified.

Barnhart v. Greenshields (1) was followed by the Court of Appeal in *Hunt v. Luck* (5), where the principle was again stated, but as COZENS-HARDY, L.J., pointed out in argument ([1902] 1 Ch. 430), and as VAUGHAN WILLIAMS, L.J., pointed out at the beginning of his judgment (*ibid.*, 432), the real question to determine was the true construction of the Conveyancing Act, 1882, s. 3. FARWELL, J., who heard the case at first instance, had dealt with the matter without reference to the statutory enactment. I have no doubt that that was because he treated the Act as merely declaratory of the existing law, but it is, after all, a matter of construction of the Act, although I have already expressed an opinion as though the matter rested solely on decided cases.

The provisions of the Conveyancing Act, 1882, s. 3, are replaced by s. 199 (1) (ii), (2) and (3), of the Law of Property Act, 1925. Section 199 (1) reads:

"A purchaser shall not be prejudicially affected by notice of: (i) any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, which is void or not enforceable as against him under that Act or enactment, by reason of the non-registration thereof; (ii) any other instrument or matter or any fact or thing unless—(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him . . . "

The question which I have to answer is this. What inspection and inquiries ought reasonably to have been made by the defendant of the plaintiff before the sale, so far as relevant to this question? I think that the only relevant inquiry which he should have made would have been to say to the plaintiff: "May I see your tenancy agreement? I want to see whether it corresponds with the copy agreement which I have seen in the auction room?" That is the document which governed the rights of the parties. He ought to have asked whether he had seen a correct copy, but he was under no obligation, in my view, to proceed further and say: "Does that correctly represent your rights?" In fact, if he had asked that question the answer, honestly but erroneously given, would have been "Yes". Still less was he bound to take the plaintiff step by step through the document and ask him how he interpreted its provisions. The defendant could not be so bound, and it would be most unwise for any intending purchaser to do so. In my judgment, the defendant is entitled and bound to rely on the terms of the document, and the document speaks for itself. Accordingly, had I come to a contrary conclusion on the claim for rectification, I should have found that the action was barred by the plea of bona fide purchaser for value without notice. In the circumstances, I must dismiss the action, with costs.

Judgment for the defendant.

Solicitors: *Crawley, Arnold, Ellis & Ellis*, agents for *Horwood & James*, Aylesbury (for the plaintiff); *Paishner & Co.*, agents for *C. R. Thomas & Son*, Maidenhead (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

W. v. W. (No. 2)

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.),
June 22, 23, 24, July 12, 13, 1954.]

Divorce—Desertion—Termination—Decree nisi of nullity—Effect on deserting spouse's mind—Termination a question of fact not law—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (b).

A *Divorce—Desertion—Termination—Offer of reconciliation by deserting spouse—Desertion simpliciter or coupled with another matrimonial offence.*

The parties lived together in a house belonging to the wife. In the autumn of 1946 the wife told the husband to leave the house and on Nov. 26, 1946, he did so. On Oct. 20, 1950, the husband presented a petition for a decree of nullity and on Nov. 8, 1951, a decree nisi was granted in his favour. The wife appealed and on Mar. 12, 1952, the Court of Appeal allowed the appeal and set aside the decree nisi. On Jan. 24, 1953, the husband presented a petition for dissolution of the marriage on the ground of the wife's desertion from the date of his eviction by the wife in 1946 until the date of the petition (Jan. 24, 1953). The wife denied desertion, and pleaded that if ever she had been in a state of desertion the desertion had been terminated by offers of reconciliation which had been refused by the husband and that from Nov. 8, 1951 to the date when the decree nisi was set aside the parties were living apart by reason of the decree nisi.

HELD: although a decree of judicial separation or, which was equivalent, a separation order of a court of summary jurisdiction, prevents the continuance of desertion after the date of such decree or order, the making of a decree nisi does not of itself put an end to desertion and it is a question of fact in each case whether a period of desertion has been terminated: observations of LORD ROMER in *Cohen v. Cohen* ([1940] 2 All E.R. 339), applied, *Fender v. Mildmay* ([1937] 3 All E.R. 402), distinguished; on the facts, the wife was guilty of desertion in 1946, the pronouncement of the decree of nullity had not affected her mind or conduct, it was not possible to say that the parties were living apart by reason of that decree, and since she had failed to prove a genuine repentance and sincere and reasonable attempts to get the husband back, her state of desertion had not been terminated and the husband was entitled to a decree: observations of LORD ROMER in *Pratt v. Pratt* ([1939] 3 All E.R. 442) and in *Cohen v. Cohen* ([1940] 2 All E.R. 334), applied.

F Appeal dismissed. *

Per SIR RAYMOND EVERSHERD, M.R.: In cases in which the offending spouse has been guilty of some matrimonial offence in addition to desertion (for example, cruelty) it is, I think, true that the injured spouse may reasonably expect a greater manifestation, a greater proof, of real change of heart extending both to the other offence and to the desertion than in a case in which the only matter at issue is desertion.

G AS TO TERMINATION OF DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 659, para. 969; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 360-365, Nos. 2978-3017.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1 (1) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 389.

H Cases referred to:

- (1) *Pratt v. Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; 27 Digest, Replacement, 350, 2895.
- (2) *Thomas v. Thomas*, [1924] P. 194; 93 L.J.P. 61; 130 L.T. 716; 27 Digest, Replacement, 349, 2890.
- (3) *Cohen v. Cohen*, [1940] 2 All E.R. 331; [1940] A.C. 631; 109 L.J.P. 53; 163 L.T. 183; 27 Digest, Replacement, 362, 2996.

- (4) *Bourron v. Bourron*, [1925] P. 187; 94 L.J.P. 33; 132 L.T. 773; 89 J.P. 43; 27 Digest, Replacement, 711, 6788.
- (5) *Stevenson v. Stevenson*, [1911] P. 191; 80 L.J.P. 137; 105 L.T. 183; 27 Digest, Replacement, 361, 2988.
- (6) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest, Replacement, 363, 3005.
- (7) *Kay v. Kay*, [1904] P. 382; 73 L.J.P. 108; 91 L.T. 360; 27 Digest, Replacement, 335, 2789.
- (8) *Fender v. Mildmay*, [1937] 3 All E.R. 402; 106 L.J.K.B. 641; 157 L.T. 340; sub nom. *Fender v. St. John-Mildmay*, [1938] A.C. 1; Digest Supp.
- (9) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest, Replacement, 360, 2978.
- (10) *Earnshaw v. Earnshaw*, [1939] 2 All E.R. 698; 27 Digest, Replacement, 360, 2979.

APPEAL by the wife against a decision of Mr. Commissioner BUSH JAMES, Q.C., given on Feb. 16, 1954.

The parties were married on Jan. 1, 1941. In June, 1944, the parties adopted a child which died later. In 1944 the wife succeeded to a certain sum of money in consequence of the death of her mother and purchased a house in Cornwall which for a time was the matrimonial home. In April, 1945, the parties adopted a child named John. In the autumn of 1946, after a quarrel, the wife told the husband to "get out and stay out" and on Nov. 26, 1946, the husband left the matrimonial home, and the parties never thereafter resumed cohabitation. In December, 1946, the husband joined the Royal Navy and went abroad. During 1947 the wife wrote to the husband suggesting that he should return to the house in Cornwall or spend his leave there, or even to obtain a transfer to a post nearer there, but refusing to join him in married quarters as requested by him. One letter dated Aug. 18, 1947, began: "Can't you recognise an olive branch when you see one?" The wife wrote one further short letter to the husband in which she acknowledged a present sent by him and then ceased to write to him until, during 1949, she wrote to him and to his commanding officer letters under a false name. On Oct. 12, 1950, solicitors acting for the wife wrote to the husband:

"We act for your wife who has instructed us that she desires to enter into a deed of separation with you. We shall be glad if you will call to see us in the matter or, alternatively, let us know the name and address of your solicitors."

On the same date the husband filed a petition for nullity on the ground of his wife's incapacity, alternatively of her wilful refusal to consummate the marriage; the wife in her answer denied incapacity and wilful refusal and prayed for a dissolution of the marriage on the ground of the husband's desertion. On Nov. 8, 1951, a decree nisi was granted to the husband by Mr. Commissioner GRAZEBROOK, K.C., on the ground of the wife's incapacity.

The wife appealed, and on Mar. 12, 1952, the decree nisi was set aside by the Court of Appeal ([1952] 1 All E.R. 858) on the ground that the adoption of the child, that is, the second adoption, implied on the part of the husband a recognition of the existence of the marriage so as to render it inequitable and contrary to public policy that he should be permitted to challenge it. The petition was remitted to the Divorce Division for the wife's cross-prayer to be dealt with. SIR RAYMOND EVERSHED, M.R., stating ([1952] 1 All E.R. 863):

"... it may be necessary for leave to be given for the husband to amend his pleadings."

On Apr. 16, 1952, the husband swore an affidavit intended to be relied on by him in support of an application to be made to amend the petition by praying a decree of dissolution on the ground of desertion by the wife. A copy of the

affidavit was sent to the wife and on Apr. 25, 1952, her solicitors wrote to the husband's solicitors:

"We have now been instructed by our client to inform you that she will not proceed with her cross-petition, and we have been instructed to withdraw same accordingly. We have also been instructed to inform you that if your client is willing to return to our client, she is prepared to have him back . . ."

A That letter was formally acknowledged by the husband's solicitors, who issued a summons for leave to amend the petition. On May 23, 1952, the wife's solicitors wrote:

B "We would remind you that on Apr. 25, we wrote to you a letter, the material part of which is that our client desired to become reconciled to her husband. We are sorry to see that you have never replied to this letter save to issue a summons . . . Our client's position is quite clear. She wants her husband back above all else and for our part we believe this is a genuine desire. If, however, your client will not return, then the future must be considered in the light of that refusal, and our client may decide to proceed with her prayer for divorce [in her answer]."

C On June 5, 1952, the husband's solicitors replied stating that they did not accept the offer as a genuine and sincere offer to terminate the desertion and that, therefore, they were unable to accede to the suggestion made. On June 9, 1952, the wife's solicitors wrote:

D "... After the proceedings were concluded our client decided that the past should be forgotten and this was the time to seek a reconciliation. There was no ulterior motive . . ."

On June 19, 1952, the wife's solicitors wrote:

"She would like to be given the opportunity of proving that she is sincere in asking him to return to her."

E The wife resisted the husband's application for leave to amend on the ground that if leave were granted she would be disabled from relying on desertion by the husband after Oct. 12, 1950 (the date of the petition which he was seeking to amend). The registrar refused leave. On appeal by the husband the judge in chambers allowed the appeal and granted leave. The wife appealed to the Court of Appeal, and on Oct. 15, 1952, SINGLETON, L.J., having indicated his view that to allow the husband to amend would or might be unfair to the wife, the parties by counsel agreed to an order dismissing both the husband's application for leave to amend and the wife's prayer in her answer for dissolution on the ground of the husband's desertion. On the same date the wife wrote to the husband:

G "Dear Jack, Now that all the litigation has been dismissed I am writing to ask if you will come and see me so that we can talk about the future and see if we can make a fresh start again together. I am asking this for John's sake as well as ours as I think we both owe it to him to try to make a success of our future life together. Yours, Helen."

On Oct. 18, 1952, the wife wrote again to the husband:

H "Won't you let me have an answer to my letter of the 16th [15th]. Would you prefer to fix a meeting place somewhere in London rather than coming here to see me? If you'll let me know what times suit you best I can fit in with them. Do let me know as soon as possible."

On Oct. 20, 1952, the wife wrote to the husband:

"Won't you at least give me a chance of showing you that I meant what I said? Do let me see you somewhere and talk things over".

On the same date the husband's solicitors wrote to the wife's solicitors:

"We are instructed by our client that he has no wish to meet your client, as he feels, looking back over the last seven years, that the offers by her are not genuine."

On Oct. 28, 1952, the wife met the husband in the street with a view to pursuing her attempt at reconciliation and arranged for a private detective to be present at a reasonable distance away from her when she met the husband. On June 24, 1953, the husband presented a new petition for dissolution of the marriage on the ground of the wife's desertion from the date of his eviction from the house in Cornwall to the date of the petition. In her answer, the wife denied desertion and alleged:

"2. If, which is denied, she ever was in a state of desertion, the same was terminated by offers on her part to become reconciled made [by the letters in April and October, 1952, and at the meeting on Oct. 28, 1952] which offers the [husband] rejected. 3. From Nov. 8, 1951, to Mar. 21, 1952,* the parties were living apart by reason of a decree nisi of nullity of marriage pronounced by this Honourable Court."

Mr. Commissioner BUSH JAMES, Q.C., held that the wife was in a state of desertion, that her offers of reconciliation were not genuine and satisfactory, and that the making of the decree nisi did not as a matter of law put an end to her desertion. He, accordingly, granted a decree in favour of the husband. The wife appealed.

Nield, Q.C., and *Fairweather* for the wife.

Simon, Q.C., and *H. G. Garland* for the husband.

SIR RAYMOND EVERSHERD, M.R.: In this appeal the husband and the wife come for the third time before this court in the course of litigation which has sought to determine on one ground or another the marriage between them. It is, therefore, a most unusual case which, I hope, will not often find a parallel. Because of its unusual character, it may, perhaps, reflect, or be thought to reflect, some imperfection in the administration of this part of the law and, if so, it is an instance of the fallibility of all human institutions. I think it reflects also another human fact—that the breakdown of a marriage between two persons of good character, who have both done their best to make a success of it, may produce feelings of implacable hostility which tend to prolong and render the more bitter the litigation as it proceeds. These introductory remarks are, I think, relevant, because on both points with which we have to deal there is no doubt (and I have the highest authority for so stating) that the case must depend on its own special and peculiar facts. [His LORDSHIP stated the facts and held that Mr. Commissioner BUSH JAMES, Q.C., was justified in finding that the wife had been guilty of desertion in the autumn of 1946, and continued:] I now desire to deal with the substance of the second paragraph of the wife's answer. A number of cases have been cited to us, and I shall, I hope, be forgiven if I do not cite many in the course of my judgment. The relevant authorities were taken into consideration by Mr. Commissioner BUSH JAMES, Q.C., and in my view he in no respect mis-directed himself. This much can at least be said, that desertion as a matrimonial offence leading to a petition for divorce differs from other matrimonial offences, such as adultery, in that it does not consist of an act or a number of acts separate and distinct in themselves, but is rather an activity or course of conduct which must persist for the statutory period up to the date of presentation of the petition; so that, except in cases where the

* Mar. 21, 1952, was the date when the order of the Court of Appeal, pronounced on Mar. 12, 1952, allowing the wife's appeal, was drawn up.

A statute* otherwise provides (and the present is not such a case) it is not permissible, if the period be broken, to add the broken periods together so as to make a sum of three years in all. The question, then, is: What is sufficient to break the period, the course of conduct, called desertion? It has been laid down in one of the passages I shall presently quote that once a spouse has deserted (that is to say, once he or she has evinced the intention of treating the marriage relationship as at an end) then, *prima facie*, if he or she remains away from the other in fact, he or she continues in desertion. Merely writing a letter or expressing an intention to come back, or to invite the other party back, without anything more, is not, I conceive, enough. There must go with the expression, and be illustrated and evinced by it, a real change of heart. I am at present leaving out of account the subject-matter of the third paragraph of the answer; that is to say, the case in which, as it is said, either the conduct of the deserted party or the circumstances is or are such that it cannot reasonably be expected or asked of the deserting party that he or she should make any move towards ending the desertion. With regard to the subject-matter of the second paragraph in the answer, a deserting party may put an end to the desertion provided that he or she does evince a real change of heart. It is said in the present case that the so-called offers in the correspondence of April and October, 1952, and the incident in the street on Oct. 28, 1952, did evince a real change of heart and that the husband was not entitled to disregard them and, having chosen to do so, he can no longer rely on the subsequent absence of his wife as constituting continued desertion. In the course of his reference to the cases, counsel for the husband contended that in testing whether or not the deserting spouse has terminated his or her desertion, the court must apply, or in some cases will have to apply, a subjective test and an objective test; that is to say, must consider whether the refusal of the deserted spouse to respond to the advance was reasonable on his or her part as well as whether objectively the action of the deserting spouse (and, indeed, of the deserted spouse as well) constituted a termination of the desertion. In cases in which the offending spouse has been guilty of some matrimonial offence in addition to desertion (for example, cruelty) it is, I think, true that the injured spouse may reasonably expect a greater manifestation, a greater proof, of real change of heart extending both to the other offence and to the desertion than in a case in which the only matter at issue is desertion. Although, as counsel for the husband observed, the wife's behaviour during the marriage, before as well as after the desertion, was in many respects reprehensible, and the learned commissioner described it as to one part of the history as "outrageous", the present is a case in which no allegation has been made by the husband save that of desertion.

The following opinions of LORD ROMER will sufficiently found the principle which, in my judgment, has to be applied to the facts of the present case. In *Pratt v. Pratt* (1) LORD ROMER said ([1939] 3 All E.R. 442):

G "Can it be said, however, in view of those letters, that the respondent thereafter was continuing to desert her husband? For the purpose of assisting your Lordships in answering this question, counsel for the appellant called your Lordships' attention to several reported cases in which the subject of desertion by one of the spouses of the matrimonial home has been considered by the courts. These were, no doubt, the authorities which had been cited to the Court of Appeal and were referred to by SCOTT, L.J., in the passage ([1939] 1 All E.R. 504) in his judgment to which I have already referred. I agree with him in thinking that they do not lay down any principle of law applicable to the question which we have to decide, for, as was pointed out by WARRINGTON, L.J., in *Thomas v. Thomas* (2) ([1924]

* It seems that this is a reference to s. 7 (3) of the Matrimonial Causes Act, 1950; HALSBURY'S STATUTES, 2nd ed., vol. 29, p. 396; see *Green v. Green* ([1946] 1 All E.R. 308).

P. 200) approving a statement made in the Divisional Court: "... the question whether desertion continues is one of fact to be determined in view of the circumstances of the particular case". That was a case where a husband shortly after committing the matrimonial offence of desertion had written to his wife offering to resume cohabitation. The court, however, came to the conclusion that the husband's offer was not a genuine one. His desertion was accordingly treated as continuing, notwithstanding the offer. My Lords, in the present case, I can find nothing which even remotely suggests that the offer of the respondent contained in the two September letters was other than genuine. The appellant, indeed, concedes that the writing of the letters was a spontaneous act on the part of the respondent, and not one done upon the advice or at the instigation of her legal advisers. Nor does he suggest that the letters were written for the purpose of being used by her in any legal proceedings. All that he could say about the letters, when giving his evidence, was that he took the view at the time that the respondent was not 'honest in her desire to come back'. By this, I think, he must have meant that she only desired to come back on conditions to which he could not be expected to submit. However, there is no word in either letter to justify any such suspicion on his part."

In *Cohen v. Cohen* (3) LORD ROMER, with whose speech the other noble Lords concurred, said ([1940] 2 All E.R. 334):

"In *Bowron v. Bowron* (4), where the intention of a husband to desert his wife had been established, it was said ([1925] P. 195) by SCRUTTON, L.J., that the intention is presumed to continue unless the husband proves genuine repentance and sincere and reasonable attempts to get his wife back. There were certainly no such attempts in the present case."

Those two passages will provide for me my text, and I ask myself as a question of fact: Was the nature and the true intention of these communications, the first batch written by the solicitors and the second written by the wife herself, such in fact as to put an end to the desertion, having regard to the husband's rejection of them? I answer that negatively. Treating it as a matter of fact, I think the learned judge clearly had evidence before him which entitled him to conclude that the true character of these letters (and the same is true of the incident in the street on Oct. 28, 1952) was that they were manoeuvres in what I will call, without meaning the phrase offensively, the legal game. I do not think they did in fact represent any change of heart. No doubt they were true and genuine in the limited sense that when she said through her solicitors, for example, in the letter dated Apr. 25, 1952, "I will have you back", she would have opened the door to the husband if he had presented himself at the house in Cornwall. The word "genuine" in this context has, I think, a wider significance, and I agree with counsel for the husband that in judging this matter it is necessary to bear in mind the background. [His LORDSHIP referred to the letters in April having followed immediately on the first petition, to the wife's demeanour as a witness, and to the presence of the inquiry agent on Oct. 28, 1952, and continued:] I think that Mr. Commissioner BUSH JAMES, Q.C., was amply justified on the evidence in concluding, as he did, that these communications in April and October, 1952, did not have the quality which, because they were rejected, entitles the wife to say that her desertion was thereby terminated.

I turn, accordingly, to the point raised by the wife in the third paragraph of the answer, namely, that, whatever might be said of her own conduct, as a matter of law the making of the decree nisi for nullity on Nov. 8, 1951, necessarily put an end to the desertion, and that the desertion, accordingly, ceased to exist until a date in March, 1952. At first sight, I must confess that the proposition has an obvious attraction. A decree nisi is a decree, conditional it is true, but nevertheless it is an order of the court to the effect that the marriage, being voidable on the ground of incapacity, has been successfully avoided by the petitioner.

The order in the present case was in the normal form and after referring to the hearing of the evidence, and so forth, read:

A "The commissioner pronounced on Nov. 8, 1951 . . . that the [husband] had sufficiently proved the contents of the petition and decreed that the marriage in fact had and solemnised on Jan. 1, 1941, between the husband and the wife be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever by reason of the incapacity of the [wife] to consummate the marriage and the said [husband] be pronounced to have been and to be free from all bond of marriage with the [wife] unless within six weeks from this date sufficient case be shown to the court why this decree should not be made absolute."

B The attraction of the argument obviously rests on this, that if the court has decreed that the husband be free from all bond of marriage, it would obviously appear to follow that any approach on the part of the wife to resume marital relations would be futile, since they would be addressed to a party who was under no obligation whatever to pay any regard to them. This, however, was a decree nisi and proceeds with the condition "unless it be shown that the decree should not be made absolute". It never was made absolute. On this decree being made the wife repudiated it instantly and appealed against it—in the end successfully. What, then, is the test to be applied? I am bound to say (because C I confess this does weigh a little on my mind) that I would be extremely reluctant to hold that the wife is entitled to resist successfully the husband's petition on the ground of desertion having regard to what occurred before the Court of D Appeal on Oct. 15, 1952. On the suggestion of the court on that occasion the parties mutually agreed to put an end to the first proceedings and to start afresh, there never having been any mention or intimation on the wife's part that she intended to rely on, or that there was available to her, this point which, if valid, made the discussion wholly futile. Had she done so, I think that the Court of Appeal would have made an order different from the one that was made on that date (Oct. 15, 1952). However, that of itself would not justify me in E rejecting this point if, in other respects, I thought it well founded.

I think the answer to this point is to be derived from *Cohen v. Cohen* (3), from which I have already made one brief quotation. In that case the wife had on two occasions, one in 1930 and one in 1936, presented petitions seeking for the dissolution of her marriage with the husband on the grounds of his adultery. F For reasons which I assume good and which, at any rate, are irrelevant, the wife obtained leave on both occasions to withdraw those petitions. On Jan. 1, 1938, the Matrimonial Causes Act, 1937, came into force (s. 14 (2) of that Act), and by s. 2 of that Act desertion for three years immediately preceding the petition was made a ground for divorce. The wife thereupon presented her third petition on Mar. 2, 1938, seeking dissolution of her marriage on the ground of desertion. G By the common sense of the matter, it was as clear as it is that night follows day that the husband had deserted his wife for a long period of time. The point was taken, however, that the presence of the petitions for dissolution on the file inevitably and as a matter of law broke the period of desertion alleged. The matter came before HODSON, J., who felt bound by *Stevenson v. Stevenson* (5), to hold that the husband's point was well founded, a conclusion which was affirmed on the same grounds by this court. When, therefore, the matter came to be considered in the House of Lords, the validity of the decision in *Stevenson v. Stevenson* (5), which had then stood for nearly a generation, was reviewed, and the substance of the conclusion was, as I follow the speech of LORD ROMER, that there is no rule of law which governs cases of this kind to the effect that the presentation of a petition seeking dissolution of a marriage is so inconsistent with the assertion by the petitioning party that the other is a deserter that automatically and ipso facto the desertion is thereby terminated.

The question is posed by LORD ROMER thus ([1940] 2 All E.R. 332):

"Where one of the spouses has committed the matrimonial offence of desertion, does that desertion necessarily come to an end by the presentation and service upon the deserting spouse of a petition by the other one asking for a dissolution of the marriage?"

After narrating the facts of the case and citing the passage ([1925] P. 195) from SCRUTTON, L.J.'s judgment in *Bourron v. Bourron* (4) which I have already read, LORD ROMER pointed out that the grounds on which *Stevenson v. Stevenson* (5) was based, namely, the presence of earlier authorities, were in his view not sound. Thus LORD ROMER observes ([1940] 2 All E.R. 335), in reference to the judgment of SIR HERBERT COZENS-HARDY, M.R., in *Stevenson v. Stevenson* (5):

"It will be observed that Sir H. H. Cozens-Hardy, M.R., did not base his decision upon any facts peculiar to the case before him. He laid down a general principle applicable to all cases where the deserted spouse places upon the file a petition for judicial separation or divorce. The subsequent desertion cannot, he held, be treated as being without cause while the petition remains on the file. I shall consider the reason which he gave for coming to this conclusion at a later stage in this judgment. For the moment, I merely propose to call attention to the singular fact that, of the three cases to which he referred as justifying his conclusion, the first two in no way establish, and the third seems to be inconsistent with there being, any such general principle as he was laying down."

The second case on which SIR HERBERT COZENS-HARDY, M.R., had relied was *Harriman v. Harriman* (6). LORD ROMER said (*ibid.*, 337):

"*Harriman v. Harriman* (6) was a decision of the full Court of Appeal given in these circumstances. A husband deserted his wife in July, 1905. In March, 1906, the wife obtained an order under the Summary Jurisdiction (Married Women) Act, 1895, s. 5, that her husband should pay a weekly sum for her support, but the order contained a provision under s. 5 (a) of that Act that the wife should no longer be bound to cohabit with her husband, and this provision, by virtue of the sub-section, had the effect of a decree of judicial separation. In December, 1907, the wife presented a petition for dissolution of the marriage on the grounds of the husband's adultery and desertion for two years without reasonable excuse. It was held that the effect of the non-cohabitation clause was to prevent the continuance of the desertion after the date of the order. There had been a decree, or what was equivalent to a decree, of the court, in the face of which it was out of the question that the husband should make any attempt to return to the matrimonial domicile. The case is no authority whatsoever for the proposition that the mere filing and service of a petition for divorce or judicial separation have of themselves the same effect."

In connection with the same matter, the noble Lord pointed out (*ibid.*, 338) that s. 6 (3) of the Matrimonial Causes Act, 1937, had been passed in order to deal with the difficulty which *Harriman v. Harriman* (6) had created and which LORD ROMER says (*ibid.*, 338) "was unquestionably rightly decided." LORD ROMER continues (*ibid.*, 339):

"There may be cases—*Kay v. Kay* (7) was one of them—where the petition contains gross charges against the husband so reckless and so unfounded that he cannot reasonably be expected to make any attempt to bring his desertion to an end . . . My Lords, in my opinion, in laying down a general principle applicable to all cases in which a deserted spouse presents a petition for divorce or judicial separation, the decision in *Stevenson v. Stevenson* (5) was wrong, and should be overruled. The question whether a deserting spouse has reasonable cause for not trying

to bring the desertion to an end, and the corresponding question whether desertion without cause has existed for the necessary period, must always be questions of fact, and the determination must depend upon the circumstances of the particular case. I deprecate attempts to lay down any general principle applicable to them all. It only remains to consider whether, in the case now before your Lordships, the respondent can be said to have had any reasonable excuse for making no attempt to put an end to his desertion of the appellant . . . it was never disproved, and there is nothing in the history of this case which even remotely suggests that the petition, while it was on the file, deterred the respondent in the very least from taking steps to end his desertion . . . It is abundantly plain that there was nothing connected with this second petition [for divorce on the ground of adultery] which could in any way have induced the respondent to refrain from putting an end to his desertion, had he had the slightest desire to do so."

I appreciate that there may well be great differences both in the facts themselves and in the effect they are likely to have on other people's minds between the mere presentation of a petition (later not proceeded with) on the one hand, and the obtaining of a decree nisi on the other. A deserting spouse might without difficulty be able to establish as a matter of fact that the making of a decree nisi for dissolution or for nullity so affected his or her mind and conduct that a court would hold that the desertion had then ceased. It may well also be true that *Cohen v. Cohen* (3) is only direct authority for the view that the presentation of a petition for divorce or for nullity on the grounds that the marriage is voidable, such as this, would not in themselves as a matter of law break the period of desertion. However, from the passages that I read with emphasis, I take *Cohen v. Cohen* (3) also to be authority that, prima facie at least, it is a question of fact in each case whether or not the desertion without cause has continued during the requisite period. Where a final order has been made for judicial separation or an order having the same effect, then no doubt that order establishes a state of affairs which is inconsistent with the subsistence of desertion by either spouse: so this court decided in *Harriman v. Harriman* (6) and, as the House of Lords held, rightly decided. That is not the present case. The making of the decree nisi in the present case did not terminate the marriage. The pendency of a decree nisi is not itself inconsistent with the commission of a matrimonial offence, including, in my opinion, desertion. The court then has in the present case, as in all others of the same kind, to ask itself the question: Did the obtaining by the husband of the decree nisi for nullity, on Nov. 8, 1951, in fact end the desertion? The court still has to decide whether (to use the exact language of LORD ROMER) "the desertion without cause has existed for the necessary period."

I have pointed out that the form of the order showed on its face that it was not final, but conditional. I have also sketched the long and lamentable history of the attempts of these two unfortunate people to live happily together as man and wife. It is, in my judgment, clear that in fact the obtaining of this decree did not affect the mind of the wife, treating her as being in desertion, in the slightest degree. During the period from the presentation of the petition onwards, she in no way altered her attitude of mind. In her answer she included a prayer for dissolution of the marriage on the ground of desertion, and the presentation of the petition (on Oct. 12, 1952) was, in fact, contemporaneous with a suggestion from her solicitors that the two of them should enter into a deed of separation. Applying, therefore, the test which LORD ROMER lays down, that is, the test of fact, and considering all the circumstances of the present case, I am satisfied that Mr. Commissioner BUSH JAMES, Q.C., rightly held that the wife's animus deserendi, her desertion, her state of mind and conduct, was wholly unaffected either by the presentation of the petition or by the obtaining by the husband of the decree nisi. It will be remembered that, according to the language of para. 3

of the wife's answer "the parties were living apart by reason of the decree nisi". If one thing in the present case is clear it is that "the parties" were not living apart for any such reason. In my judgment, the commissioner was well entitled to hold that they were living apart by reason of the fact that the wife had deserted the husband and continued at all material times to desert him. I prefer to leave it like that, and do not, therefore, refer to the cases by which counsel for the husband illustrated his argument that mere impossibility of cohabitation, if such there be, is not necessarily and of itself an end to the desertion period. In the course of his argument he cited instances where one or other party is incarcerated in prison or where one or other party is detained owing to mental incapacity. Those cases may be useful to show that there is no rule in dealing with matters of this kind and to emphasise the necessity for having regard to the state of mind of the deserting party (though I do not forget that the state of mind of the deserted party is or may also be relevant).

Another argument, based on *Fender v. Mildmay* (8), was suggested by counsel for the wife for rejecting the view which I have formed. The subject-matter of that case was wholly different from that with which we are concerned. The point of the citation was, however, to show that there is so great and so valid a distinction between the presentation of a petition for dissolution of marriage, on the one hand, and the obtaining of a decree on that petition, on the other, that the observations of LORD ROMER in *Cohen v. Cohen* (3) should be treated as inapplicable in a case where a decree nisi has been obtained. I am unable to agree. In *Fender v. Mildmay* (8) the respondent, Mildmay, had, after a decree nisi for divorce had been obtained against him by his wife, made a promise to the appellant, Miss Fender, to marry her when the decree had become absolute. After the decree had become absolute and Mildmay was, therefore, in a position to perform his promise, he decided not to marry the appellant after all, and she sued him for breach of promise of marriage. The only point, as I understand it, which was decided by the House of Lords, was whether or not Miss Fender was disabled from suing and recovering damages on the ground that the promise, proved by her to have been made by Mildmay, was made in circumstances which rendered it contrary to public policy that it should be recognised and enforced by the courts. It was truly said that during the period between the making of the decree nisi and the making of the decree absolute the marriage had subsisted. Thus, for example, if one party to the marriage during that period had sexual relations with someone else, that would constitute the matrimonial offence of adultery. It was said, therefore, that, since the marriage was subsisting, it was contrary to public policy, because it would tend to the depravity of public morals, that the court should recognise and enforce a promise made by a married man, albeit after decree nisi had been obtained, to marry somebody else. It was suggested that it might tend to encourage one party to murder the other party to the marriage. It was suggested that it would encourage the committing of promiscuous adultery and so forth. Much of (if I may say so with respect) the lively opinion of LORD ATKIN is directed to ridiculing suggestions of that kind. It is no doubt true that in certain of the speeches, particularly the speech of LORD WRIGHT, emphasis is laid on the circumstance that the making of a decree nisi marks a definite stage in the termination of the first marriage relationship. LORD ATKIN himself at times uses similar language. LORD THANKERTON said ([1937] 3 All E.R. 415) (I take one citation from his speech as an example):

"My Lords, once the decree nisi has been pronounced, the petitioner, as I have already stated, has done all that he or she can do in order to obtain dissolution of the marriage tie, except to apply, after expiry of the statutory period, for the decree absolute."

On the other hand, there are other passages in LORD ATKIN's speech which seem to me to be no less applicable to the state of affairs which exists even before

the presentation of the petition and long before any decree has been pronounced. I take one example (*ibid.*, 410):

A " If a respectable man, whose wife has fled with the lodger, leaving the children in his charge, engages himself to another respectable person, to marry her as soon as he is free, no public interests suffer. In my opinion, they benefit. Similarly in the converse case of a wife whose husband is living with another woman, of whose child he is the father. Does either of these persons still owe any kind of duty to love or cherish the other spouse, to whom no doubt he or she is still married, or owe him or her any duty which, in the interests of themselves or of the public, will be impaired by a promise to marry a third person when free ? "

B In any case, the decision in *Fender v. Mildmay* (8) seems to me to be directed to a wholly different question from that with which we are concerned. The question was whether or not it was contrary to good morals and to public policy that the court should recognise and enforce a conditional contract of a particular kind, namely, a contract by A to marry B on A's marriage ceasing, that promise having been made at a time when, according to the common sense of the matter, it was as near certain as anything could be that A's marriage would shortly be

C terminated by order of the court. We are not in the present case concerned with any question, so far as I can see, of public policy. If there were any distinction, vital to the decision, between the presentation of the petition and the making of the decree nisi in *Fender v. Mildmay* (8), its relevance was related to the question of public policy and does not seem to me to be essential to a consideration of the point raised in this case.

D Finally, it was suggested by counsel for the wife—and I will assume that this point, for the purposes of my judgment, is open to him on the pleadings—that the inclusion in the first petition of the allegation not merely of incapacity, for which the unhappy wife could not be blameworthy, but also the allegation of wilful refusal on her part to consummate the marriage, constituted charges of so extravagant a character, within the line of cases of which LORD ROMER had

E treated *Kay v. Kay* (7) as an example, that, after they had been made, in the language of SCRUTTON, L.J., the wife could not reasonably be expected to make any attempt to bring her desertion to an end. It is true that to this extent the charges may be regarded as grave and unfair, since it was proved she underwent operations in the hopes that she would thereby be assisted in

F having sexual relations with her husband. Having regard, however, to the whole conduct and tenor of the present case, I am far from saying that the charges were so reckless and so unfounded and extravagant as to render it no longer incumbent on the wife to take any step to end her desertion. In any event, I add that it is clear on the facts that the inclusion of those charges in the petition did not influence in the smallest degree, in my judgment, the conduct of the wife from the time the petition was presented onwards. For these reasons I agree

G with the judge in thinking that the making of the decree nisi and its subsistence until March, 1952, cannot be treated as putting an end to the desertion. In my judgment, this appeal should be dismissed.

JENKINS, L.J.: I agree and have nothing to add.

H HODSON, L.J.: The husband set out in his petition to prove desertion from the autumn of 1946 until the presentation of the petition, on Jan. 24, 1953, and the first question which has to be answered is whether the wife ever did desert the husband. That question was answered in his favour by Mr. Commissioner BUSH JAMES, Q.C., whose decision has been attacked in this court on the ground that the evidence shows that, although there were quarrels between these parties in the year 1946 when they were living in a house which belonged to the wife and although the wife turned the husband out, this turning out was merely something which happened in anger and was not intended by the

wife to bring about a permanent separation. The learned commissioner heard the evidence of the parties and of the unhappy scenes which had occurred both before the wife told the husband to go and before he went, and he came to the conclusion that desertion did begin in the way in which the husband said, and, in my judgment, that decision cannot properly be reversed in this court. The matter does not rest there, because although the initial turning out by the wife was wrongful, yet the parties continued to communicate with one another, and the husband has to prove that the desertion continued. It was his duty in so doing to put before the court all the relevant material, including letters which had passed between him and his wife, and this he did. Those letters of the husband, while complaining bitterly of his wife's bad temper and the unhappy life which he had led with her in this house, contained a clear offer to have her to live with him in married quarters, he having joined the Royal Navy after leaving home in December, 1946. That offer was rejected by the wife.

The argument directed to this court is that the wife had been perfectly willing to have her husband back, and on Aug. 18, 1947, had proffered what she called an olive branch, by a letter in which she suggested to the husband that he should come down to the old home in which they had lived together; if he could not live there altogether, he could spend his leaves there while he was home from his station. It is said that the husband was, on the face of it, unreasonable in not falling in with that suggestion. That contention was, I think, rightly rejected by the learned commissioner. The obligation being on the husband to maintain his wife, *prima facie* at any rate the husband is entitled to say where the home shall be. That, of course, is not a proposition of law, because there may often be circumstances where the husband is unreasonable in suggestions which he may make as to the home which he is ready to offer to his wife, or where the circumstances of his own life make it impossible for him to make a home for her with him, whether the circumstances of his life are of his own choice or of necessity. It is usually the necessity of his calling. In the background of these cases, I think, it always has to be remembered that the primary obligation of the husband is to maintain the wife in a home where they can be together, it is not an obligation to make a separate maintenance allowance to a woman who is living in another place. Whether or not the desertion continued from that time in 1947 until the presentation of this petition (on Jan. 24, 1953) depends on a consideration of all the facts in the case. As WARRINGTON, L.J., said in *Thomas v. Thomas* (2), to which SIR RAYMOND EVERSHED, M.R., has referred:

“... the question whether desertion continues is one of fact to be determined in view of the circumstances of the particular case.”

In *Pratt v. Pratt* (1) LORD ROMER quoted ([1939] 3 All E.R. 442) that sentence with approval. It cannot, however, be stated as an absolute proposition that the question is one of fact, because, as appears from *Cohen v. Cohen* (3), there is at least one exception to this rule: if one of the spouses has obtained a decree of judicial separation or an order of a court of summary jurisdiction which has the effect of such a decree, it is shown by *Harriman v. Harriman* (6) that there is a break in the desertion. As LORD ROMER said ([1940] 2 All E.R. 337) in *Cohen v. Cohen* (3):

“There had been a decree, or what was equivalent to a decree, of the court, in the face of which it was out of the question that the husband should make any attempt to return to the matrimonial domicile.”

Apart from that exception, although it has often been argued in these courts that other matters must be taken to prevent desertion running as a matter of law, as the law now stands, they must be taken to have always failed.

One example is that of a deserted spouse who takes proceedings against the other in these courts. It was argued that in so doing he or she was praying the other spouse to keep away. That problem was considered in *Stevenson v. Stevenson* (5) (which was overruled by *Cohen v. Cohen* (3)), and the argument

which, on the face of it, has force, is stated by LORD ROMER ([1940] 2 All E.R. 335) citing SIR HERBERT COZENS-HARDY, M.R. ([1911] P. 194), in *Stevenson v. Stevenson* (5):

"The presentation of the petition and its continuance on the files of the court prevented the subsequent desertion from being without excuse."

A The contention that the praying the other side to keep away by petitioning this court must, as a matter of law, operate to prevent desertion running was rejected by the House of Lords in *Cohen v. Cohen* (3), and that decision stands as good law today. Similarly, it can, I think, with force be argued that where a deserted spouse is living in adultery, it can hardly be said that the desertion is continuing, because there is an obvious obstacle to the other spouse returning. That position was considered by SIR BOYD MERRIMAN, P., in *Herod v. Herod* (9), and that decision has been approved by this court (*Earnshaw v. Earnshaw* (10)), which has said in effect that the question is not: Is the petitioner living in adultery, or has the petitioner been living in adultery during the period of desertion? but: What effect, if any, has that adultery had on the conduct of the opposite party?

C Coming back to the question in the form posed by WARRINGTON, L.J., viz., that whether or not desertion continues is a question of fact, I agree with SIR RAYMOND EVERSLED, M.R., that the pronouncement of the decree nisi in the present case must be looked at from the aspect of seeing what effect, if any, it had on the conduct of the wife. The question of law is, to my mind, out of the way, having regard to the decision of *Cohen v. Cohen* (3). The decree nisi, no doubt, is a further step in the proceeding beyond the mere presentation of the petition, but there is nothing in the decree nisi which corresponds to a decree of judicial separation, in that it brings the marriage to an end, or the duties of cohabitation to an end. The decree nisi is an interlocutory decree which does not take effect until it has been made absolute. For the reasons which have already been given—I do not propose to repeat the unhappy history—I see no reason to find that the pronouncement of this decree had any effect at all on the wife's conduct. The argument on her behalf was, no doubt, supported by a reference to the decision of the House of Lords in *Fender v. Mildmay* (8), where the question to be determined was whether or not a contract by a man after decree nisi and before decree absolute to marry a woman other than his wife was void as being against public policy. That was a different question from the one to be determined in the present case. However, the majority of their Lordships, reaching a conclusion that such a contract was not against public policy, undoubtedly laid emphasis on the fact that after decree nisi (to use the words of LORD ATKIN ([1937] 3 All E.R. 413) quoting GREER, L.J. ([1936] 1 K.B. 117)) "nothing but a shell is left", and it would be absurd to regard the marriage as subsisting in any real sense of the word. In LORD ATKIN's speech particularly, it is to be observed that most of the arguments which he directed to the absurdity of the situation applied equally to the position after a petition had been presented, indeed, even to the position before a petition had been presented, when a matrimonial wrong had been inflicted by one spouse on the other. LORD THANKERTON used this language ([1937] 3 All E.R. 415):

H "My Lords, once the decree nisi has been pronounced, the petitioner, as I have already stated, has done all that he or she can do in order to obtain dissolution of the marriage tie, except to apply, after expiry of the statutory period, for the decree absolute. The guilt of the respondent has been judicially determined. The waiting period is imposed in the public interest, in order to ensure that there has been full disclosure before the court. If intervention takes place and is successful, the decree absolute will not be obtained, and the promise of marriage will be nugatory."

Earlier in his judgment, LORD THANKERTON had said (*ibid.*):

"While, on the one hand, the marriage tie is not dissolved until the decree is made absolute, and misconduct with a third party still constitutes adultery, the consortium vitae of the spouses is suspended from a stage prior to the decree nisi, and the petitioning spouse has done all he or she can or need do, except, after the expiry of the necessary period, to apply to have the decree made absolute."

LORD WRIGHT said ([1937] 3 All E.R. 433):

"I have here chosen the decree nisi as marking the line of division and demarcation. Many of the above arguments would apply to a mere separation, and even more to the presentation of a petition. But I think a decisive point is reached by the decree nisi. The petition is merely the first step in proceedings. The result is uncertain. There is no public hearing. It is true the parties are, when the petition is lodged, almost certainly living apart, and must live apart while the petition is pending. But there is nothing final such as there is in the adjudication and the decree nisi, given in public court and in the eyes of the world. Before that the charges may fail, the petition may be compromised, the parties may be reconciled. The whole position, in my opinion, becomes changed and fixed by the decree nisi."

That, I think, is the high-water mark of the speeches which can be used in favour of the argument for the wife in the present case as showing that their Lordships attached importance to the decree nisi as showing a marked change in the situation between the parties from what it had been before. I come back again to the opinion expressed by the House of Lords in *Cohen v. Cohen* (3), that, whatever may have been said in the breach of promise case, *Fender v. Mildmay* (8), the question of whether or not, there has been a break brought about by the decree nisi, is a question of fact to be determined in each particular case and that there is nothing in the pronouncing of a decree nisi which, as a matter of law, affects the position.

[His LORDSHIP considered the evidence and concluded:] Mr. Commissioner BUSH JAMES, Q.C., was, I think, in considering the genuineness of the wife's offers, entitled to take into account, as he did, the whole history of the case, beginning from the time when the wife drove her husband from the door, over the period of silence and hostile action, ending with the offers themselves, which, I think, contain intrinsic evidence that they were nothing more than what the commissioner called "manœuvres". They were made at a time when the appeal to this court on the nullity proceedings had been heard and after that appeal had been allowed in the wife's favour, and they culminated in the peculiar incident of Oct. 28, 1952, when the wife met her husband in the street with a view, as she asserted, to pursuing her attempts at reconciliation. In my judgment, the learned commissioner was, for the reasons which SIR RAYMOND EVERSHED, M.R., has given and for those which I have tried to give, entitled to come to the conclusion that there was no real offer on the part of the wife to the husband, no manifestation at any rate of any change of heart or of attitude towards him, and, accordingly, the learned commissioner was entitled to treat those offers as if they had never been made. I agree, therefore, that the appeal fails.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Bishop & Cooke* (for the husband); *Scadding & Bodkin* (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

THE MINISTER v. THISTLETHWAYTE AND ANOTHER.

[PRIVY COUNCIL (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone), June 15, 16, 17, 21, 22, July 22, 1954.]

Privy Council—New South Wales—Compulsory resumption of land—Assessment of compensation—Land resumed when subject to land sales control—Admissibility of evidence relating to sales of land after removal of land sales control—Commonwealth Lands Acquisition Act, 1906-1936 (No. 13 of 1906—No. 60 of 1936), s. 28 (1) (a).

In 1946, at a time when the Commonwealth National Security (Economic Organisation) Regulations, controlling the price at which land might be bought and sold, were in force, land, of which the respondents were the registered proprietors for an estate in fee simple, was compulsorily resumed [i.e., in the terminology of English law, compulsorily purchased] by the appellant under the Public Works Act, 1912, of New South Wales. At the date of the resumption, the land was being used as a golf course, but it was suitable for development by sub-division into residential lots, for which purpose the construction of roads and drainage and other works would have been necessary. Land sales control ceased to apply to the land in question in 1948. The measure of compensation payable to the respondents was calculated on the price which a vendor, willing but not anxious, to sell would have agreed to if it were not for the land sales control then in force, and the price which a willing purchaser would have given to obtain the land, although he would have then been subject to land sales control in re-selling. In determining the amount of compensation on that footing evidence was admitted of prices obtained for comparable land about six months after the termination of land sales control (i.e., about two years after the date of compulsory resumption), of the estimated cost of road construction, drainage and other works which would have been necessary for the development of the land at that time, and of the price which the land might have been expected to have realised if sold in globo at that time.

HELD: (i) in assessing the compensation it was the value to the owner which must be ascertained; and whatever formula was adopted for the measure of compensation it must be one which included compensation to the owner for the element of value to him which lay in the possibility of selling the property in the future, at a date which might reasonably be expected to be not far distant and at a price which would almost certainly exceed the then controlled price; therefore, the basis on which compensation was awarded to the respondents was correct.

The Commonwealth v. Arklay (1952) (87 C.L.R. 159), applied.

(ii) evidence of prices obtained on the cessation of land sales control shortly after resumption was relevant as giving some indication of the volume of demand and level of prices which might have been expected to have existed at the date of resumption, and it was a question of degree in every case at what stage it became inadmissible as wholly irrelevant; in the present case, the conditions prevailing when land sales control ceased were not so different from those which must have been deemed to have existed at the time of the hypothetical sale assumed in the formula for assessing the measure of compensation as to exclude the evidence as irrelevant, and, accordingly, the evidence in question was admissible.

Appeal dismissed.

Cases referred to:

(1) *The Commonwealth v. Arklay*, (1952), 87 C.L.R. 159; A.L.R. 640; 26 A.L.J. 267.

(2) *Spencer v. The Commonwealth*, (1907), 5 C.L.R. 418; 14 A.L.R. 253.

APPEAL by the Minister for Public Works from a judgment of the Full Court.

of the Supreme Court of New South Wales, dated Sept. 28, 1953, on a Case Stated pursuant to the Land and Valuation Court Act, 1921-1940, s. 17, of New South Wales, by SUGERMAN, J. (the judge of the Land and Valuation Court), dated Aug. 14, 1953. By a judgment dated Mar. 20, 1953, SUGERMAN, J., had determined the amount of compensation for the compulsory resumption for public purposes of land at Gordon, New South Wales, of which the respondents, trustees under a will, were the registered proprietors for an estate in fee simple, in proceedings brought by the respondents against the appellant under the Public Works Act, 1912, s. 104, of New South Wales. The resumption was effected under the Public Works Act, 1912, Division I, Part V, and the land vested in the council of the municipality of Ku-Ring-Gai, at a time when the Commonwealth National Security (Economic Organisation) Regulations (made under the Commonwealth National Security Act, 1939, as amended), providing for land sales control, were in force.

J. D. Holmes, Q.C., and *R. Else-Mitchell* (both of the Australian Bar) for the appellant.

M. F. Hardie, Q.C. (of the Australian Bar), and *J. G. Le Quesne* for the respondents.

July 22. **LORD TUCKER:** This is an appeal by leave of the Supreme Court of New South Wales from a judgment of that court dated Sept. 28, 1953, on a Case stated by SUGERMAN, J. (the judge of the Land and Valuation Court), dated Aug. 14, 1953. By a judgment dated Mar. 20, 1953, SUGERMAN, J., had determined the amount of compensation for the compulsory resumption for public purposes of certain lands of the respondents in proceedings brought by the respondents against the appellant under the Public Works Act, 1912. The learned judge considered himself bound by the decision of the High Court in *The Commonwealth v. Arklay* (1), and assessed compensation on the principle held to be applicable in that case. The Supreme Court considered the present case indistinguishable from *Arklay's* case (1), by which they were bound, and answered the questions in the Case Stated accordingly. The appeal was not argued at length before the Supreme Court as they were informed that its purpose was to obtain a re-consideration of *Arklay's* case (1) by Her Majesty in Council, unless the court were of opinion that the present case could be distinguished from that case on the ground that the judgment of the High Court in *Arklay's* case (1) was based on, or largely influenced by, the requirement in s. 51 (xxxii) of the constitution that legislation for the acquisition of property should afford just terms. The appellant's written case in the present appeal is framed in the same way. It contends that the decision in *Arklay's* case (1) was erroneous and should be disapproved, or, alternatively, that it can be distinguished by reason of the constitutional element present therein.

On the hearing of this appeal, however, an elaborate argument was addressed to their Lordships in support of a contention that the New South Wales legislation was wholly different from the legislation in question in *Arklay's* case (1), and that s. 5, s. 68 and s. 70 of the Valuation of Land Act, 1916, had established a new statutory basis for the assessment of compensation for compulsory resumption under certain specified statutes, including the Public Works Act, 1912, which is the one presently relevant, and that the construction of these sections presented a problem quite different from that involved in *Arklay's* case (1), which was concerned with the construction of the Lands Acquisition Act, 1906-1936, in the context of the National Security (Economic Organisation) Regulations. Their Lordships would have been reluctant to allow a matter of this importance to be raised at this late stage and without the benefit of the views of the Supreme Court thereon, but they do not consider it necessary or desirable to explore this question further in view of the proviso to s. 9 (1) of the Land and Valuation Court Act, 1921 [of New South Wales]. This section deals with the hearing of claims for compensation in resumption cases and provides that they

"shall be heard and determined in the following way and not otherwise— (a) where the claim does not exceed £100, by a stipendiary or police magistrate or any two justices in petty sessions; and (b) where the claim exceeds £100, by the court without a jury: Provided that for the purpose of any such determination the judge or magistrate or justices shall give effect to any provision of the Act, under which the land is acquired, which prescribes a basis for, or matters to be considered in, the assessment of compensation . . ."

A In the opinion of their Lordships, assuming s. 5, s. 68 and s. 70 of the Valuation of Land Act, 1916, standing alone might have resulted in some modification in the basis of assessment of compensation under the Public Works Act, 1912, the effect of this proviso is to restore that basis unimpaired.

B Before proceeding to the questions of substance involved in this appeal, viz., the correctness or otherwise of the decision in *Arklay's* case (1) and the admissibility of certain evidence relating to sales after the removal of price control, it will be convenient to dispose of the submission that the presence in *Arklay's* case (1) of the constitutional element is sufficient to distinguish it from the present. Their Lordships are in agreement with the Supreme Court in holding that the suggested distinction is not a valid one. It is true that this element of difference
C existed, it is also true that it received some emphasis in the judgment, but, none the less, their Lordships are of opinion that the reasoning of that judgment must stand or fall independently.

It will now be convenient to refer to the statutory provisions relevant to *Arklay's* case (1) and the present. Section 28 of the Commonwealth Lands Acquisition Act, 1906-1936, is in the following words:

D " (1) In determining the compensation under this Act, regard shall be had . . . to the following matters:—(a) the value of the land acquired; (b) the damage caused by the severance of the land acquired from other land of the person entitled to compensation; and (c) the enhancement or depreciation in value of other land adjoining the land taken or severed therefrom of the person entitled to compensation by reason of the carrying
E out of the public purpose for which the acquired land was acquired."

Section 45 (3) of the Public Works Act, 1912 (N.S.W.), provides:

"Every person shall upon asserting his claim as hereinafter provided and making out his title in respect of any portion of the said resumed lands be entitled to compensation on account of such resumption in manner
F hereinafter provided."

Section 124 reads:

"For the purpose of ascertaining the purchase money or compensation to be paid, regard shall in every case be had by the magistrates, arbitrators, surveyors, valuers, or jury (as the case may be) not only to the value of the land to be purchased or taken, but also to the damage (if any) caused
G by the severing of the lands taken from other lands of the owner, or by the exercise of any statutory powers of the constructing authority otherwise injuriously affecting such other lands; and they shall assess the same according to what they find to have been the value of such lands, estate, or interest at the time notice was given, or notification published, as the case may be, and without reference to any alteration in such value arising from
H the establishment of railway or other public works upon or for which such land was resumed."

The National Security (Economic Organisation) Regulations (relevant to *Arklay's* case (1) and the present) are:

"6. (1) Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer— (a) purchase any land; (b) take an option for the purchase of any land; (c) take any lease of land; (d) take a

transfer or assignment of any lease of land; or (e) otherwise acquire any land. (2) Nothing in this regulation shall prevent— . . . (e) any transaction to which the Commonwealth, a State, or any authority of the Commonwealth or a State, or to which any person acting on behalf of the Commonwealth, or a State, or an authority of the Commonwealth or a State is a party . . . (5) In the case of an application for consent to purchase any land the application shall be accompanied by a valuation of the land by an independent approved valuer, unless, in special circumstances, the Treasurer dispenses with such a valuation."

The respondents are trustees of the will of William Moore, deceased, and were at all material times the registered proprietors for an estate in fee simple of the lands described in the schedule to a notification of resumption by the appellant published in the New South Wales Government GAZETTE dated Sept. 20, 1946. The lands had been developed as a golf course and were being so used at the date of resumption. The land was suitable for development by sub-division into residential lots for which purpose the construction of roads and drainage and other works would be necessary. At the date of resumption, which is the relevant date for the purposes of compensation, the Commonwealth National Security (Economic Organisation) Regulations were in force. These regulations ceased to apply in New South Wales on Sept. 20, 1948. They were replaced on that date by the Land Sales Control Act, 1948, of New South Wales, the provisions of which were similar to those of the regulations, but vacant land was exempted from the operation of the Act by regulations made thereunder. The land in question was treated as vacant land. Land sales control in New South Wales was not permanently retained and no longer operates. The resumption having taken place during a time when the price control regulations were in force, and when there was, accordingly, no free market for land, the main issue before the Valuation Court was the proper measure of compensation. The respondents contended that it should be assessed in accordance with the principles approved by the High Court in *Arklay's case* (1), whereas the appellant contended that the price should be determined at the figure at which the Treasurer would have consented to a purchase of the land at the date of resumption.

In *Arklay's case* (1), where the same question arose, the court, after stating that "value" in the context in question meant the value of the land to the owner and referring to the formula for ascertaining this value which had been laid down in Australia in *Spencer v. The Commonwealth* (2) in these terms (87 C.L.R. 169):

"What is required is 'an estimate of the price which would have been agreed upon in a voluntary bargain between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook ordinary business considerations' "

proceeded (*ibid.*, 170) as follows:

"This test requires considerable adaptation when the compulsory acquisition occurs in a period of controls. The test pre-supposes that a vendor can ask any price which it would be reasonable to expect the purchaser to pay. This price would usually exceed the price fixed by a controller; for there would be no necessity to fix prices if they were intended to represent market prices. It would be unreasonable to impute to a vendor a willingness to sell his property at the controlled price to a purchaser who was likely, if he held the land until controls were abolished, to be able to sell the land at an enhanced price. An owner, though otherwise willing to sell, would himself prefer to wait, if guided by ordinary prudence, in the hope that the regulation of land sales requiring the consent of the controller would terminate."

After observing that, once the notion is introduced of an external authority forbidding the parties or one of them to offer or give such sum as they please,

the permitted figure ceases to evidence the value contained in the land to the owner and becomes no more than an expression of government economic policy, the judgment proceeds to point out that it would not, however, be right to disregard the existence of the controls as a factor to be taken into consideration as affecting the buyer, who would himself be precluded from re-selling above the controlled price. After referring to the question of principle on which the opinion of the court was sought, the court said (*ibid.*, 173):

"On this question we have no doubt that under the Lands Acquisition Act, in estimating the value of land to an owner dispossessed during controls, the valuer should estimate the price which a vendor willing but not anxious to sell would agree to, if he were allowed, and a willing purchaser would give to obtain the land, although in his turn he would be subject to the controls in re-selling."

Their Lordships can find nothing to question in this approach to a novel situation created by the existence of emergency legislation of a temporary nature rendering wholly inappropriate the time-honoured test of market value at a particular date in terms of a willing seller and a willing buyer without further qualification. It must not be forgotten that it is the value of the land to the owner that has to be ascertained, and that the willing seller and purchaser is merely a useful and conventional method of arriving at a basic figure, to which must be added, in appropriate cases, further sums for disturbance, severance, special value to the owner and the like. Furthermore, when the subject-matter of control is the sale of land suitable for development and the control is of a temporary nature and may reasonably be expected to be lifted in the near future—at the date of resumption hostilities had ceased for over a year—circumstances are present which permit of differentiation of a case such as this from others involving consumable goods, or goods which would ordinarily be suitable for immediate sale. Whatever formula is adopted, it must be one which gives effect in such cases as the present to the element of value to the owner in being deprived of his right to retain his property with a view to sale in the future at a date which may reasonably be expected to be not far distant at a price which will almost certainly exceed the present controlled price. In so far as *Arklay's* case (1) so decided, their Lordships respectfully concur in the decision of the High Court and consider it equally applicable to the present case, and, accordingly, answer question (1) (a) of the questions submitted, which are shortly to be set out in full, "Yes" and question (1) (b) "No".

It appears, however, that what has been referred to as "the principle in *Arklay's* case (1)" was considered by SUGERMAN, J., to extend to approval by the High Court of every step taken by WEBB, J., the trial judge, in arriving at his decisions in that case, including the admission of evidence of post-control sales. Their Lordships do not consider that the judgment of the High Court can properly be so construed. The actual decision dealt only with the specific question referred to above. It is true that the court stated that they were unable to find that WEBB, J., had acted on any wrong principle, but the only wrong principle which had been suggested was his refusal to take the control price as decisive, and no question of the admissibility of evidence was argued. It would not, therefore, be right to use the case as forming a model necessarily to be adopted in all future cases or as decisive of any matter which was not in issue.

Their Lordships, accordingly, approach the remaining questions submitted to the Supreme Court as being in no way affected by the decision in *Arklay* (1). In this connection it may be convenient at this stage to set out in full the questions asked in the Case Stated. They are as follows:

"(1) Was the measure of the compensation to which the plaintiff was entitled in respect of the resumption of the subject land: (a) the price which a vendor willing but not anxious to sell would agree to, if he were

allowed, and a willing purchaser would give to obtain the land, although in his turn he would be subject to the control of land sales in re-selling, that is to say the measure which I adopted following *The Commonwealth v. Arklay* (1); or (b) the price which the Treasurer or his Delegate would have approved under the National Security (Economic Organisation) Regulations on a sale of the subject land on the date of resumption subject to the control of land sales then in force under the said regulations? (2) If the answer is 'Yes' to (1) (a), was the method pursued in order to ascertain the said price of following the method adopted by the learned trial judge in *The Commonwealth v. Arklay* (1) with modifications necessary to apply it to the circumstances of this case, as more fully detailed in my reasons for judgment hereinbefore referred to, a proper method in law? (3) If the answer is 'Yes' to (1) (a), was the evidence referred to under the several heads in para. 12 of this Case, or under any, and if so which, of these heads, admissible?"

Paragraph 12 of the Case is as follows:

"As relevant to the determination of the amount of compensation on that footing, adopting for that purpose the method of determination adopted by the learned trial judge in *The Commonwealth v. Arklay* (1) with the modifications necessary for its application to the circumstances of the present case, I admitted evidence of the following matters, subject however to the limitations and qualifications indicated in my reasons for judgment (hereinafter referred to) as to the legitimate purposes, effect, and use of such evidence:—(A) Evidence of prices obtained on sales effected, after the termination of land sales control, of individual residential lots situated in the neighbourhood of the subject land and comparable to those into which it would be sub-divided on a proper mode of sub-division, to the extent that such evidence was a guide to the price which might be expected to be obtained for residential lots in a sub-division of the subject land if sold shortly after the termination of land sales control, that is to say, on or about Dec. 31, 1948, or at or about the expiration of a period of six months from such termination. (B) Evidence of the estimated cost, as at or about the periods mentioned in (A) above, of road construction, and drainage and other works, necessary for the development of the subject land in sub-division. (C) Evidence of the opinions of expert valuers, founded upon, inter alia, the materials mentioned in (A) and (B) above, as to what price the subject land might be expected to have realised if sold in globo at or about the times mentioned in (A) above."

Dealing first with question (3), and leaving question (2) for later consideration, it is clear from the judgment of SUGERMAN, J., that the evidence admitted under (A), (B) and (C) of para. 12 of the Case was only admitted for the purpose of establishing one step in the process of ascertaining the sum which might be expected to have been obtained for the land if sold in globo at the date of resumption on the hypothesis that vendor and purchaser were then free to agree any price they liked free from all control, so far as that particular transaction was concerned, but with knowledge on the part of the purchaser that any re-sale by him so long as land sales control continued would be subject thereto. The question, therefore, becomes one of relevance. There could be no evidence, as at the date of resumption, of sales comparable to the hypothetical sale to be envisaged and, consequently, no evidence of the extent of demand or the prices which might be offered by purchasers. If evidence is available of prices obtained on the lifting of controls shortly after the date of resumption it will be relevant as giving some indication of the volume of demand and level of prices which might be expected to have existed at the date of resumption. The larger the interval between resumption and lifting of control the less cogent the evidence

becomes, and it must be a question of degree in every case to say at what stage it is inadmissible as wholly irrelevant. In the present case, the interval was two years, but, having regard to the fact that hostilities had ceased at the date of resumption, their Lordships do not consider that the conditions prevailing at the date when control ceased were so different from those which must be deemed to have existed at the time of the hypothetical sale assumed in the *Arklay* formula (1) as to render the evidence inadmissible as irrelevant. It is, of course, true that any figure so obtained will require to be discounted by the circumstance that the hypothetical purchaser will be prevented from re-selling above the control price if he should be minded so to do during the continuance of control. On the other hand, there was the reasonable prospect that, by the time he had developed the land for sub-divisional sales, the control would have been lifted. The judgment of SUGERMAN, J., shows that he gave full weight to such considerations in arriving at his final figure. Considering it, therefore, impossible to hold as a matter of law that such evidence was inadmissible, and seeing no reason in the circumstances of this case to draw any distinction between the evidence referred to in (A), (B) or (C) of para. 12 of the Case, their Lordships answer question (3) "Yes".

Returning to question (2). In so far as this question has already been answered under (1) and (3) the answer is "Yes", but if it is intended to go further and to invite express approval for every step in the judgment in the present case, or for the precise method adopted at every stage by the trial judge in *Arklay's* case (1), their Lordships consider it is unnecessarily and undesirably wide and would not be disposed to answer it.

In the result, their Lordships agree with the answers given by the Supreme Court of New South Wales to the questions set out in the Case stated by SUGERMAN, J., subject to the above qualification with regard to the answer to question (2). Their Lordships will, accordingly, humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs of the appeal.

Appeal dismissed.

Solicitors: *Light & Fulton* (for the appellant); *Birkbeck, Julius, Coburn & Broad* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

R. v. CAMBORNE JUSTICES. *Ex parte* PEARCE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Slade, J.J.), July 21, 29, 1954.]

Justices' Bias—Clerk to the justices—Prosecution by officer of county council of which justices' clerk was a member.

Certiorari—Bias—Test is whether real likelihood of bias is shown.

To disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceedings, a real likelihood of bias must be shown: dictum of BLACKBURN, J., in *R. v. Rand* (1866) (L.R. 1 Q.B. 233), applied; and, further, the real likelihood of bias must be made to appear having regard not only to the materials ascertained by the party complaining, but also to such further facts as he might readily have ascertained and easily verified in the course of his inquiries.

Per curiam: The frequency with which allegations of bias have come before the courts in recent times seems to indicate that the reminder of LORD HEWART, C.J., in *R. v. Sussex JJ. Ex p. McCarthy* ([1924] 1 K.B. 259), that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases on the flimsiest pretexts of bias. While indorsing and fully maintaining the integrity of the principle reasserted by LORD HEWART, C.J., this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done.

Per LORD GODDARD, C.J.: If the court were asked to express an opinion they would say that it would be better that a member of a county council should not sit as a clerk to justices in cases where the prosecution is conducted on behalf of the council of which he is a member.

AS TO BIAS OF JUSTICES' CLERK, see HALSBURY, Hailsham Edn., Vol. 21, p. 541, para. 957; and FOR CASES, see DIGEST, Vol. 33, p. 294, No. 97, and Digest Supp.; and AS TO BIAS AS A GROUND FOR CERTIORARI, see HALSBURY, Hailsham Edn., Vol. 9, p. 883, paras. 1487 et seq; and FOR CASES, see DIGEST, Vol. 16, p. 427, No. 2862 et seq.

Cases referred to:

- (1) *R. v. Rand*, (1866), L.R. 1 Q.B. 230; 35 L.J.M.C. 157; sub nom. *R. v. Rand*, *R. v. Bradford JJ.*, 30 J.P. 293; 33 Digest 292, 84.
- (2) *Eckersley v. Mersey Docks & Harbour Board*, [1894] 2 Q.B. 667; 71 L.T. 308; 2 Digest 370, 362.
- (3) *R. (Donoghue) v. County Cork JJ.*, [1910] 2 I.R. 271; 33 Digest 293, *d.*
- (4) *R. (Taverner) v. Tyrone JJ.*, [1909] 2 I.R. 763; 43 L.L.T. 262; 33 Digest 292, 84 (*ii*).
- (5) *R. (De Vesci) v. Queen's County JJ.*, [1908] 2 I.R. 285; 26 Digest 356, *b.*
- (6) *R. v. Sussex JJ. Ex p. McCarthy*, [1924] 1 K.B. 256; 93 L.J.K.B. 129; 88 J.P. 3; sub nom. *R. v. Hurst. Ex p. McCarthy*, 130 L.T. 510; 33 Digest 294, 97.
- (7) *Frame United Breweries Co. v. Bath JJ.*, [1926] A.C. 586; 95 L.J.K.B. 730; 135 L.T. 482; 90 J.P. 121; 33 Digest 292, 83.
- (8) *R. v. Sunderland JJ.*, [1901] 2 K.B. 357; 70 L.J.K.B. 946; 85 L.T. 183; 65 J.P. 598; 33 Digest 296, 109.
- (9) *R. v. Essex JJ. Ex p. Perkins*, [1927] 2 K.B. 475; 96 L.J.K.B. 530; 137 L.T. 455; 91 J.P. 94; Digest Supp.

(10) *R. v. Salford Assessment Committee, Ex p. Ogden*, [1937] 2 All E.R. 98; [1937] 2 K.B. 1; 106 L.J.K.B. 344; 156 L.T. 474; 101 J.P. 225; Digest Supp.

(11) *Cottle v. Cottle*, [1939] 2 All E.R. 535; Digest Supp.

MOTION for an order of certiorari.

A At a court of summary jurisdiction sitting at Camborne on Jan. 26, 1954, the applicant, Henry Pearce, was convicted (i) of having on Dec. 13, 1953, unlawfully sold to the prejudice of the purchaser an article of food, to wit milk, which was not of the quality demanded in that it contained added water, contrary to the Food and Drugs Act, 1938, s. 3 (1), and (ii) of having on the same date wilfully obstructed Henry Arthur Rundle, who was then acting in the execution of the Food and Drugs Act, 1938, contrary to s. 78 (1) thereof. The justices fined the B applicant £20 and £2 and ordered him to pay £2 12s. 6d. costs. The applicant now applied for an order of certiorari on the grounds

C "that the informations alleging the . . . offences were laid by . . . Henry Arthur Rundle a sampling officer under the Food and Drugs Act, 1938, and were stated by him to be laid by him for the Cornwall County Council. The prosecutor in respect of each of the . . . alleged offences was the said Rundle. On the hearing of the said informations the said D Henry Arthur Rundle was represented and the prosecution case conducted by . . . a solicitor of the Supreme Court in the whole time employment of the . . . Cornwall County Council as a local government officer. Throughout the hearing Mr. Donald Woodroffe Thomas a solicitor of the Supreme Court acted as clerk to the . . . justices and was called into their private room for the purpose of advising them although (unknown to the applicant, his counsel and the representative of his solicitors attending the hearing) he is and was at the time a councillor member of the . . . Cornwall County Council. In the premises a reasonable suspicion of bias might arise."

E *Wright, Q.C.*, and *Pedlar* for the applicant.

Laskey for the justices.

Paul Wrightson for Mr. H. A. Rundle.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and *J. P. Ashworth* as amici curiae.

Cur. adv. vult.

F July 29. **SLADE, J.**, read the following judgment of the court. The full facts, as this court finds them, are as follows. On Jan. 27, 1948, the public health and housing committee (later known as the health committee) of the Cornwall County Council recommended that the authority of the council should be given to its sampling officers to institute proceedings under the Food and Drugs Act, 1938. On Feb. 24, 1948, the council adopted this recommendation. Since that date each of the council's sampling officers, including Mr. Henry G Arthur Rundle, have from time to time been given authorities under the seal of the council appointing them inspectors and authorised officers of the council under the Food and Drugs Acts, 1938 and 1944, and expressly authorising them to institute, on behalf of the council, proceedings under the said Acts before any court of summary jurisdiction. On June 20, 1952, a fresh sealed authority was given to Mr. Rundle and the other sampling officers, being an extension of the H earlier authorities, and this sealed authority was in force at all material times. This authority empowered the sampling officers to institute proceedings under (inter alia) the Food and Drugs Acts, 1938 and 1944, in their own discretion and without seeking any specific authority from the council to do so, and it became the practice for the chief sampling officer to report to the health committee the action his subordinates had in fact taken. On Jan. 4, 1954, Mr. Rundle laid the said two informations against the applicant. On Jan. 19, 1954, the chief sampling officer reported to the health committee that such proceedings were

pending against the applicant. On Feb. 23, 1954, the council received and adopted the report of its health committee dated Jan. 19, 1954. On Apr. 13, 1954, the chief sampling officer reported to the health committee the result of the said proceedings against the applicant. On May 11, 1954, the council received and adopted the report of its health committee dated Apr. 13, 1954. Mr. Donald Woodroffe Thomas was not present at any of the above-mentioned four meetings and, indeed, was never a member of the health committee or its predecessor, the public health and housing committee. Mr. Rundle laid the said two informations in the exercise of his own discretion and on his own responsibility, in pursuance of the power conferred on him by his said sealed authority. Mr. Thomas was appointed clerk to the justices for the East Penwith Division of Cornwall on Dec. 30, 1931. He was elected a member of Cornwall County Council on Apr. 22, 1937. He acted as clerk to the justices during the trial of the applicant on the said informations at the Camborne Magistrates' Court on Jan. 26, 1954. He did not retire with the justices while they were considering their verdict but was later sent for by the chairman, who requested him to advise the justices on a point of law. During the short time he was with them the justices did not discuss the facts of the case at all and, having given his advice on the point of law, he returned to court. Some appreciable time later the justices returned and gave their decision. At the hearing the applicant pleaded "Not Guilty". The prosecution was conducted by a solicitor in the full time employment of the Cornwall County Council. The applicant was represented by counsel, instructed by his solicitors, on behalf of whom an articled clerk, Mr. Philip Stephens (who was not related to any partner in the firm) attended counsel at the hearing. Neither the applicant, nor counsel, nor the said articled clerk was aware at that time that the clerk to the justices was a member of the Cornwall County Council, though that fact was well known to the partner in the firm who had the conduct of the applicant's defence.

During the six years from 1948 to 1953 inclusive some six hundred and sixty prosecutions by the Cornwall County Council were heard and determined by the East Penwith justices at which either Mr. Thomas or the deputy clerk to the justices, Mr. Garfield Scown, acted as clerk to the justices. Yet so far as is known no previous objection has ever been made because Mr. Thomas acted as clerk to the justices during the hearing of an information by or on behalf of the Cornwall County Council. Not only is no allegation made that Mr. Thomas attempted in any way improperly to influence the justices in their decision on Jan. 26, 1954, but also counsel for the applicant at the outset of the hearing in this court expressly disclaimed any such suggestion. The applicant having learned, shortly after his conviction, the fact which was known all along to his solicitor, namely, that Mr. Thomas was on Jan. 26, 1954, a member of the Cornwall County Council, thereupon consulted his solicitor, took counsel's advice, and then caused the present motion for certiorari to be launched. On May 25, 1954, application was made ex parte to a Divisional Court for leave to apply for the order now sought. The application was supported by an affidavit of the applicant sworn on May 8, 1954, and by an affidavit of his solicitor, Mr. William Garfield Scown, sworn on May 17, 1954. Mr. Scown's affidavit makes no mention of his knowledge that Mr. Thomas was at all material times a member of the Cornwall County Council, and, indeed, his firm's letter to Mr. Thomas dated Feb. 1, 1954, which Mr. Scown exhibits to his affidavit would, with that knowledge, seem hardly to have been necessary. It is, however, only fair to Mr. Scown to state that on Jan. 26, 1954, he had good reason to believe that Mr. Thomas was then abroad and, accordingly, that his deputy would be acting as clerk to the justices on that date. In these circumstances this court contents itself with saying that when the Divisional Court on May 25, 1954, gave leave to apply, its members were ignorant of the knowledge possessed by Mr. Scown.

These being the facts, the question which this court has to decide is: What

interest in a judicial or quasi-judicial proceeding does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating on it on the ground of bias or appearance of bias? It is, of course, clear that any direct pecuniary or proprietary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias. What interest short of that will suffice? In the present case, it is claimed that a reasonable suspicion of bias is enough. It is true that there are dicta and passages to be found in judgments which lend some colour to this claim, but the authorities as a whole are almost overwhelming in support of the requirement that, to use the well-known words of BLACKBURN, J., in *R. v. Rand* (1) (L.R. 1 Q.B. 233) "a real likelihood" of bias must be proved to exist before proceedings will be vitiated on the ground that a person who has taken part or assisted in adjudicating them was in law incapacitated by interest from doing so. Probably the strongest authority in favour of the contention that mere suspicion, or a reasonable suspicion, of bias will suffice is the following passage from the judgment of LORD ESHER, M.R., in *Eckersley v. Mersey Docks & Harbour Board* (2) ([1894] 2 Q.B. 670):

"When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be suspected of being biassed, although in truth he would not be biassed. It is an attempt to apply the doctrine which is applied to judges, not merely of the superior courts, but to all judges—that, not only must they be not biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed."

In *R. (Donoghue) v. County Cork JJ.* (3) LORD O'BRIEN, C.J., said ([1910] 2 I.R. 275):

"I adhere to what I said in *R. (Taverner) v. Tyrone JJ.* (4) . . . I then said ([1909] 2 I.R. 768): 'A passage has been cited from the judgment of a distinguished judge, LORD ESHER, in *Eckersley v. Mersey Docks & Harbour Board* (2). [LORD O'BRIEN read the above passage ([1894] 2 Q.B. 670) from LORD ESHER's judgment, and continued:] . . . That, in my opinion, goes too far. It makes the mere suspicions of unreasonable persons a test of bias. I think that the judgment was not a considered one, and that LORD ESHER made use of some loose expressions. We decline, on a consideration of the cases, to go so far as that very eminent judge. There must, in the words of BLACKBURN, J., be "a real likelihood" of bias: *R. v. Rand* (1). In *R. (De Vesci) v. Queen's County JJ.* (5), I expressed myself as follows: "By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias.' I do not think that the mere vague suspicions of whimsical, capricious, and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds—was reasonably generated—but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."

The "suspicion" test nevertheless derived further support from the following passage from the well-known judgment of LORD HEWART, C.J., in *R. v. Sussex JJ. Ex p. McCarthy* (6) ([1924] 1 K.B. 259):

"But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have

made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

Two years later, however, in *From United Breweries Co. v. Bath J.J.* (7), VISCOUNT A CAVE, L.C., said ([1926] A.C. 590):

"My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called courts, have to act as judges of the rights of others. . . . Thus being so, the justices who are members of the authority are bound to act judicially and not to sit if they are subject to that which in *R. v. Rand* (1) was referred to by BLACKBURN, J., as a 'real likelihood of bias' . . ."

In the same case, LORD ATKINSON, citing ([1926] A.C. 607) in support of his opinion passages from the judgments of SIR ARCHIBALD SMITH, M.R., and VAUGHAN WILLIAMS, L.J., in *R. v. Sunderland J.J.* (8) applied the same test (ibid.):

"The Master of the Rolls [SIR ARCHIBALD SMITH] said ([1901] 2 K.B. 364): 'It appears to me that, in cases where the decision of justices is impeached on the ground of a bias such as is suggested in the present case, the decision must really turn on the question of fact, whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the justices alleged to have been so biassed. If there is such a likelihood, then it is clearly in accordance with natural justice and common sense that the justices likely to be so biassed should be incapacitated from sitting' . . . He then adopts and applies to the facts the rule laid down by BLACKBURN, J., in *R. v. Rand* (1), and ultimately holds that the appeal should be allowed, and the rule for a certiorari be made absolute. VAUGHAN WILLIAMS, L.J., puts the test in a forcible and practical form; he said ([1901] 2 K.B. 373): 'Can it be said here that there was nothing more than a mere possibility or suspicion that these justices would be biassed? We must judge of this matter as a reasonable man would judge of any matter in the conduct of his own business. Can one doubt that a reasonable man as a matter of business would, under the circumstances of this case, infallibly draw the inference that the justices who had negotiated and brought about this agreement would have a real bias in favour of granting the licence . . . ?'"

LORD SUMNER (ibid., 615) and LORD CARSON (ibid., 618) both posed the question whether in the case before them there was such a likelihood of bias as would cause the court to interfere. Moreover, the third member of the Court of Appeal in *R. v. Sunderland J.J.* (8), STIRLING, L.J., said ([1901] 2 K.B. 373):

"The question which we have to determine is, I apprehend, that stated by BLACKBURN, J., in delivering the judgment of the Queen's Bench in *R. v. Rand* (1), namely, was there in this case such an interest on the part of the justices whose decision is impugned as to create a real likelihood that they would have a bias in favour of the applicant . . . ?"

In *R. v. Essex JJ. Ex p. Perkins* (9) AVORY, J., said ([1927] 2 K.B. 488):

"We have here to determine, however, whether or not there might appear to be a reasonable likelihood of his being biassed."

And SWIFT, J., said (*ibid.*, 490):

A "It is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiassed. As LORD HEWART, C.J., said in *R. v. Sussex JJ. Ex p. McCarthy* (6) ([1924] 1 K.B. 259): 'Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.' Might a reasonable man suppose that there had here been such an interference with the course of justice?"

B In *R. v. Salford Assessment Committee. Ex p. Ogden* (10), SLESSER, L.J. ([1937] 2 All E.R. 103) and LUXMOORE, J. (*ibid.*, 108) applied the "reasonable likelihood" test, while GREENE, L.J. (*ibid.*, 107) dissented only on the inference to be drawn from the facts. In *Cottle v. Cottle* (11) SIR BOYD MERRIMAN, P. ([1939] 2 All E.R. 541) asked himself the question whether the party complaining

C "... might reasonably have formed the impression that Mr. Browning [the chairman of the bench] could not give this case an unbiassed hearing."

BUCKNILL, J., said (*ibid.*):

D "The test which we have to apply is whether or not a reasonable man, in all the circumstances, might suppose that there was an improper interference with the course of justice . . ."

In the judgment of this court the right test is that prescribed by BLACKBURN, J. (L.R. 1 Q.B. 233) in *R. v. Rand* (1), namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown. This court is, further, of opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. In the present case, for example, the facts relied on in the applicant's statement, under R.S.C., Ord. 59, r. 3 (2), of the grounds of his application might create a more sinister impression than the full facts as found by this court, all or most of which would have been available to the applicant had he pursued his inquiries on learning that Mr. Thomas was a member of the Cornwall County Council, and none of these further facts was disputed at the hearing of this motion. The frequency with which allegations of bias have come before the courts in recent times seems to indicate that the reminder of LORD HEWART, C.J., in *R. v. Sussex JJ. Ex p. McCarthy* (6) ([1924] 1 K.B. 259) that it is

G "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"

is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the flimsiest pretexts of bias. While indorsing and fully maintaining the integrity of the principle reasserted by LORD HEWART, C.J., this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done. In the present case this court is of the opinion that there was no real likelihood of bias and it was for this reason that the court dismissed the application on July 21, 1954.

H Counsel for the justices asked for costs against the solicitor who acted for the applicant. Refusing that application, LORD GODDARD, C.J., stated that the

Act of 1872* gave the justices the right to file an affidavit in reply to the evidence of the applicant, and, as there was no allegation of misconduct against the justices, there was no necessity of their being represented by counsel. In the course of argument His Lordship stated that the court so far had not given an opinion as to the desirability of a member of a county council acting as a clerk to justices in cases like the present. If the court were asked to express an opinion they would say that it were better if Mr. Thomas were not to sit when prosecutions were conducted on behalf of the council of which he was a member.

Application dismissed.

Solicitors: *Jaques & Co.*, agents for *Stephens & Scown*, St. Austell (for the applicant); *Barlow, Yeates & Hart*, agents for *Vivian Thomas & Jervis*, Penzance (for the justices); *Sharpe, Pritchard & Co.*, agents for *E. T. Verger*, clerk to the County Council, Truro (for the council); *Treasury Solicitor*.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

AICHROTH v. COTTEE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Slade, JJ.), July 27, 1954.]

Street Traffic—Driving while disqualified for holding licence—Fine—"Special circumstances"—Sudden emergency—No other means of transport—Road Traffic Act, 1930 (c. 43), s. 7 (4).

A sudden emergency, if it is serious enough and cannot reasonably be met in any other way, may amount to a special circumstance for the purposes of s. 7 (4) of the Road Traffic Act, 1930, under which sub-section the court can impose a fine in lieu of imprisonment for an offence against the sub-section (i.e., for driving or obtaining a licence while disqualified), if, having regard to the special circumstances of the case, they think that a fine will be an adequate punishment.

Whittall v. Kirby ([1946] 2 All E.R. 552), explained.

Appeal allowed.

EDITORIAL NOTE. Although this case is decided on s. 7 (4) of the Road Traffic Act, 1930, and in relation to the words "special circumstances" used in that sub-section, it is material also to the meaning of the words "special reasons" in s. 15 (2) of that Act, which is concerned with the punishment of persons driving motor vehicles when under the influence of drink. LORD GODDARD, C.J., said in *Lewis v. Hanson* ([1951] 2 All E.R. 652) that he could find no difference to be attached to the words in s. 7 (4) and s. 15 (2), and other sections of the Act of 1930, and he affirms this view at p. 857, post. Thus the present case is relevant also to the construction of similar words in s. 11 and s. 35 of the Act of 1930, which deal with dangerous driving and driving while uninsured.

FOR THE ROAD TRAFFIC ACT, 1930, s. 7 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 580.

Cases referred to:

- (1) *Lewis v. Hanson*, [1951] 2 All E.R. 650; [1951] 2 K.B. 682; 115 J.P. 494; 2nd Digest Supp.
- (2) *Whittall v. Kirby*, [1946] 2 All E.R. 552; [1947] K.B. 194; [1947] L.J.R. 234; 175 L.T. 449; 111 J.P. 1; 2nd Digest Supp.
- (3) *R. v. Crossan*, [1939] 1 N.I. 106.

CASE STATED by London County Quarter Sessions.

On Sept. 8, 1953, the appeal committee of the County of London Quarter Sessions dismissed an appeal by the appellant, Gerald Paul Aichroth, against a sentence of three months' imprisonment passed on him by Hampstead justices on July 8, 1953, for driving a motor vehicle on a road, he being disqualified under

*The Review of Justices Decisions Act, 1872, s. 2, s. 3; HALSBURY'S STATUTES, 2nd ed., vol. 14, p. 842.

the Road Traffic Act, 1930, Part I, for holding a driving licence, contrary to s. 7 (4) of the Road Traffic Act, 1930. On the hearing of the appeal the following facts were found. On June 9, 1953, the appellant was convicted at the Marylebone Magistrate's Court of careless driving and was disqualified from driving a motor vehicle for three months. On Monday, June 22, 1953, the appellant drove his motor vehicle from his home at West Norwood to his bakery business at Hampstead, while still disqualified. About 5 a.m. on that morning the appellant was told by his foreman on the telephone that the dough-mixing machine at his bakery had broken down. The keys of the store in the bakery in which the tools were kept were in the appellant's possession, and if the dough-mixing machine were not repaired the material would be wasted, and to that extent the Monday morning supply for the bakery's five thousand retail and five hundred wholesale customers would have been spoilt, causing the bakery to lose its customers and goodwill. The driver regularly employed by the appellant since his disqualification had no telephone, and lived some four miles further south. There were no taxis about, but the appellant made no inquiry as to any car hire services being available. It was contended by the appellant that these circumstances could in law amount to special circumstances within s. 7 (4) of the Road Traffic Act, 1930, justifying the court in not passing a sentence of imprisonment. It was contended by the respondent that the said circumstances did not in law amount to special circumstances. *Lines v. Hersom* (1) was referred to. The appeal committee, being of opinion that the circumstances were in law special to the offender and not special to the case, considered that it was not open to it to hold that the circumstances were special circumstances justifying consideration of the view that a fine would be an adequate punishment for the offence, and dismissed the appeal.

E. Clarke for the appellant.

Paul Wrightson for the respondent.

LORD GODDARD, C.J. : We have to consider not whether there were special circumstances, but whether or not on the facts stated by the appeal committee it was open to them to consider whether there were special circumstances.

[His LORDSHIP stated the facts and continued:] In *Lines v. Hersom* (1) this court held that there was in substance no difference between the words "special circumstances" which appear in s. 7 (4) and the words "special reasons" which appear in other sections in the Road Traffic Act, 1930. I think it is very difficult to find any satisfactory distinction, and it is desirable to adhere to what this court said in *Lines v. Hersom*, (1), that the two expressions are the same.

In *Whittall v. Kirby* (2) we made an attempt to lay down what could be special circumstances and we said that special was the antithesis of general and, therefore, that a circumstance which was common to a large number of people as, for instance, that the defendant was a first offender, could not be special. In an endeavour to lay down some guidance to courts, we said that the circumstances must be special to the offence and not to the offender, but we recognised that, however much one may try to give guidance or lay down principles in a matter such as this, there must be border-line cases in which it will be difficult to draw the line. In *Whittall v. Kirby* (2) I quoted a decision of the King's Bench Division in Northern Ireland in *R. v. Crossan* (3) and said ([1946] 2 All E.R. 555):

"In that case the court adopted a test that I had ventured to use in an address that I gave to the magistrates assembled at the Summer Assizes for Essex in 1937. I suggested that the reasons must be special to the offence, and not to the offender, and the court in adopting what I had said used these words ([1939] 1 N.I. 112): 'A "special reason" within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence

to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a "special reason" within the exception.' I respectfully and entirely agree with and adopt this passage. While it is impossible to enumerate or define everything that can amount to a special reason, one may give as an illustration a driver exceeding the speed limit because he has suddenly been called to attend a dying relative or a doctor going to an urgent call. It is difficult indeed to visualise any special reason in the case of dangerous driving, except the one actually mentioned in the section itself, namely, the lapse of time from the date of a previous conviction."

Then I dealt with driving under the influence of drink or drugs, and said that it was difficult indeed to find any excuse there. The court in that case did give the illustration of a man going to attend a dying relative or of a doctor going to an urgent call, and, I think, it is a reasonable deduction from that that the court meant to lay down that a sudden emergency, provided of course it is serious enough and provided it cannot be reasonably dealt with in any other way, can amount to a special circumstance or special reason, to use the actual expression which had to be considered in *Whittall v. Kirby* (2).

In the present case the emergency was that the dough-mixing machine apparently needed—and this will be a matter for the appeal committee to go into—some special tools. These special tools were locked up and the appellant had the keys. There is nothing, *prima facie*, unreasonable in a man locking up his tools, and the appeal committee will have to consider when the case comes before them again, whether or not it was essential, in view of what had happened, to get at those keys. The appeal committee found that there were no taxis about and that the appellant made no inquiry whether any car hire services were available. Whether there were likely to be any car hire services available at West Norwood as distinct from the West End of London is questionable. I should have thought it unlikely that you would find them in West Norwood, but that is again a matter for the committee to consider. They must also consider whether it would make any difference if there were any public transport, because public transport does come on early in London. All these are matters which, I think, the committee may take into account if they are of opinion that there was a sudden emergency and this was a bona fide case of a man trying to deal with a sudden emergency. As SLADE, J., pointed out in argument, it was said that the failure to put the dough-mixing machine in order would not only waste material but would prevent the supply of bread to the bakery's five thousand retail customers and five hundred wholesale customers. I do not know how many retail customers five hundred wholesale customers represent, but the bakery itself seems to have had five thousand retail customers, so it looks at any rate—the court says no more than this—as though there was a sudden emergency. Although *Whittall v. Kirby* (1) has left it open to the court to say that there is a sudden emergency, yet the mere fact that there is a sudden emergency will not be enough, if it is shown that there are other reasonable methods of meeting it. If, on the other hand, the committee think that the appellant was using the only method open to him on that early morning, we think they would be entitled to say that those matters were special to the offence and not to the offender.

We, therefore, think that the appeal committee did not come to a correct determination, and that it would be open to them to hold—but not that they are bound to hold—that there were special circumstances in the present case.

CASSELS, J. : I agree.

SLADE, J. : I also agree.

Appeal allowed.

Solicitors : *Wontner & Sons* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

THE MAYSTONE AND THE ALBION.
THOMASON v. SWAN, HUNTER, AND WIGHAM
RICHARDSON, LTD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), July 21, 1954.]

Costs—Fatal accident—Limitation of court's discretion—Party and party costs—
Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 50 (1) —
R.S.C., Ord. 22, r. 14, para. (11).

In an action in which damages are adjudged to be paid under the Fatal Accidents Acts, 1846 to 1908, to an infant and to the widow of the person killed, the court has no power, in the absence of consent, to direct payment of costs to be taxed otherwise than as between party and party, since the discretion given to the court by s. 50 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, to award costs as between solicitor and client or even solicitor and own client is expressly made subject to the rules of court and thus is limited by the mandatory provisions of R.S.C., Ord. 22, r. 14, para. (11), with which there could not be compliance unless the amount of the party and party costs were certified.

AS TO COSTS IN THE HIGH COURT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 93-103, paras. 179-193; and FOR CASES, see DIGEST, Practice, pp. 848-958, Nos. 3941-4980.

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 50 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 486.

Cases referred to:

- (1) *The Albion, France, Fenwick Tyne & Wear Co., Ltd. v. Swan, Hunter & Wigham Richardson, Ltd.*, [1953] 1 All E.R. 978; [1953] P. 117; [1953] 2 All E.R. 679; 3rd Digest Supp.
- (2) *Mordue v. Palmer*, (1870), 6 Ch. App. 22; 40 L.J.Ch. 8; 23 L.T. 752; 35 J.P. 196; 2 Digest 589, 2226.
- (3) *Cockburn v. Edwards*, (1881), 18 Ch.D. 449; 51 L.J.Ch. 46; 45 L.T. 500; 17 Digest 116, 260.
- (4) *Andrews v. Barnes*, (1888), 39 Ch.D. 133; 57 L.J.Ch. 694; 58 L.T. 748; 53 J.P. 4; 8 Digest 410, 2482.
- (5) *Re Mills' Estate. Ex p. Works & Public Buildings Comrs.*, (1886), 34 Ch.D. 24; 56 L.J.Ch. 60; 55 L.T. 465; 51 J.P. 151; 11 Digest, Replacement, 267, 1518.
- (6) *Re Fisher*, [1894] 1 Ch. 450; 63 L.J.Ch. 235; 70 L.T. 62; 11 Digest, Replacement, 268, 1525.
- (7) *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K.B. 756; 72 L.J.K.B. 933; 89 L.T. 429; 12 Digest, Replacement, 463, 3459.
- (8) *Gibbs v. Gibbs*, [1952] 1 All E.R. 942; [1952] P. 332; 3rd Digest Supp.

SUMMONS adjourned into court.

On Oct. 18, 1949, the s.s. Maystone sank as a result of a collision with the Albion, and the deceased, James George Thomason, while employed as an able seaman in the Maystone, was lost and died at sea. The plaintiff suing as the lawful widow and administratrix of the deceased brought an action for negligence claiming against the defendants, among others, damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, and

"5. A reference to the registrar for the assessment of such damages, together with interest and costs."

By their defence, dated Jan. 12, 1954, the defendants admitted that the collision was caused by the negligence of their servants and that the deceased lost his life as a result of that collision, and consented to a reference to assess the damages

to which the plaintiff on behalf of the estate and the dependants of the deceased might be entitled. The action was settled and by summons dated June 23, 1954, the plaintiff applied for the settlement to be approved and included an application for an order

"That the . . . defendants do pay the plaintiff's costs of this action including the costs of the proceedings issued in the King's [sic] Bench Division to be taxed as between solicitor and client."

The defendant contended that the court had no power to award costs on a solicitor and client basis.

Vick for the plaintiff.

Hene for the defendants.

WILLMER, J., stated the facts and continued: Counsel for the plaintiff made it clear at the outset that he sought to recover from the defendants his costs to be taxed as between solicitor and own client, i.e., on a full indemnity basis. He was not able to cite any reported case in which such an order had been made in a case of this character, but stated that in his experience such orders were not uncommonly made in chambers, more particularly in the Queen's Bench Division. My own understanding is that, where such orders have been made, they have been made by consent, or at least without active opposition on the part of the defendant. Be that as it may, counsel for the plaintiff contended that the discretion of the court in the matter of costs included a discretion to order that they be paid on a full indemnity basis, i.e., that they be taxed as between solicitor and own client. Counsel submitted that on the facts of the present case my discretion should be exercised in that way, having regard to the great delay which has occurred, through no fault of the plaintiff, between the death of the deceased and the determination of the defendants' liability. That delay has been due to the fact that the plaintiff's action was stayed for a long period while it was being determined in other proceedings, *The Albion* (1) (which went to the Court of Appeal), which of five different defendants sued by the plaintiff was responsible for the casualty. It was contended that in such circumstances it would be wrong that the amount recovered by the plaintiff should be diminished by any liability, however small, in respect of unrecovered costs. Counsel for the defendants contended that, even allowing for the court's unfettered discretion in the matter of costs, there was no power, in a case of this character, to order the payment of costs to be taxed as between solicitor and own client. Alternatively, he submitted that, even if such a power existed, there was no good reason in the present case for awarding costs against the defendants otherwise than on a party and party basis, seeing that the defendants were no more responsible than the plaintiff for the long delay that elapsed before liability was determined.

In view of the general interest and importance of the subject, it is surprising to find such a paucity of reported authority on the power of the court, in a case such as this, to order payment of costs to be taxed as between solicitor and client. In support of his argument counsel for the defendants relied on a passage in *HALSBURY'S LAWS OF ENGLAND*, Halsham ed., vol. 26, p. 101, para. 190, contributed by no less an authority than *SIR GEORGE BONNER*. It is there stated as follows:

"In general the costs are taxed as between party and party. In matters of equitable jurisdiction, and in cases where there is express statutory provision to that effect, and, in cases where there is an obligation to indemnify or contribute, costs to be taxed as between solicitor and client may be awarded; but in general there is no power to award such costs."

A similar view is expressed in *ODGERS ON PLEADING AND PRACTICE*, 13th ed., p. 303, where it is stated:

"Except in matters of equitable jurisdiction, the judge cannot award

costs as between solicitor and client to the successful party, unless there is an express statutory provision enabling him to do so (e.g., the Public Authorities Protection Act, 1893), or unless both parties consent."

A Before the passing of the Supreme Court of Judicature Act, 1873, it was held in *Mordue v. Palmer* (2), that the Court of Chancery had power to award costs as between solicitor and client. In the same case MELLISH, L.J., however, expressed the view (6 Ch. App. 32) that the courts of common law had no such power. In 1881, eight years after the passing of the Supreme Court of Judicature Act, 1873, the Court of Appeal, consisting of SIR GEORGE JESSEL, M.R., BRETT and COTTON, L.J.J., decided unanimously in *Cockburn v. Edwards* (3) that a successful plaintiff was not entitled to receive, as damages in the same action, the difference between solicitor and client and party and party costs. COTTON, L.J., succinctly expressed what I conceive to be the view of all three members of the court in the following words (18 Ch.D. 463):

B " . . . I am of opinion that the difference between solicitor and client costs and party and party costs in an action cannot be given by way of damages in the same action, the latter costs being all that the plaintiff is entitled to. Costs in another action stand on quite a different footing."

C I apprehend that what the learned lord justice had in mind, in relation to that last sentence, was the case where the plaintiff's claim is for an indemnity against costs incurred by him in prosecuting or defending some other action. It is to be observed that in *Cockburn v. Edwards* (3) the difference between solicitor and client and party and party costs was claimed as an item of damages in the action, whereas in the present case the claim is for the recovery as costs of the whole of the solicitor and client costs. The effect, however, appears to be the same, and the observations of the Court of Appeal would seem to be equally applicable, however the claim is put. In 1887 a similar question again came before the Court of Appeal in *Andrews v. Barnes* (4), when the court, citing *Mordue v. Palmer* (2) with approval, decided that since the passing of the Supreme Court of Judicature Act, 1873, the High Court of Justice had, as the old Court of Chancery formerly had in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client. The previous decision in *Cockburn v. Edwards* (3) was doubted, and the question whether the High Court had the same power in matters of common law jurisdiction was expressly left open, the court refraining from expressing a decided opinion on that point. Since the date of *Andrews v. Barnes* (4) I have been unable to find any reported decision which gives an authoritative ruling on the point, and certainly none has been cited to me.

The material statutory provision in relation to costs in force at the time of *Cockburn v. Edwards* (3) and *Andrews v. Barnes* (4) was the Supreme Court of Judicature Act, 1875 (which by s. 1 was to be construed as one with the Act of 1873), sched. I, Ord. 55, which was in the following terms:

G "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the court . . ."

The corresponding provision today is s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, which substantially reproduces s. 5 of the Supreme Court of Judicature Act, 1890. Section 50 (1) of the Act of 1925 is in the following terms:

H "Subject to the provisions of this Act and to rules of court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent the costs are to be paid."

It will be seen that the sub-section, as it stands today, and as it was substantially enacted in 1890, contains additional words, as compared with the corresponding

words in the order in the schedule to the Act of 1875, which may well be thought to be of no little significance. In particular, it can be argued that, even if prior to 1890 there was no power in common law proceedings to award costs as between solicitor and client, as stated by MELLISH, L.J., in *Mordue v. Palmer* (2), and as would seem to follow from the Court of Appeal's decision in *Cockburn v. Edwards* (3) (if that decision be accepted), such a power was abundantly conferred by the very wide words of s. 5 of the Act of 1890. As a matter of history, it has been said that s. 5 of the Act of 1890 was passed in consequence of the decision in *Re Mills' Estate, Ex p. Works & Public Buildings Comrs.* (5) and for the purpose of conferring on the court jurisdiction to award costs in certain classes of case in which it had previously been held that there was no jurisdiction to do so: see *Re Fisher* (6). However, it can well be argued that, coming so soon after the decision of the Court of Appeal in *Andrews v. Barnes* (4), the section was further intended to resolve the question therein left open as to the jurisdiction of the court to award solicitor and client costs in common law proceedings. At all events, KAY, L.J., in *Re Fisher* (6), appears to have been disposed to give the words of the new enactment a wide interpretation, for he said ([1894] 1 Ch. 452):

"Then follow these additional words: 'And the court or judge shall have full power to determine by whom and to what extent such costs are to be paid'. Taking these last words alone, to what costs do they apply? Clearly to the costs of and incident to all proceedings in the Supreme Court. The object of words so plainly expressed must be to give the court power to do that which it had not power to do before. In my opinion, it is impossible to read s. 5 in any way but this. It is an enabling section enlarging the jurisdiction of the court; giving it jurisdiction where it had not jurisdiction before in respect of costs. What is the limitation to that jurisdiction? The limitation is contained in a former part of the section [s. 5 of the Act of 1890] 'subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any statute whether passed before or after the commencement of this Act'. That means if there be a provision in the Judicature Acts or in the rules of court, or an express provision in any statute which limits the discretion of the court, the Act is to be taken subject to that limitation; but it also means that the court is to have a discretion where the former Acts are silent as to costs."

I think KAY, L.J., might well have added "or where the rules of court are silent as to costs".

A rather different and narrower view was expressed by LORD ALVERSTONE, C.J., in *Civil Service Co-operative Society v. General Steam Navigation Co.* (7). In that case the trial judge (BIGHAM, J.), while dismissing the plaintiffs' claim, nevertheless ordered each party to bear their own costs, because he did not approve of the fact that the defendants had refused to agree to what he considered reasonable terms of settlement. The Court of Appeal held that there were no materials on which the judge could exercise his discretion by making that order, and they ordered that the defendants should have their costs. In the course of the argument in the Court of Appeal it was contended for the plaintiffs that the judge's discretion was unlimited, because the discretion of the court had been extended by s. 5 of the Act of 1890, which, it was argued, conferred a new jurisdiction. Dealing with this point, the lord chief justice said ([1903] 2 K.B. 765):

"... s. 5 of the Judicature Act, 1890, did not alter the law with respect to the discretion of a judge as to costs, or with respect to the powers of the Court of Appeal in dealing with that discretion. Section 5 merely brought within the ambit of the discretion certain cases in which it had previously been considered doubtful whether costs were in the discretion of the judge."

In the light of these conflicting dicta I have to construe s. 50 (1) of the Act of 1925 as best I can. The sub-section gives the court or judge "full power" to determine not only "by whom" but also "to what extent" costs are to be paid. Reading these words in their natural and ordinary sense, it appears to me that standing by themselves they are *prima facie* sufficient to empower me, in a proper case, to order the payment of costs to be taxed as between solicitor and client, and even as between solicitor and own client. However, as KAY, L.J., pointed out in *Re Fisher* (6) the words must be used subject to the limitation imposed by the opening words of the section, i.e., "Subject to the provisions of this Act and to rules of court". In my judgment, therefore, it is necessary to look closely at the provisions of the Rules of the Supreme Court, in order to ascertain whether, and to what extent, the "full power" conferred by s. 50 (1) of the Act of 1925 is subject to any limitation. The most obvious limitation is that contained in R.S.C., Ord. 65, r. 27, reg. (29), which provides as follows:

"On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

If, as the plaintiff asks, I were to order payment of costs to be taxed as between solicitor and own client, i.e., on an indemnity basis, the registrar, when he comes to tax the costs, would be prevented from doing the very thing which he is directed by this regulation to do, namely, to disallow (as against the paying party) such costs as appear to him to have been incurred, e.g., through over-caution, negligence or mistake, or by payment of special fees, or by other unusual expenses. He would be bound to allow the whole of the costs in fact incurred, save only such costs, if any, as could not properly be charged by the solicitor against his own client. In my judgment, having regard to the limitation imposed by this regulation, it is not open to me to direct payment of costs to be taxed as between solicitor and own client.

As was pointed out, however, by HAVERS, J., in *Gibbs v. Gibbs* (8), between the extremes of solicitor and own client taxation on the one hand and party and party taxation on the other, provision is made for various forms of so-called solicitor and client taxation, which really amount to party and party taxations, but on a more generous basis. Such, for instance, is the form of taxation which the court is required to order in the case of an assisted person under the legal aid scheme. I do not think that there is anything in R.S.C., Ord. 65, r. 27 (29), to prevent my directing the payment of costs taxed on a solicitor and client basis, as so defined. On the contrary, in certain instances, e.g., where the Public Authorities Protection Act, 1893, applies, it is mandatory to direct the payment of costs to be taxed on such a basis. I can well conceive that there may be other types of case, where there is no such mandatory requirement and where the court, in the exercise of the "full power" conferred by s. 50 (1) of the Act of 1925, could properly direct payment of costs to be taxed on an ordinary solicitor and client basis, without offending against the provisions of R.S.C., Ord. 65, r. 27 (29). An instance may be found in the case where a pleading is ordered to be struck out as unnecessary or scandalous: see R.S.C., Ord. 19, r. 27, which expressly authorises the court to order costs to be taxed as between solicitor and client in such a case. The present, however, is a special class of case, namely, one in which damages are adjudged to be paid under the Fatal Accidents Acts, 1846 to 1908, to an infant and to the widow of the person killed. Cases of this class are subject to a special code of rules, as set out in the various paragraphs of R.S.C., Ord. 22, r. 14, particularly para. (9), which specifically brings cases

under the Fatal Accidents Acts within the provisions of this special code of rules. Paragraph (11) provides:

"The costs of the plaintiff . . . shall be taxed . . . as between party and party and as between solicitor and client, and the taxing master . . . shall certify the respective amounts of the party and party and solicitor and client costs, and the difference (if any) . . . and no costs other than those so certified shall be payable to the solicitor for any plaintiff in the cause or matter."

Again, para. (3) empowers the court to give directions as to dealing with any money adjudged to be paid, and by para. (4) such directions may include directions

"as to any payment to be made either directly or out of the amount paid into court . . . to the plaintiff . . . or to the plaintiff's solicitor in respect of costs or of the difference between party and party and solicitor and client costs."

If in the present case I were to direct payment by the defendants of costs to be taxed as between solicitor and client, how, it may be asked, is the registrar on taxation to comply with the requirements of para. (11) of r. 14 which have more than once been held to be mandatory? How again would it be possible to apply the provisions of para. (4), which clearly contemplate that there shall have been both a party and party and a solicitor and client taxation? In all the circumstances, I am driven to the conclusion that, so far at any rate as actions under the Fatal Accidents Acts are concerned, the discretion of the court under s. 50 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, is limited by the rules of court, and that in the absence of consent there is no power to direct payment by the defendant of costs to be taxed otherwise than as between party and party. My order in the present case will, therefore, be that the defendants do pay the plaintiff's costs to be taxed as required by R.S.C. Ord. 22, r. 14 (11). It is perhaps right that I should add that if I had come to the conclusion that I had a discretion to order the payment of costs otherwise than on a party and party basis, I should not in any event, in the particular circumstances of the present case, have felt disposed to make the order asked for by the plaintiff, having regard to the fact that the defendants are no more responsible than the plaintiff for the unfortunate delay which has occurred in settling this claim. It should, I think, be made clear that there has been no suggestion of any default, or of any impropriety in the conduct of the proceedings, on the part of the defendants or their solicitors.

Order accordingly.

Solicitors: *Neil Maclean & Co.* (for the plaintiff); *Bentleys, Stokes & Lowless*, agents for *Wm. Mark Pybus & Sons*, Newcastle-on-Tyne (for the defendants).

[Reported by A. T. HOOLAHAN, Esq., *Barrister-at-Law*.]

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